¶556 N. PATRICK CROOKS, J. (concurring in part, dissenting in part). The United States Supreme Court has recently acknowledged that "Judges are not politicians, even when they come to the bench by way of the ballot." Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1662 (2015). Williams-Yulee involved whether a judicial conduct rule prohibiting judicial candidates from personally soliciting campaign funds violated the First Amendment to the United States Constitution. Id. In concluding that the First Amendment permits the particular regulation of speech at issue, the Supreme Court stressed:

In deciding cases, a judge is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors. A judge instead must "observe the utmost fairness," striving to be "perfectly and completely independent, with nothing to influence or controul him but God and his conscience."

Id. at 1667 (citing Address of John Marshall, in Proceedings and Debates of the Virginia State Convention of 1829-1830, p. 616 (1830)).

¶557 These principles must serve as guideposts for all of us as judges in the courts of Wisconsin, whether or not the case or cases at issue involve significant political overtones, as these John Doe cases do.

¶558 It is with these important tenets in mind that I write separately.

¶559 By erroneously concluding that campaign committees do not have a duty under Wisconsin's campaign-finance law, Wis. Stat. ch. 11 (2011-12),[238] to report receipt of in-kind contributions in the form of coordinated spending on issue advocacy,[239] the majority rejects the special prosecutor's primary argument regarding criminal activity. Although the special prosecutor advances a secondary argument of criminal activity concerning coordinated express advocacy, the majority inexplicably ignores that argument. These mistakes lead the majority to terminate a valid John Doe[240] investigation in an unprecedented fashion.

¶560 With respect to the special prosecutor's primary argument, which is the focus of my writing, the majority misapplies the related doctrines of overbreadth and vagueness. Unlike the majority, I conclude that Wis. Stat. § 11.06(1) is neither overbroad nor vague in its requirement that campaign committees report receipt of in-kind contributions. The majority also makes the troubling pronouncement that an act is not a regulable disbursement or contribution under Chapter 11 unless it involves express advocacy or its functional equivalent. This is an erosion of Chapter 11 that will profoundly affect the integrity of our electoral process. I cannot agree with this result.

¶561 It is also imperative to note that the majority conveniently overlooks the special prosecutor's secondary argument of criminal activity in its effort to end this John Doe investigation. Specifically, the special prosecutor seeks to investigate whether particular express advocacy groups coordinated their spending with candidates or candidate committees in violation of their sworn statement of independence under Wis. Stat. § 11.06(7). Despite the fact that the special prosecutor utilizes a significant portion of his brief to present evidence of such illegal coordination, the majority determines, without explanation, that the John Doe investigation is over.

¶562 Has the majority abused its power in reaching this conclusion? The majority's rush to terminate this investigation is reminiscent of the action taken by the United States District Court for the Eastern District of Wisconsin in O'Keefe v. Schmitz, 19 F. Supp. 3d 861 (E.D. Wis.) order clarified, No. 14-C-139, 2014 WL 2446316 (E.D. Wis. May 30, 2014) (O'Keefe v. Schmitz), an action that was both criticized and reversed by the United States Court of Appeals for the Seventh Circuit in O'Keefe v. Chisholm, 769 F.3d 936 (7th Cir. 2014) cert. denied, No. 14-872, 2015 WL 260296 (U.S. May 18, 2015). Although the focus of my writing lies elsewhere, the majority's error in this regard cannot be overlooked.

¶563 For these reasons, I respectfully dissent in State ex. rel. Two Unnamed Petitioners v. Peterson (Two Unnamed Petitioners).

¶564 However, like the majority, I conclude that the special prosecutor and certain Unnamed Movants have failed to meet their heavy burden of establishing that the John Doe judge violated a plain legal duty in either initiating these proceedings or quashing various subpoenas and search warrants related to the investigation. Accordingly, I concur with the majority in State ex. rel. Schmitz v. Peterson (Schmitz v. Peterson) and State ex. rel. Three Unnamed Petitioners v. Peterson (Three Unnamed Petitioners). In concurring in Schmitz v. Peterson, it is significant for me that when an appellate court decides to issue a supervisory writ, it is a rare, discretionary decision. Madison Metro. Sch. Dist. v. Circuit Ct. for Dane Cnty., 2011 WI 72, ¶¶33-34, 336 Wis. 2d 95, 800 N.W.2d 442. Here, the John Doe judge also made a discretionary decision in deciding a complex legal issue. Deference should be given where there is such discretion.

¶565 The John Doe investigation should not be terminated because the special prosecutor's primary argument regarding criminal activity is supported by Chapter 11, and the United States Supreme Court has not concluded that the First Amendment to the United States Constitution prohibits the type of regulation underlying that argument. See O'Keefe, 769 F.3d at 942.[241] The special prosecutor seeks to investigate whether certain campaign committees failed to comply with their statutory obligation to report receipt of in-kind contributions (in the form of coordinated spending on issue advocacy) in connection with various recall elections. A campaign committee's duty to report such in-kind contributions is prescribed by Wis. Stat. § 11.06(1).[242]

¶566 In Two Unnamed Petitioners, the majority holds that the special prosecutor fails to advance a valid argument under Wisconsin criminal law and rashly closes the John Doe investigation. In reaching its conclusion, the majority does not confront the plain language of Wis. Stat. § 11.06(1). Instead, it focuses more generally on Chapter 11's definition of "political purposes," because in its view, "If an act is not done for political purposes, then it is not a disbursement or a contribution, and it therefore is not subject to regulation under Ch. 11."[243]

¶567 The majority determines that the definition of "political purposes" in Wis. Stat. § 11.01(16) is unconstitutionally overbroad and vague regardless of the context in which it applies to regulate political speech under Chapter 11.[244] This is so, the majority reasons, primarily because the definition encompasses an act done "for the purpose of influencing" an election.[245] To support the notion that the phrase "for the purpose of influencing" an election is hopelessly overbroad and vague, even where it operates to regulate campaign contributions, the majority purports to borrow pages from Buckley v. Valeo, 424 U.S. 1 (1976), and Wis. Right

to Life, Inc. v. Barland, 751 F.3d 804 (7th Cir. 2014) (Barland II). It then applies a narrowing construction to § 11.01(16) to confine the definition of "political purposes" to express advocacy or its functional equivalent, because that construction is "'readily available' due to the Seventh Circuit's decision in Barland II."[246] The upshot, according to the majority, is that an act is not a regulable disbursement or contribution under Chapter 11 unless it involves express advocacy or its functional equivalent.[247]

¶568 Turning to the special prosecutor's arguments regarding criminal activity, the majority summarily concludes: "The limiting construction that we apply makes clear that the special prosecutor's theories are unsupportable in law given that the theories rely on overbroad and vague statutes."[248] The majority must therefore dismiss the special prosecutor's in-kind contribution argument on the basis that Wis. Stat. § 11.06(1) contains the terms "contribution" and "disbursement," thereby triggering the definition of "political purposes." It follows, according to the majority's logic, that § 11.06(1) is unconstitutionally overbroad and vague unless its reach is limited to express advocacy or its functional equivalent. Since the special prosecutor's in-kind contribution argument relies on coordinated issue advocacy, not express advocacy, the majority swiftly rejects that argument.[249]

¶569 As previously mentioned, I conclude that Wis. Stat. § 11.06(1) is neither overbroad nor vague in its requirement that campaign committees report receipt of in-kind contributions. I recognize that under the special prosecutor's argument a reportable in-kind contribution requires a "political purpose," thus implicating the phrase "for the purpose of influencing" an election that the majority finds so troubling. However, in Buckley, the United States Supreme Court indicated that this phrase is hardly problematic "in connection with the definition of a contribution because of the limiting connotation created by the general understanding of what constitutes a political contribution." Buckley, 424 U.S. at 23 n.24. In other words, it is common sense——not the retention of a campaign-finance attorney——that tells people of ordinary intelligence what is and is not a campaign contribution.

¶570 The majority disregards this important language in Buckley, opting instead to justify its overbreadth and vagueness determination with the Supreme Court's discussion of the phrase "for the purpose of influencing" an election in a completely different context: the regulation of independent political expenditures. The majority's failure to perform a context specific analysis of the subject phrase in reaching its blanket conclusion that Chapter 11's definition of "political purposes" is overbroad and vague represents a fundamental misunderstanding of Buckley and its progeny, including Barland II. It further ignores the principle that "The First Amendment vagueness and overbreadth calculus must be calibrated to the kind and degree of the burdens imposed on those who must comply with the regulatory scheme. The greater the burden on the regulated class, the more acute the need for clarity and precision." Barland II, 751 F.3d at 837.

¶571 The majority's errors in Two Unnamed Petitioners (including its failure to address Wis. Stat. § 11.06(1) in rejecting the special prosecutor's in-kind contribution argument) serve to terminate a valid John Doe investigation. They also work to limit the reach of Wisconsin's campaign-finance law in a manner that will undermine the integrity of our electoral process. I disagree with these consequences.

I. TWO UNNAMED PETITIONERS (ORIGINAL ACTION)

¶572 To support my position that the John Doe investigation should move forward because the special prosecutor advances a valid argument under Wisconsin criminal law, I begin by identifying the relevant portions of Chapter 11 that support that argument. Next, I discuss some important principles pertaining to the related doctrines of overbreadth and vagueness, as well as significant campaign-finance law decisions embodying those principles. These general principles and decisions lead me to determine that there are no overbreadth and vagueness concerns with respect to the statute that supports the special prosecutor's primary argument regarding criminal activity. Finally, I discuss the question of whether the First Amendment to the United States Constitution forbids regulation of coordinated issue advocacy between a candidate or a campaign committee and an issue advocacy group. I conclude that the absence of Supreme Court precedent regarding an issue that has sparked "lively debate among judges and academic analysts"[250] is an important factor as to why this John Doe investigation should not be terminated.

A. Under Chapter 11, a Campaign Committee Must Report its Receipt of In-Kind Contributions in the Form of Coordinated Spending on Issue Advocacy.

¶573 In the special prosecutor's own words, the "non-disclosure of reportable campaign contributions is at the heart of this [John Doe] investigation." The following illustrates the special prosecutor's in-kind contribution argument:

X is a nonprofit corporation that engages in political speech on issues of public importance. Y is a campaign committee[251] regulated under Ch. 11. When X spends money on issue advocacy, it does not operate independently of Y. Rather, X coordinates its spending with Y, such that Y may be involved in the timing, content, or placement of issue advocacy that is made for its benefit. Y has received an in-kind contribution that must be reported under Chapter 11.[252]

¶574 The special prosecutor's in-kind contribution argument is rooted in Wis. Stat. § 11.06. That section, entitled "Financial report information; application; funding procedure," generally requires Chapter 11 registrants[253] to "make full reports . . . of all contributions received, contributions or disbursements made, and obligations incurred." Wis. Stat. § 11.06(1) (emphasis added). Candidates and their campaign committees have an absolute duty to register with the Government Accountability Board (GAB) under Wis. Stat. § 11.05(2g), so there appears to be no question that the general reporting obligations prescribed by § 11.06(1) apply to those entities.

¶575 The term "contribution" is defined by Wis. Stat. § 11.01(6)(a). It includes "A gift, subscription, loan, advance, or deposit of money or anything of value . . . made for political purposes." Wis. Stat. § 11.01(6)(a)1. The definition encompasses contributions that are received in cash, i.e., a "gift . . . of money," and those that are received "in kind," i.e., "anything of value." See Wis. Coal. for Voter Participation, Inc. v. State Elections Bd., 231 Wis. 2d 670, 680, 605 N.W.2d 654 (Ct. App. 1999) (WCVP). Wisconsin Admin. Code § GAB 1.20(1)(e) defines an "in-kind contribution" as "a disbursement by a contributor to procure a thing of value or service for the benefit of a registrant who authorized the disbursement." To constitute a cash or in-kind contribution, money must be given or spent for "political purposes," which is defined by Wis. Stat. § 11.01(16) to include an act done "for the purpose of influencing" an election.

¶576 Reading the above definitions in conjunction with Wis. Stat. § 11.06(1), it is clear that a campaign committee has a duty to report its receipt of cash as contributions. It is equally clear that a campaign committee has a duty to report its receipt of services as contributions if it authorizes a third party to pay for those services for the benefit of the campaign.

¶577 But what if a campaign committee does not necessarily authorize or control a third party's spending on services for the campaign's benefit, but instead prearranges that spending with the third party? Chapter 11 instructs that under these circumstances a candidate committee has received a reportable contribution as well. See Wis. Stat. § 11.06(4)(d) ("A . . . disbursement . . . made . . . for the benefit of a candidate is reportable by the candidate or the candidate's personal campaign committee if it is made or incurred with the authorization, direction or control of or otherwise by prearrangement with the candidate or the candidate's agent.") (emphasis added).

¶578 As the foregoing discussion demonstrates, under Chapter 11, "contributions to a candidate's campaign must be reported whether or not they constitute express advocacy." WCVP, 231 Wis. 2d at 679 (emphasis in original). There is nothing in the plain language of Wis. Stat. § 11.06(1), § 11.01(6)(a)1, § 11.06(4)(d), or Wis. Admin. Code § GAB 1.20(1)(e) that limits receipt of reportable contributions to express advocacy or its functional equivalent.

¶579 Returning to the illustration of the special prosecutor's in-kind contribution argument, it is evident that Chapter 11 supports that argument in one of two ways. First, Y, the campaign committee, may have received a reportable in-kind contribution if the nature of its coordination with X is such that Y authorized or controlled X's spending on issue advocacy. Second, Y may have received a reportable in-kind contribution if the nature of its coordination with X is such that the two entities prearranged X's spending on issue advocacy.

¶580 Thus, absent the majority's limiting construction that confines the term "contribution" to express advocacy or its function equivalent, the special prosecutor makes a valid argument under Wisconsin criminal law.[254]

B. The Key Inquiry in First Amendment Overbreadth and Vagueness Analysis is Whether the Statute at Issue Reaches a Substantial Amount of Constitutionally Protected Activity.

¶581 Having identified the portions of Chapter 11 that support the special prosecutor's in-kind contribution argument, I turn to the related doctrines of overbreadth and vagueness to highlight some important principles that the majority opinion overlooks. I also examine relevant campaign-finance decisions that embody those principles.

i. Overbreadth and Vagueness

¶582 "According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech." United States v. Williams, 553 U.S. 285, 292 (2008) (emphasis added). The Supreme Court in Williams explained:

The doctrine seeks to strike a balance between competing social costs. On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. Invalidation for overbreadth is strong medicine that is not to be casually employed.

Id. (emphasis added) (internal citations and quotations omitted). When engaging in overbreadth analysis, a court's first step "is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." Id. at 293 (emphasis added). Once a court interprets the statute at issue, the second step is to determine whether it "criminalizes a substantial amount of protected expressive activity." Id. at 297.

¶583 "Like the overbreadth doctrine, the void-for-vagueness doctrine protects against the ills of a law that 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 478-79 (7th Cir. 2012) (quoted source and citation omitted). Where the statute at issue implicates First Amendment rights, a greater degree of precision and guidance is required. Id. at 479; see also Buckley, 424 U.S. at 77 ("Where First Amendment rights are involved, an even 'greater degree of specificity' is required.") (quoted source and citation omitted). That said, "'perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.'" Williams, 553 U.S. at 304 (quoted source and citation omitted). Similar to overbreadth analysis, a court engaging in First Amendment vagueness analysis must interpret the statute at issue and determine whether it restricts a substantial amount of constitutionally protected activity. Madigan, 697 F.3d at 479. If it does not, a facial challenge to the statute must fail. Id.

¶584 The takeaway is that "The First Amendment vagueness and overbreadth calculus must be calibrated to the kind and degree of the burdens imposed on those who must comply with the regulatory scheme. The greater the burden on the regulated class, the more acute the need for clarity and precision." Barland II, 751 F.3d at 837.

ii. Relevant Campaign-Finance Decisions

¶585 That First Amendment overbreadth and vagueness analysis is context specific is best exemplified by Buckley, the case in which the United States Supreme Court created the express-advocacy limitation that is at the heart of this case. In Buckley, the Supreme Court considered various challenges to the Federal Election Campaign Act of 1971's (FECA) restrictions on contributions and independent expenditures. The main provisions under review involved: (1) limitations on individual and group political contributions; (2) limitations on independent expenditures; and (3) disclosure requirements for individual and group political contributions and independent expenditures. Buckley, 424 U.S. at 7.

¶586 Prior to addressing the subject enactments, Buckley discussed the kind and degree of burdens imposed on political speakers through limitations on the giving and spending of money in political campaigns. Regarding limitations on contributions, the Supreme Court explained:

a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support . . . . A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

Id. at 20-21 (emphasis added). In comparison, limitations on independent expenditures "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." Id. at 19. This is because "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." Id.

¶587 Bearing in mind the relative burdens on political speech imposed by limitations on contributions and independent expenditures, the Supreme Court turned to address constitutional challenges to FECA's $1,000 limitation on individual and group political contributions to any single candidate per election. Under FECA, the term "contribution" was defined to include "a gift, subscription, loan, advance, or deposit of money or anything of value . . . made for the purpose of influencing" an election. Id. at 182. The appellants did not challenge the subject enactment as unconstitutionally overbroad and vague on the basis that it incorporated the phrase "for the purpose of influencing" an election. However, in a footnote, Buckley all but assured that the phrase poses little overbreadth and vagueness concerns in the context of regulating contributions:

The Act does not define the phrase "for the purpose of influencing" an election that determines when a gift, loan, or advance constitutes a contribution. Other courts have given that phrase a narrow meaning to alleviate various problems in other contexts. . . . The use of the phrase presents fewer problems in connection with the definition of a contribution because of the limiting connotation created by the general understanding of what constitutes a political contribution.

Id. at 23 n.24 (internal citations omitted).

¶588 Given the Supreme Court's recognition that limitations on contributions impose marginal burdens on free speech, its decision not to require a more precise definition of the term "contribution" is entirely consistent with the context specific inquiry that must take place when engaging in overbreadth and vagueness analysis. Ultimately, Buckley upheld FECA's limitation on individual and group political contributions, finding a "sufficiently important interest" in preventing quid pro quo corruption or the appearance thereof. Id. at 25-28.

¶589 The Supreme Court then considered FECA's $1,000 limitation on independent expenditures "relative to a clearly identified candidate." Id. at 39. In that context, the appellants successfully asserted a vagueness challenge to the subject enactment's use of the above quoted phrase. Significant to the Supreme Court's determination was the fact that the limitation on independent expenditures posed a substantial burden on political speech. See id. at 39-44. It reasoned that the indefiniteness of the phrase "relative to a clearly identified candidate" "fails to clearly mark the boundary between permissible and impermissible speech . . . ." Id. at 41. Thus, it searched for a narrowing construction to save the statute from unconstitutionality.

¶590 The Supreme Court found that narrowing construction in the text of the subject enactment itself:

The section prohibits any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures . . . advocating the election or defeat of such candidate, exceeds, $1,000. This context clearly permits, if indeed it does not require, the phrase "relative to" a candidate to be read to mean "advocating the election or defeat of" a candidate.

Id. at 42 (internal quotations omitted). It then determined that the readily apparent limiting construction simply "refocuse[d] the vagueness question," Id., "[f]or the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." Id. As a result, the Supreme Court further narrowed FECA's limitation on independent expenditures to "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." Id. at 44.

¶591 The express advocacy limitation created in Buckley was therefore "an endpoint of statutory interpretation, not a first principle of constitutional law." McConnell v. Fed. Election Comm'n, 540 U.S. 93, 190 (2003), overruled on other grounds by Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010). Ultimately, the Supreme Court determined that FECA's limitation on independent expenditures, even as narrowly construed, impermissibly burdened the constitutional right of free expression. Buckley, 424 U.S. at 47-51.

¶592 Perhaps most significant for purposes of the instant action is Buckley's discussion of FECA's disclosure requirements for contributions and independent expenditures. The enactment at issue imposed reporting obligations on individuals and groups that made contributions or independent expenditures aggregating over $100 in a calendar year "other than by contribution to a political committee or candidate." Id. at 74-75.

¶593 FECA defined the terms "contribution" and "expenditure" to include anything of value made "for the purpose of influencing" an election. Id. at 77. This time Buckley took issue with that phrase, but only as it operated to regulate independent expenditures. Id. at 77-80.[255] To avoid overbreadth and vagueness concerns, the Supreme Court construed "expenditure" for purposes of the subject enactment "to reach only funds that expressly advocate the election or defeat of a clearly identified candidate." Id. at 80. So construed, the enactment withstood constitutional scrutiny, as Buckley found disclosure to be "a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." Id. at 82.

¶594 The foregoing discussion reveals that the majority misconstrues Buckley. Buckley's conclusion is that the phrase "for the purpose of influencing" an election poses First Amendment overbreadth and vagueness concerns in regard to independent expenditures, not contributions received.[256]

¶595 In the aftermath of Buckley, the Supreme Court has continued to utilize the express advocacy limitation to curb FECA restrictions on independent expenditures. For example, in Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 245-49 (1986) (MCFL), the Supreme Court applied Buckley's express advocacy limitation to FECA's prohibition on corporations using treasury funds to make independent expenditures in connection with any federal election. Tracking Buckley's overbreadth and vagueness analysis with respect to FECA's disclosure requirements on independent expenditures, the Supreme Court in MCFL determined that FECA's broad definition of the term "expenditure," i.e., anything of value made "for the purposes of influencing" an election, posed overbreadth concerns in the context of the "more intrusive provision that directly regulate[d] independent spending." Id. at 246-49. Accordingly, it held that the term "expenditure" in the subject provision was limited to communications for express advocacy. Id. at 249.

¶596 That Buckley's express advocacy limitation was the product of statutory interpretation designed to avoid overbreadth and vagueness concerns solely with respect to the statutory language at issue is confirmed by McConnell, 540 U.S. at 191-93. There, the Supreme Court considered challenges to the Bipartisan Campaign Reform Act of 2002 (BCRA). Id. at 189. BCRA created a new term, "electioneering communication,"[257] which placed restrictions on communications for express advocacy as well as issue advocacy. Id. The plaintiffs asserted constitutional challenges to the new term as it applied to both the expenditure and disclosure contexts. Id. at 190. In essence, they argued that the term "electioneering communication" must be limited to communications for express advocacy because "Buckley drew a constitutionally mandated line between express advocacy and so-called issue advocacy, and that speakers possess an inviolable First Amendment right to engage in the latter category of speech." Id.

¶597 McConnell patently rejected that contention, reasoning:

a plain reading of Buckley makes clear that the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command. In narrowly reading the FECA provisions in Buckley to avoid problems of vagueness and overbreadth, we nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line. Nor did we suggest as much in MCFL . . . in which we addressed the scope of another FECA expenditure limitation and confirmed the understanding that Buckley's express advocacy category was a product of statutory construction.

In short, the concept of express advocacy and the concomitant class of magic words were born of an effort to avoid constitutional infirmities. . . . We have long rigidly adhered to the tenet never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, . . . for [t]he nature of judicial review constrains us to consider the case that is actually before us, . . . Consistent with that principle, our decisions in Buckley and MCFL were

specific to the statutory language before us; they in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech.

Id. at 191-93 (emphasis added) (internal citations and quotations omitted). Thus, it would be error for a court to rely on Buckley to narrow a statute's reach to express advocacy where it does not pose the same overbreadth and vagueness concerns that drove the Supreme Court's analysis in Buckley. See id. at 194.

¶598 The Seventh Circuit's decision in Barland II is entirely consistent with the notion that Buckley's express advocacy limitation is context specific. There, Wisconsin Right to Life (WRTL), a nonprofit tax-exempt corporation, "sued to block enforcement of many state statutes and rules against groups that spend money for political speech independently of candidates and parties." Barland II, 751 F.3d at 807 (emphasis added). Specifically, the complaint alleged "that the challenged laws are vague and overbroad and unjustifiably burden the free-speech rights of independent political speakers in violation of the First Amendment." Id. (emphasis added). Lest there be any confusion, the Seventh Circuit specified: "Neither [WRTL] nor its state PAC contributes to candidates or other political committees, nor are they connected with candidates, their campaign committees, or political parties. That is to say, they operate independently of candidates and their campaign committees." Id. at 809.

¶599 So when the Seventh Circuit considered WRTL's overbreadth and vagueness challenge to Chapter 11's definition of "political purposes," it did so in the context of that term's restrictions on independent expenditures, not contributions received. Any other reading contravenes the principle that courts should not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . ." McConnell, 540 U.S. at 193 (citation and quotations omitted). To be clear, the GAB's concession in Barland II was that Chapter 11's definition of "political purposes" was overbroad and vague "in the sense meant by Buckley . . . ." Barland II, 751 F.3d at 832. As demonstrated, Buckley was concerned with the phrase "for the purpose of influencing" an election where it operated to regulate independent expenditures, not contributions. Thus, it is incorrect to rely on Barland II to support the notion that the subject phrase poses overbreadth and vagueness concerns in the context of Chapter 11's regulation of contributions received.[258]

¶600 In sum, the key inquiry in First Amendment overbreadth and vagueness analysis is whether the statute at issue reaches a substantial amount of constitutionally protected speech. As a result, a court's analysis in this regard must be context specific——"the greater the burden on the regulated class, the more acute the need for clarity and precision." Id. at 837. Buckley embodies that principle in its disparate treatment of contributions and independent expenditures under FECA.[259]

C. There are No Overbreadth and Vagueness Concerns with Respect to Wis. Stat. § 11.06(1).

¶601 Wisconsin Stat. § 11.06(1) is neither overbroad nor vague in its requirement that campaign committees report receipt of in-kind contributions in the form of coordinated spending on issue advocacy.

¶602 As noted, the primary inquiry is whether Wis. Stat. § 11.06(1) reaches a substantial amount of constitutionally protected speech. Madigan, 697 F.3d at 479. Of course, in order to answer that question, it is necessary to examine the plain language of the statute. Williams, 553 U.S. at 293.

¶603 Generally speaking, Wis. Stat. § 11.06(1) requires registrants to "make full reports . . . of all contributions received, contributions or disbursements made, and obligations incurred." Registrants must file frequent and detailed reports under § 11.06; Barland II summarized a variety of those reporting obligations as follows:

For contributions received in excess of $20, the report must include the date of the contribution, the name and address of the contributor, and the cumulative total contributions made by that contributor for the calendar year. For contributions received in excess of $100, the registrant must obtain and report the name and address of the donor's place of employment. All other income in excess of $20—including transfers of funds, interest, returns on investments, rebates, and refunds received—must be listed and described.

Registrants must report all disbursements. For every disbursement in excess of $20, the registrant must include the name and address of the recipient, the date of the disbursement, and a statement of its purpose. Individuals and committees not primarily organized for political purposes need only report disbursements made for the purpose of expressly advocat[ing] the election or defeat of a clearly identified candidate. In other words, committees in this category need not report general operating expenses; for all other committees, administrative and overhead expenses must be reported as disbursements. All disbursements that count as contributions to candidates or other committees must be reported.

Barland II, 751 F.3d at 814 (internal citations and quotations omitted). "No person may prepare or submit a false report or statement to a filing officer under [Chapter 11]." Wis. Stat. § 11.27(1). A registrant that intentionally violates § 11.27(1) is subject to criminal penalty. See Wis. Stat. § 11.61(1)(b).

¶604 To understand Wis. Stat. § 11.06(1)'s full reach on constitutionally protected speech, the terms "contribution" and "disbursement" must be construed.[260] As previously noted, a "contribution" includes a "gift . . . of money . . . or anything of value . . . made for political purposes." Wis. Stat. § 11.01(6)(a)1. The definition encompasses a "disbursement by a contributor to procure a thing of value or service for the benefit of a registrant who authorized the disbursement." Wis. Admin. Code § GAB 1.20(1)(e). A disbursement made for the benefit of a candidate that is prearranged with the candidate or the candidate's agent is treated as a contribution to the candidate or the campaign committee that must be reported as a contribution received. Wis. Stat. § 11.06(4)(d).

¶605 A "disbursement" includes "A purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value . . . made for political purposes." Wis. Stat. § 11.01(7)(a)1.

¶606 A "contribution" and a "disbursement" must be made for "political purposes." "Political purposes" is defined to include an act done "for the purpose of influencing" an election. Wis. Stat. § 11.01(16).

¶607 To reiterate, the phrase "for the purpose of influencing" an election has caused overbreadth and vagueness problems in the context of campaign-finance regulation where it serves to restrict independent expenditures. See Buckley, 424 U.S. at 77-80; MCFL, 479 U.S. at 249; Barland II, 751 F.3d at 833. That is because restraints on independent expenditures have the potential to encumber a substantial amount of protected speech. Buckley, 424 U.S. at 19. At first blush, then, Wis. Stat. § 11.06(1)'s reporting requirement for "disbursements" raises the specter of unconstitutionality as far as independent spending is concerned. But Wis. Stat. § 11.06(2) solves that dilemma, exempting from § 11.06(1)'s reporting requirement independent disbursements that do not "expressly advocate the election or defeat of a clearly identified candidate . . . ." Thus, with respect to § 11.06(1)'s regulation of independent disbursements, there are no overbreadth and vagueness concerns in the sense meant by Buckley.

¶608 That leaves the question of whether the phrase "for the purpose of influencing" an election, incorporated in Wis. Stat. § 11.06(1) through the definition of "contribution," raises constitutional concerns in the sense meant by Buckley. Clearly, the answer is "no."

¶609 For starters, restrictions on contributions pose marginal as opposed to substantial burdens on speech. Id. at 20-21; see also Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 440 (2001) (Colorado II) ("Restraints on expenditures generally curb more expressive and associational activity than limits on contributions do."). The main rationale is that restraints on contributions have little direct impact on political communication, as they permit the symbolic expression of support and leave the contributor free to discuss candidates and issues. Buckley, 424 U.S. at 21. Arguably, that justification might not apply with equal force to contributions that take the form of coordinated issue advocacy, since such contributions do "communicate the underlying basis for the [contributor's] support." Id. But there is a simple solution to that problem: stop coordinating. In the absence of coordination, the contributor is free to discuss candidates and issues.

¶610 That restrictions on contributions impose marginal burdens on free speech is especially true where the restriction at issue involves disclosure rather than a ceiling on the amount of money a person can give to a campaign. See Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 369 (2010) ("The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech."). Even the majority is forced to acknowledge the fact that disclosure requirements pose less significant burdens on the exercise of free speech.[261] So it is important to keep in mind that Wis. Stat. § 11.06(1) requires disclosure of contributions made and received.

¶611 In light of the more modest burdens that Wis. Stat. § 11.06(1) imposes on the free speech rights of those that make and receive contributions, it is clear that less precision and clarity is required with respect to what is regulated. See Barland II, 751 F.3d at 837 ("The greater the burden on the regulated class, the more acute the need for clarity and precision."). That leads me to conclude that the phrase "for the purpose of influencing" an election is not problematic where it operates to regulate contributions under § 11.06(1). Indeed, Buckley supports my position. See Buckley, 424 U.S. at 23 n.24 ("The use of the phrase presents fewer problems in connection with the definition of a contribution because of the limiting connotation created by the general understanding of what constitutes a political contribution.").

¶612 It is common sense that a gift of money to a candidate or a campaign committee constitutes an act made for the purpose of influencing an election. It is also common sense that money spent on services for the benefit of a candidate or a campaign committee that authorized the spending is an act done for the purpose of influencing an election. Similarly, where a candidate or a candidate's agent and a third party prearrange the third party's spending for the benefit of the candidate, common sense says the spending is done for the purpose of influencing an election. The point is that the aforementioned actions are connected with a candidate or his or her campaign.

¶613 Therefore, I conclude that Wis. Stat. § 11.06(1) is neither overbroad nor vague in its requirement that candidate committees report receipt of in-kind contributions in the form of coordinated spending on issue advocacy.

¶614 The majority disagrees, although it does not address Wis. Stat. § 11.06(1) in reaching its conclusion that the special prosecutor fails to advance a valid argument under Wisconsin criminal law. Rather, the majority dismisses the special prosecutor's primary argument by analyzing the GAB's definition of the term "in-kind contribution."[262] That approach is inconsistent with First Amendment overbreadth and vagueness analysis. See Williams, 553 U.S. at 293 ("The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers."); Madigan, 697 F.3d at 479 ("'In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.'") (quoted source and citation omitted). Wisconsin Admin. Code § GAB 1.20(1)(e), standing alone, does not regulate protected speech——it is a definition.

¶615 Had the majority performed a context specific First Amendment overbreadth and vagueness analysis, it presumably would have concluded that Wis. Stat. § 11.06(1) is unconstitutionally overbroad and vague in the sense meant by Buckley because it contains the terms "contribution" and "disbursement," thereby triggering "political purposes" and the phrase "for the purpose of influencing" an election.[263] But a correct reading of Buckley and its progeny leads to a conclusion that there are no constitutional infirmities with respect to § 11.06(1).

¶616 The majority's contrary conclusion ignores the legislature's intent in enacting Chapter 11. When searching for a limiting construction to cure an overly broad or vague statute, "we examine the language of the statute as well as its legislative history to determine whether the legislature intended the statute to be applied in its newly-construed form." State v. Janssen, 219 Wis. 2d 362, 380, 580 N.W.2d 260 (1998). By rejecting the special prosecutor's in-kind contribution argument and holding that contributions received need not be reported under Wis. Stat. § 11.06(1) unless they involve express advocacy or its functional equivalent, the majority disregards the legislature's declaration of policy in creating Chapter 11: ensuring that the public is fully informed of the true source of financial support to candidates for public office. Wis. Stat. § 11.001.

¶617 The majority's errors will have a detrimental effect on the integrity of Wisconsin's electoral process, particularly in the context of campaign contributions. Under the majority's holding, an act is not a campaign contribution unless it involves express advocacy or its functional equivalent.[264] The majority claims that its limiting construction is necessary to place issue

advocacy beyond Chapter 11's reach,[265] but at what cost? Surely gifts of money to a campaign trigger the same quid pro quo corruption concerns that justify the regulation of communications for express advocacy or its functional equivalent, and yet gifts of money would not constitute contributions under the majority's holding. Since Buckley, the United States Supreme Court has consistently upheld restraints on such campaign contributions. See O'Keefe, 769 F.3d at 941. Thus, I question the propriety of the majority's decision to tear down those restraints.

¶618 In sum, I conclude that Chapter 11 supports the special prosecutor's in-kind contribution argument. The majority's contrary determination is the product of a fundamental misunderstanding and misapplication of Buckley and its progeny, including Barland II, as well as the First Amendment overbreadth and vagueness principles that those decisions embody.

D. The Question of Whether the First Amendment Prohibits Regulation of Coordinated Issue Advocacy Should Not Prevent the John Doe Investigation From Moving Forward.

¶619 Having concluded that the special prosecutor makes a valid argument under Wisconsin criminal law, the question remains whether the First Amendment to the United States Constitution prohibits regulation of coordinated issue advocacy.[266] This question should be addressed by the United States Supreme Court because it has sparked "lively debate among judges and academic analysts." Id. at 942.

¶620 In O'Keefe, the plaintiffs filed suit seeking an injunction that would halt this John Doe investigation permanently, regardless of whether the special prosecutor could demonstrate a violation of Wisconsin law. Id. at 938. In addition, the complaint sought damages against five defendants, including the special prosecutor and the Milwaukee County District Attorney. Id. The United States District Court for the Eastern District of Wisconsin "held that the First Amendment to the Constitution (as applied to the states through the Fourteenth) forbids not only penalties for coordination between political committees and groups that engage in issue advocacy, but also any attempt by the state to learn just what kind of coordination has occurred." Id. As a result, the district court rejected the defendants' argument that they enjoyed qualified immunity. Id. at 939.

¶621 In reversing the district court's order that rejected the defendants' qualified immunity defense, the Seventh Circuit, in an opinion authored by Judge Easterbrook, reasoned:

No opinion issued by the Supreme Court, or by any court of appeals, establishes ("clearly" or otherwise) that the First Amendment forbids regulation of coordination between campaign committees and issue-advocacy groups—let alone that the First Amendment forbids even an inquiry into that topic. The district court broke new ground. Its views may be vindicated, but until that day public officials enjoy the benefit of qualified immunity from liability in damages.

Id. at 942.

¶622 It is important to note that the United States Supreme Court has endorsed FECA's treatment of coordinated expenditures as contributions. As previously mentioned, in Buckley, the Supreme Court upheld FECA's limitations on individual and group political contributions

notwithstanding the fact that "contribution" was defined to include coordinated expenditures. Buckley, 424 U.S. at 23-59. It also upheld FECA's disclosure requirements on contributions so defined. Id. at 78. In Colorado II, the Supreme Court upheld FECA's limitations on coordinated expenditures between political parties and candidates. Colorado II, 533 U.S. at 465. Also, in McConnell, it upheld BCRA's treatment of coordinated disbursements for electioneering communications as contributions, even though the term "electioneering communication" was defined to include issue advocacy. McConnell, 540 U.S. at 203.

¶623 The basic rationale underlying the Supreme Court's endorsement of such restrictions is that coordinated expenditures "are as useful to the candidate as cash . . . ." Colorado II, 533 U.S. at 446. Thus, they are "disguised contributions" that "might be given 'as a quid pro quo for improper commitments from the candidate' (in contrast to independent expenditures, which are poor sources of leverage for a spender because they might be duplicative or counterproductive from a candidate's point of view." Id. (citing Buckley, 424 U.S. at 47). Since the prevention of quid pro quo corruption or its appearance remains a permissible goal justifying regulations on political speech, McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1441 (2014), it is certainly likely that the regulation of coordinated issue advocacy will withstand First Amendment scrutiny.

¶624 Moreover, as noted previously, the Supreme Court recently determined that the First Amendment permits the regulation of judicial candidates' speech. Williams-Yulee, 135 S. Ct. at 1662. The Supreme Court reasoned that states have a compelling interest in preserving public confidence in their judges by preventing quid pro quo corruption or its appearance. Id. at 1667-68. Thus, an argument can be made that Williams-Yulee bolsters the special prosecutor's contention that the First Amendment permits the regulation of coordinated issue advocacy, since that is an area where corruption or its appearance is a significant concern as well.

¶625 Because the special prosecutor makes a valid argument under Wisconsin criminal law, and because the United States Supreme Court has not concluded that the First Amendment prohibits the regulation of coordinated issue advocacy, the John Doe investigation should not be terminated. Not only do the majority's errors serve to end a valid John Doe investigation, they work to limit the reach of Wisconsin's campaign-finance law in a manner that will undermine the integrity of our electoral process. I disagree with these consequences and therefore respectfully dissent in Two Unnamed Petitioners.

II. SCHMITZ v. PETERSON AND THREE UNNAMED PETITIONERS

¶626 The questions presented in Schmitz v. Peterson and Three Unnamed Petitioners boil down to whether the John Doe judge violated a plain legal duty in either initiating these proceedings or quashing various subpoenas and search warrants related to the investigation. Both the special prosecutor in Schmitz v. Peterson and the Unnamed Movants in Three Unnamed Petitioners carry a heavy burden in this regard, as a supervisory writ is an "extraordinary and drastic remedy that is to be issued only upon some grievous exigency." State ex. rel. Kalal v. Circuit Ct. for Dane Cnty., 2004 WI 58, ¶17, 271 Wis. 2d 633, 681 N.W.2d 110. I agree with the majority that neither the special prosecutor nor the Unnamed Movants have established the prerequisites for a writ to issue.[267]

¶627 However, I wish to clarify that the majority's decision in Schmitz v. Peterson should not be construed as holding that the evidence gathered in the John Doe proceedings fails to provide a reasonable belief that Wisconsin's campaign-finance law was violated. The majority's decision to deny the writ rests solely on the fact that Reserve Judge Gregory Peterson made a discretionary decision to quash the subpoenas and search warrants at issue. By the very nature of the supervisory writ standard, the majority's conclusion takes no position on the propriety of Reserve Judge Peterson's decision in this regard.

III. CONCLUSION

¶628 By erroneously concluding that campaign committees do not have a duty under Wisconsin's campaign-finance law to report receipt of in-kind contributions in the form of coordinated spending on issue advocacy, the majority rejects the special prosecutor's primary argument regarding criminal activity. Although the special prosecutor advances a secondary argument of criminal activity concerning coordinated express advocacy, the majority inexplicably ignores that argument. These mistakes lead the majority to terminate a valid John Doe investigation in an unprecedented fashion.

¶629 With respect to the special prosecutor's primary argument, which is the focus of my writing, the majority misapplies the related doctrines of overbreadth and vagueness. Unlike the majority, I conclude that Wis. Stat. § 11.06(1) is neither overbroad nor vague in its requirement that campaign committees report receipt of in-kind contributions. The majority also makes the troubling pronouncement that an act is not a regulable disbursement or contribution under Ch. 11 unless it involves express advocacy or its functional equivalent. This is an erosion of Ch. 11 that will profoundly affect the integrity of our electoral process. I cannot agree with this result.

¶630 It is also imperative to note that the majority conveniently overlooks the special prosecutor's secondary argument of criminal activity in its effort to end this John Doe investigation. Specifically, the special prosecutor seeks to investigate whether particular express advocacy groups coordinated their spending with candidates or candidate committees in violation of their sworn statement of independence under Wis. Stat. § 11.06(7). Despite the fact that the special prosecutor utilizes a significant portion of his brief to present evidence of such illegal coordination, the majority determines, without explanation, that the John Doe investigation is over.

¶631 Has the majority abused its power in reaching this conclusion? The majority's rush to terminate this investigation is reminiscent of the action taken by the United States District Court for the Eastern District of Wisconsin in O'Keefe v. Schmitz, 19 F. Supp. 3d at 875, an action that was both criticized and reversed by the United States Court of Appeals for the Seventh Circuit in O'Keefe, 769 F.3d at 942. Although the focus of my writing lies elsewhere, the majority's error in this regard cannot be overlooked.

¶632 For these reasons, I respectfully dissent in State ex. rel. Two Unnamed Petitioners v. Peterson (Two Unnamed Petitioners).

¶633 However, because I agree that the special prosecutor and certain Unnamed Movants have failed to meet their heavy burden of establishing that the John Doe judge violated a plain legal

duty in either initiating these proceedings or quashing various subpoenas and search warrants related to the investigation, I respectfully concur with the majority in State ex. rel. Schmitz v. Peterson (Schmitz v. Peterson) and State ex. rel. Three Unnamed Petitioners v. Peterson (Three Unnamed Petitioners). In concurring in Schmitz v. Peterson, it is significant for me that when an appellate court decides to issue a supervisory writ, it is a rare, discretionary decision. Madison Metro. Sch. Dist., 336 Wis. 2d 95, ¶¶33-34. Here, the John Doe judge also made a discretionary decision in deciding a complex legal issue. Deference should be given where there is such discretion.

¶634 For the foregoing reasons, I concur in part and dissent in part. To be clear, I agree with the majority's decision to deny the petition for supervisory writ and affirm Reserve Judge Gregory Peterson's order in Schmitz v. Peterson. I also agree with the majority's decision to deny the petition for supervisory writ and affirm the court of appeals' decision in Three Unnamed Petitioners. However, contrary to the majority, I would deny the relief sought in Two Unnamed Petitioners and allow the John Doe investigation to continue.

[1] We have granted the amicus briefs on the merits filed by: Wisconsin Right to Life; Citizens for Responsible Government Advocates, Inc.; The Wisconsin Government Accountability Board; The Honorable Bradley A. Smith, Center for Competitive Politics, and Wisconsin Family Action; Campaign Legal Center, Democracy 21, Common Cause in Wisconsin, and League of Women Voters of Wisconsin; Former Federal Election Commission Members Lee Ann Elliott, David Mason, Hans von Spakovsky, and Darryl Wold; and Wyoming Liberty Group.

[2] All subsequent references to the Wisconsin Statutes are to the 2011-12 version unless otherwise indicated.

[3] In our December 16, 2014, grant order we consolidated the cases for the purpose of briefing and oral argument. We subsequently consolidated these three cases into one opinion because each case arises out of the same facts.

[4] Express advocacy is a communication that expressly advocates for the election or defeat of a clearly identified candidate.

[5] This is issue seven from our December 16, 2014, grant order.

[6] This is issue ten from our December 16, 2014, grant order.

[7] These are issues one through five from our December 16, 2014, grant order.

[8] See Madison Teachers, Inc. v. Walker, 2014 WI 99, ¶23 n.9, 358 Wis. 2d 1, 851 N.W.2d 337, reconsideration denied, 2015 WI 1, 360 Wis. 2d 178, 857 N.W.2d 620 (concluding that the freedom of speech rights protected under the Wisconsin and United States Constitutions are coextensive.) See also Kenosha Co. v. C&S Management, Inc., 223 Wis. 2d 373, 389, 588 N.W.2d 236 (1999).

[9] The functional equivalent of express advocacy occurs when the "'ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.'" Wis. Right to Life, Inc. v. Barland, 751 F.3d 804, 820 (7th Cir. 2014) (Barland II) (citing Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 469-70 (2007) (WRTL II)).

[10] See infra Section V.

[11] In setting forth the facts, we respect the terms of the secrecy order issued by Reserve Judge Kluka and thus our majority opinion will set forth only the facts necessary for our resolution of this case. See State ex rel. Niedziejko v. Coffey, 22 Wis. 2d 392, 398, 126 N.W.2d 96 (1964). However, we can interpret the secrecy order and modify it to the extent necessary for the public to understand our decision herein. If a fact is necessary to include in order to render explicable a justice's analysis of an issue presented, it is not precluded by the secrecy order.

We do not discuss the identity of the Unnamed Movants or the specific allegations against them. We do, however, discuss the actions of the prosecutors and the judges involved.

[12] We recognize that in the ordinary case our procedural background would not be given with such exacting precision. Conversely, we recognize that in the ordinary case without a secrecy order, our factual background would be more precise, in that we would, among other things, identify the parties. Be that as it may, in the interest of as much transparency as possible we set forth as many of the facts as we can.

[13] Records from John Doe I have been released to the public by the original John Doe judge and are no longer subject to any secrecy order.

[14] The actual text of the assignment orders read: "Shirley Abrahamson Chief Justice By: Electronically signed by [sic] A. John Voelker, Director of State Courts."

[15] "The supreme court has appellate jurisdiction over all courts and may hear original actions and proceedings. The supreme court may issue all writs necessary in aid of its jurisdiction." Wis. Const. art. VII, § 3(2).

"The supreme court limits its exercise of original jurisdiction to exceptional cases in which a judgment by the court significantly affects the community at large." Wis. Prof'l Police Ass'n v. Lightbourn, 2001 WI 59, ¶4, 243 Wis. 2d 512, 627 N.W.2d 807. We exercised original jurisdiction because this case meets that test.

[16] The First Amendment is applicable to the States through the Fourteenth Amendment.

[17] See generally Barland II, 751 F.3d 804.

[18] Quid pro quo is a Latin term meaning "quot;what for whom" and is defined as "[a]n action or thing that is exchanged for another action or thing of more or less equal value." Black's Law Dictionary 1367 (9th ed. 2009).

[19] "The problems of vagueness and overbreadth in statutes, although raising separate problems, often arise together." State v. Princess Cinema of Milwaukee, Inc., 96 Wis. 2d 646, 656-57, 292 N.W.2d 807 (1980). "Where statutes have an overbroad sweep, just as where they are vague, 'the hazard of loss or substantial impairment of those precious [First Amendment] rights may be critical,' since those covered by the statute are bound to limit their behavior to that which is unquestionably safe." Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 609 (1967) (internal citation omitted).

[20] The original complaint initiating John Doe II alleged only coordinated fundraising between the Unnamed Movants. Over time, the theory of coordination evolved to include coordinated issue advocacy.

[21] Adopting a limiting construction is the only feasible option because the statutory definition of "political purposes" is not severable and because simply declaring the definition unconstitutional without adopting a limiting construction would effectively eliminate all of Wis. Stat. Ch. 11.

[22] Although Barland II did not involve an allegation of coordination, that distinction is meaningless in determining whether the definition of "political purposes" is vague or overbroad. It may well be that the distinction between issue and express advocacy is little more than "a line in the sand drawn on a windy day." WRTL II, 551 U.S. at 499 (Scalia, J., concurring) (citation omitted). However, "'[p]rotected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.'" Id. at 475 (majority opinion) (quoting Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002)).

[23] We note that in Wis. Coal. for Voter Participation, Inc. v. State Elections Bd., 231 Wis. 2d 670, 605 N.W.2d 654 (Ct. App. 1999) (WCVP), the court of appeals concluded that conduct substantially identical to the subject of this investigation, coordinated issue advocacy, is regulated under Wisconsin law. The key language from that case upon which the special prosecutor's theories rest, is that "the term 'political purposes' is not restricted by the cases, the statutes or the code to acts of express advocacy. It encompasses many acts undertaken to influence a candidate's election . . . ." WCVP, 231 Wis. 2d at 680.

The court of appeals' statement regarding "political purposes" is incorrect. It was incorrect when WCVP was decided in 1999, and it is incorrect today. Just four months prior to the WCVP decision, this court stated that

Buckley stands for the proposition that it is unconstitutional to place reporting or disclosure requirements on communications which do not 'expressly advocate the election or defeat of a clearly identified candidate.' Any standard of express advocacy must be consistent with this principle in order to avoid invalidation on grounds of vagueness and/or overbreadth.

Elections Bd. of State of Wis. v. Wis. Mfrs. & Commerce, 227 Wis. 2d 650, 669, 597 N.W.2d 721 (1999) (WMC) (citations omitted). This should have been enough to "restrict" the definition of "political purposes" in Chapter 11. If "it is unconstitutional to place reporting or disclosure requirements on communications which do not 'expressly advocate the election or defeat of a clearly identified candidate,'" then "political purposes" cannot extend as broadly as WCVP and the special prosecutor claim. At the very least, WCVP ignores WMC and is inconsistent with its explanation of Buckley.

In any event, even assuming that it was good law to begin with, WCVP is no longer a correct interpretation of "political purposes" in Chapter 11. As discussed above, recent case law has clearly restricted the scope of permissible regulation in campaign finance law to express advocacy and its functional equivalent. See WRTL II, 551 U.S. 449; Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); Barland II, 751 F.3d 804. Therefore, to the extent that WCVP implies that the definition of "political purposes" in Chapter 11 extends beyond express advocacy and its functional equivalent, WCVP is overruled.

[24] The full text of this subsection is:

The extent to which the judge may proceed in an examination under sub. (1) or (2) is within the judge's discretion. The examination may be adjourned and may be secret. Any witness examined under this section may have counsel present at the examination but the counsel shall not be allowed to examine his or her client, cross-examine other witnesses, or argue before the judge. Subject to s. 971.23, if the proceeding is secret, the record of the proceeding and the testimony taken shall not be open to inspection by anyone except the district attorney unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only to the extent that it is so used. A court, on the motion of a district attorney, may compel a person to testify or produce evidence under s. 972.08 (1). The person is immune from prosecution as provided in s. 972.08 (1), subject to the restrictions under s. 972.085.

Wis. Stat. § 968.26(3).

[25] We do not disregard the secrecy order issued in the John Doe proceeding. See Niedziejko, 22 Wis. 2d at 398. However, we interpret and modify the secrecy order to the extent necessary for the public to understand our decision herein. Consequently, if a fact is necessary to include in order to render explicable a justice's analysis of an issue presented, it is not precluded by the secrecy order.

[26] The Fourth Amendment provides that

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

[27] Article I, Section 11 provides that

[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Wis. Const. art. I, § 11.

[28] The special prosecutor now claims that coordinated express advocacy did in fact occur between Unnamed Movants 1 and 6 and two express advocacy groups, neither of which are parties to the current lawsuits. The special prosecutor and the Unnamed Movants presented Reserve Judge Peterson with the evidence of coordination regarding the first express advocacy group. Reserve Judge Peterson considered this evidence when deciding whether or not to quash the subpoenas or order the return of seized property. Reserve Judge Peterson definitively concluded that "[t]here is no evidence of express advocacy." We will not disturb that decision as, under the John Doe statute, it was Reserve Judge Peterson's to make. More fundamentally, however, as a member of the first express advocacy group, the candidate at

issue in this case and his agents had an absolute constitutional right to interact with a political organization of which he was a member, and improper coordination cannot be presumed by such contacts. Colo. Republican Fed. Campaign Comm. v. Fed. Eletion. Comm'n, 518 U.S. 604, 619 (1996). Further, the special prosecutor chose not to present evidence pertaining to the second express advocacy group to Reserve Judge Peterson. Arguments not presented to the court in the first instance are deemed waived. State v. Caban, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997).

[29] Although he refers only to the subpoenas issued in the John Doe investigation, Reserve Judge Peterson later clarified that "for the reasons stated above regarding the limitations on the scope of the campaign finance laws, I conclude that the . . . warrants [issued for Unnamed Movants Nos. 6 and 7] lack probable cause."

[30] We note that as a result of our interpretation of Chapter 11 in Two Unnamed Petitioners, Reserve Judge Peterson's interpretation is correct as a matter of law.

[31] While we base our conclusion solely on Reserve Judge Peterson's exercise of discretion under the John Doe statute, we note that there are serious flaws with the subpoenas and search warrants, which were originally issued by Reserve Judge Kluka. As we explained above, a John Doe judge does not act as "chief investigator" or as a mere arm of the prosecutor. State v. Washington, 83 Wis. 2d 808, 823, 266 N.W.2d 597 (1978). Rather, a John Doe judge serves as a check on the prosecutor and on the complainant to ensure that the subject(s) of the investigation receive(s) due process of law. See State v. Doe, 78 Wis. 2d 161, 164-65, 254 N.W.2d 210 (1977). This is an important function that cannot be ignored. Judges cannot simply assume that the prosecutor is always well-intentioned. Due to the exceptionally broad nature of the subpoenas and search warrants, it is doubtful that they should have ever been issued in the first instance.

The special prosecutor alleges that the Unnamed Movants engaged in "illegal" coordination of issue advocacy sometime between 2011 and 2012. The subpoenas and search warrants, however, sought records-many of which were personal and had nothing to do with political activity-and information ranging from 2009 through 2013. If the illegal conduct took place during a discrete timeframe in 2011 and 2012, as the special prosecutor alleges, what possible relevance could documents from a full two years prior have to the crime alleged? By authorizing such sweeping subpoenas and search warrants, Reserve Judge Kluka failed in her duty to limit the scope of the investigation to the subject matter of the complaint. See In re Doe, 2009 WI 46, ¶23, 317 Wis. 2d 364, 766 N.W.2d 542. These subpoenas and search warrants also come dangerously close to being general warrants of the kind which, in part, provoked our forefathers to separate from the rule of Empire.

[32] This case presents issues one through five in our December 16, 2014 grant order. See supra ¶9.

[33] "The director of state courts shall have the responsibility and authority regarding the assignment of reserve judges and the interdistrict assignment of active judges at the circuit court level where necessary to the ordered and timely disposition of the business of the court."

[34] "The director of state courts may make interdistrict judicial assignments at the circuit court level." SCR 70.23(1). "The director of state courts may also make a permanent assignment to a judicial district of a reserve judge who can be assigned by a chief judge in the same manner as an active circuit judge under this section." SCR 70.23(2). "[I]f the chief judge deems it necessary the chief judge shall call upon the director of state courts to assign a judge from outside the judicial administrative district or a reserve judge." SCR 70.23(4).

[35] "A person who has served as a supreme court justice or judge of a court of record may, as provided by law, serve as a judge of any court of record except the supreme court on a temporary basis if assigned by the chief justice of the supreme court."

[36]

(1)Definitions. In this section:

(a)'Permanent reserve judge' means a judge appointed by the chief justice to serve an assignment for a period of 6 months. Permanent reserve judges shall perform the same duties as other judges and may be reappointed for subsequent periods.

(b)'Temporary reserve judge' means a judge appointed by the chief justice to serve such specified duties on a day-by-day basis as the chief justice may direct.

(2)Eligibility. The chief justice of the supreme court may appoint any of the following as a reserve judge:

(a)Any person who has served a total of 6 or more years as a supreme court justice, a court of appeals judge or a circuit judge.

(b)Any person who was eligible to serve as a reserve judge before May 1, 1992.

[37] "The chief justice may assign active or reserve judges, other than municipal judges, to serve temporarily in any court or branch of a circuit court for such purposes and period of time as the chief justice determines to be necessary."

[38] "If a district attorney requests a judge to convene a proceeding to determine whether a crime has been committed in the court's jurisdiction, the judge shall convene a proceeding described under sub. (3) and shall subpoena and examine any witnesses the district attorney identifies."

[39] To be clear, we do not rely on State v. Carlson, 2002 WI App 44, 250 Wis. 2d 562, 641 N.W.2d 563. There are certainly distinctions to be made between the facts of Carlson and the facts of the instant case. We discuss Carlson only as it relates to the larger question of whether Reserve Judge Kluka violated a plain legal duty at the time the appointment was made.

[40] Wisconsin Stat. § 978.045, the "special prosecutors" statute, provides:

(1g)A court on its own motion may appoint a special prosecutor under sub. (1r) or a district attorney may request a court to appoint a special prosecutor under that subsection. Before a court appoints a special prosecutor on its own motion or at the request of a district attorney for an appointment that exceeds 6 hours per case, the court or district attorney shall request assistance from a district attorney, deputy district attorney or assistant district attorney from other prosecutorial units or an assistant attorney general. A district attorney requesting the appointment of a special prosecutor, or a court if the court is appointing a special prosecutor on its own motion, shall notify the department of administration, on a form provided by that department, of the district attorney's or the court's inability to obtain assistance from another prosecutorial unit or from an assistant attorney general.

(1r)Any judge of a court of record, by an order entered in the record stating the cause for it, may appoint an attorney as a special prosecutor to perform, for the time being, or for the trial of the accused person, the duties of the district attorney. An attorney appointed under this subsection shall have all of the powers of the district attorney. The judge may appoint an attorney as a special prosecutor at the request of a district attorney to assist the district attorney in the prosecution of persons charged with a crime, in grand jury proceedings or John Doe proceedings under s. 968.26, in proceedings under ch. 980, or in investigations. The judge may appoint an attorney as a special prosecutor if any of the following conditions exists:

(a)There is no district attorney for the county.

(b)The district attorney is absent from the county.

(c)The district attorney has acted as the attorney for a party accused in relation to the matter of which the accused stands charged and for which the accused is to be tried.

(d)The district attorney is near of kin to the party to be tried on a criminal charge.

(e)The district attorney is physically unable to attend to his or her duties or has a mental incapacity that impairs his or her ability to substantially perform his or her duties.

(f)The district attorney is serving in the U.S. armed forces.

(g)The district attorney stands charged with a crime and the governor has not acted under s. 17.11.

(h)The district attorney determines that a conflict of interest exists regarding the district attorney or the district attorney staff.

(i)A judge determines that a complaint received under s. 968.26 (2) (am) relates to the conduct of the district attorney to whom the judge otherwise would refer the complaint.

[41] The procedural posture of this case prevents us from overruling Carlson. If this issue were to arise in a non-supervisory writ case we may very well overrule Carlson. However, the supervisory writ is not an "all-purpose alternative to the appellate review process." State ex rel. Kalal v. Circuit Court for Dane Cnty., 2004 WI 58, ¶24, 271 Wis. 2d 633, 681 N.W.2d 110.

[42] While we do not endorse Reserve Judge Kluka's interpretation of her inherent authority in this instance, we cannot say her conduct of appointing a special prosecutor was violative of a plain legal duty.

[43] We need not address what effect an unlawful appointment would have had because no violation of a plain legal duty occurred.

[44] State ex rel. Schmitz v. Peterson, 2014AP417-W through 2014AP421-W; State ex rel. Three Unnamed Petitioners v. Peterson, 2013AP2504-W through 2013AP2508-W.

[45] State ex rel. Two Unnamed Petitioners v. Peterson, No. 2014AP296-OA.

[46] The first Wisconsin legislator to be successfully recalled was Senator George Petak (R-Racine), who lost a recall election on June 4, 1996. In 1995 Senator Petak voted for a bill to authorize financing for a new baseball stadium for the Milwaukee Brewers. Senator Petak's recall shifted control of the Senate to the Democratic Party.

[47] See also Wis. Stat. §§ 978.03(3), 978.043.

[48] 1989 Wis. Act 117, § 5.

[49] It is not clear to the writer whether a court from one county is required to make an appointment if a district attorney, deputy district attorney, or assistant district attorney from another county, or an assistant attorney general, responds to a request for assistance from the court or from the district attorney in the court's home county. Wis. Stat. § 978.045(1g). A district attorney may, on his own, appoint an attorney to serve as a special prosecutor "without state compensation." Wis. Stat. § 978.045(3)(a). A district attorney from a large county also may appoint "temporary counsel as may be authorized by the department of administration." Wis. Stat. § 978.03(3). Judicial appointment of a special counsel in these situations would appear unnecessary but fully authorized if the appointment is consistent with subsection (1r).

[50] According to one study, Wisconsin employed only two-thirds of the number of prosecutors needed in 2012. See Eric Litke, Wisconsin Needs 215 More Prosecutors, Study Says, Green Bay Press-Gazette (Apr. 14, 2013), available at http://archive.greenbaypressgazette.com/article/20130413/GPG0198/304130026/Wisconsin-needs-215-more-prosecutors-study-says. During the 2011-13 budget cycle, 42 of the 71 district attorneys in the state requested funding for additional positions; none of the requests was granted. Id.

[51] The Supreme Court has incorporated the Fourth Amendment into the Fourteenth Amendment so that it applies to the states. See Ker v. California, 374 U.S. 23, 33 (1963).

[52] Cf. United States v. Warshak, 631 F.3d 266, 288 (6th Cir. 2010) ("[A] subscriber enjoys a reasonable expectation of privacy in the contents of emails 'that are stored with, or sent or received through, a commercial ISP.'") (citation omitted).

[53] See Kristen Purcell, Search and Email Still Top the List of Most Popular Online Activities, Pew Research Center Internet Project (Aug. 9, 2011), http://www.pewinternet.org/2011/08/09/search-and-email-still-top-the-list-of-most-popular-online-activities.

[54] Wisconsin Stat. § 968.28 limits the interception of electronic communications without a court order under Wis. Stat. § 968.30. Court orders for interception may be obtained only for specified offenses ranging from homicide, felony murder, and kidnapping to soliciting a child for prostitution, Wis. Stat. § 968.28, and such orders may not exceed 30 days in duration without specific judicial extension. Wis. Stat. § 968.30(5). These statutory limitations and protections for interception do not appear to apply when search warrants are issued for past electronic communications that must be retrieved from electronic storage.

[55] On Memorial Day weekend in 1972, an intelligence gathering team from Richard Nixon's Committee to ReElect the President broke into the Democratic National Committee's (DNC) headquarters at the Watergate complex in Washington, D.C. The operatives wiretapped the telephones of the chairman of the DNC and the executive director of the Association of State Democratic Chairmen. A member of the team also photographed certain documents. One phone tap did not work and the other yielded little information. When the burglars returned for a second visit, they were apprehended. Cf. Keith W. Olsen, Watergate: The Presidential Scandal That Shook America (2003). President Nixon was forced to resign, in part for attempting to cover up a burglary to gain political intelligence that he did not personally authorize.

[56] "SLAPP is an acronym for Strategic Lawsuit Against Public Participation. Vultaggio v. Yasko, 215 Wis. 2d 326, 359, 572 N.W.2d 450 (1998) (Bradley, J., dissenting); Briggs v. Eden Council, 969 P.2d 564, 565 n.1 (Cal. 1999)." Lassa v. Rongstad, 2006 WI 105, ¶108 n.1, 294 Wis. 2d 187, 718 N.W.2d 673 (Prosser, J., dissenting). See also id., ¶161 n.10.

[57] The precise scope of a permissible secrecy order will . . . vary from proceeding to proceeding. However, as we observed in [State v. O'Connor, 77 Wis. 2d 261, 252 N.W.2d 671 (1977)], "[s]ecrecy of John Doe proceedings and the records thereof is not maintained for its own sake." Id. at 283. The policy underlying secrecy is directed to promoting the effectiveness of the investigation. Id. at 286. Therefore, any secrecy order "should be drawn as narrowly as is reasonably commensurate with its purposes."

State ex rel. Unnamed Person No. 1 v. State, 2003 WI 30, ¶61, 260 Wis. 2d 653, 688-89, 660 N.W.2d 260.

[58] This was especially evident in the 2011 Wisconsin Supreme Court election in which both candidates were bound by minimal contribution limits and tight spending limits because they accepted public funding.

[59] "'[I]t is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by the warrant——subject of course to the general Fourth Amendment protection against unreasonable searches and seizures.'" State v. Sveum, 2010 WI 92, ¶53, 328 Wis. 2d 369, 787 N.W.2d 317 (alteration added in Sveum) (quoting Dalia v. United States, 441 U.S. 238, 257 (1979)) (internal quotation marks omitted).

[60] For a more comprehensive discussion of the law regarding nighttime searches, see Claudia G. Catalano, Annotation, Propriety of Execution of Search Warrants at Nighttime, 41 A.L.R. 5th 171 (1996).

[61] "Even if a court determines that a search warrant is constitutionally valid, the manner in which the warrant was executed remains subject to judicial review." Sveum, 328 Wis. 2d 369, ¶53 (citing State v. Andrews, 201 Wis. 2d 383, 390, 549 N.W.2d 210 (1996)).

[62] The Fourth Amendment to the United States Constitution provides in full:

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

Article I, Section 11 of the Wisconsin Constitution states:

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

[63] The Supreme Court has noted that a search of a cell phone or personal computer could carry some of the implications of a home search. The Court noted that "many [cell phones] are in fact minicomputers that also happen to have the capacity to be used as a telephone." Riley v. California, 573 U.S. ____, 134 S. Ct. 2473, 2489 (2014). Given the "storage capacity of cell phones," "a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form . . . ." Id. at 2489, 2491. In fact, some courts have required warrants to be more particular than just seeking all e-mails. See In re Applications for Search Warrants for Info. Associated with Target Email Accounts/Skype Accounts, No. 13-MJ-8163-JPO, 2013 WL 4647554, at *8 (D. Kan. Aug. 27, 2013) (holding that "the warrants proposed by the government violate the Fourth Amendment" because they did not particularly describe the e-mails to be searched).

[64] "Because the fourth amendment's proscriptions against unreasonable searches are virtually identical to those in art. I, sec. 11 of the Wisconsin Constitution, state law of search and seizure

conforms to that developed under federal law." State v. Long, 163 Wis. 2d 261, 266, 471 N.W.2d 248 (Ct. App. 1991) (citing State v. Reed, 156 Wis. 2d 546, 551, 457 N.W.2d 494 (Ct. App. 1990)). See also State v. Tullberg, 2014 WI 134, ¶29 n.17, 359 Wis. 2d 421, 857 N.W.2d 120.

[65] The Federal Rules of Criminal Procedure require special justification for a nighttime search. Fed. R. Crim. P. 41(e)(2)(A)(ii). However, "'[d]aytime' means the hours between 6:00 a.m. and 10:00 p.m. according to local time." Fed. R. Crim. P. 41(a)(2)(B). Although this Federal Rule may have been technically complied with because the searches at issue might have begun a few minutes after 6:00 a.m., technical compliance with the Federal Rule does not automatically render these searches immune from constitutional scrutiny in this state court matter. While federal rules attempt to provide for consistency from state to state, courts have often taken a practical approach when defining "nighttime" for Fourth Amendment purposes. See Claudia G. Catalano, Annotation, Propriety of Execution of Search Warrants at Nighttime, 41 A.L.R. 5th 171 (1996). See also United States v. Palmer, 3 F.3d 300, 303 (9th Cir. 1993) (holding that Federal Rule of Criminal Procedure 41 did not apply because "[t]he investigation in this case was initiated and controlled by the local law enforcement officials involved"). In the case at issue, although the Special Prosecutor is a former Federal Prosecutor, his investigation of this matter was not in the federal system. This investigation was initiated and controlled by local law enforcement officials.

[66] A violation of these rules may result in suppression of the evidence if the violation rises to constitutional proportion. See, e.g., United States v. Bieri, 21 F.3d 811, 816 (8th Cir. 1994) (citation omitted) ("We apply the exclusionary rule to violations of [the nighttime search provision of] Rule 41 only if a defendant is prejudiced or reckless disregard of proper procedure is evident."); see also United States v. Berry, 113 F.3d 121, 123 (8th Cir. 1997) (noting that a violation of Federal Rule of Criminal Procedure 41's nighttime search provision can be "of constitutional magnitude").

[67] A John Doe proceeding, known as "John Doe I," was commenced in the spring of 2010 "for the purpose of investigating the alleged misuse of public resources in the Milwaukee County Executive's office." Majority op., ¶14. The John Doe I investigation "triggered a second John Doe proceeding (John Doe II), the investigation at issue here." Id., ¶15. On August 10, 2012, Milwaukee County Assistant District Attorney David Robles filed a petition for the commencement of John Doe II in the Milwaukee County circuit court. Id. On September 5, 2012, "Reserve Judge Kluka authorized the commencement of the John Doe [II] proceeding and also granted the requested secrecy order." Id., ¶17.

[68] The return on the warrant to search Unnamed Movant No. 6's house, in a box titled "Recovery Date," reads "10/03/2013 06:15:00." Similarly, the return on the warrant to search Unnamed Movant No. 7's house, in a box titled "Recovery Date," reads "10/03/2013 6:03:13." The record does not indicate to what these times correspond. Media reports indicate that the searches lasted two and a half hours. See, e.g., Kittle, infra note 12. The record is unclear.

[69] See U.S. Naval Observatory: Astronomical Applications Department, Sun and Moon Data for One Day, available at http://aa.usno.navy.mil/rstt/onedaytable?form=1&ID=AA&year=2013&month=10&day=3&state=WI&place=Madison (last visited June 13, 2015).

[70] M. D. Kittle, The day John Doe Rushed Through the Door, WisconsinWatchdog.org, Oct. 3, 2014, available at http://watchdog.org/174987/john-doe-raids-eric-okeefe.

[71] Id.

[72] Id.

[73] The record is not clear as to why at least one representative from the Milwaukee County District Attorney's Office was on scene for the searches. The record is also unclear as to whether it is typical protocol for a Milwaukee County District Attorney's Office representative to be present when a search warrant is executed.

[74] Rich Lowry, Politicized Prosecution Run Amok in Wisconsin, National Review, Apr. 21, 2015, available at http://www.nationalreview.com/article/417207/politicized-prosecution-run-amok-wisconsin-rich-lowry.

[75] David French, Wisconsin's Shame: "I Thought It Was a Home Invasion", National Review, Apr. 20, 2015, available at http://www.nationalreview.com/article/417155/wisconsins-shame-i-thought-it-was-home-invasion-david-french.

[76] George Will, Done in by John Doe, National Review, Oct. 25, 2014, available at http://www.nationalreview.com/article/391130/done-john-doe-george-will.

[77] French, supra note 17.

[78] Id.

[79] M. D. Kittle, Warrants Command John Doe Targets to Remain Silent, WisconsinWatchdog.org, May 14, 2015, available at http://watchdog.org/218761/john-doe-warrants-raids/.

[80] Lowry, supra note 16 (emphasis added).

[81] From Unnamed Movant No. 6's home, law enforcement officers seized tax records, check stubs, invoices, a binder containing documents, a box of documents, an external hard drive, and a laptop computer. From Unnamed Movant No. 7's home, officers seized three cell phones, three external hard drives, two computer towers, two laptop computers, two Apple iPods, a

document folder, three compact discs, a thumb drive, a voice recorder, bank stubs, personal pocket calendars, and financial records.

[82] Christine Galves & Fred Galves, Ensuring the Admissibility of Electronic Forensic Evidence and Enhancing Its Probative Value at Trial, 19 Criminal Justice Magazine 1 (Spring 2004), available at http://www.americanbar.org/publications/criminal_justice_magazine_home/crimjust_cjmag_19_1_electronic.html.

[83] David Goldman, How Police Can Find Your Deleted Text Messages, CNN Money, May 22, 2013, available at http://money.cnn.com/2013/05/22/technology/mobile/smartphone-forensics/.

[84] Galves, supra note 24.

[85] David French, Wisconsin's Shame: Sheriff Clarke Weighs In, National Review, Apr. 23, 2015, available at http://www.nationalreview.com/corner/417406/wisconsins-shame-sheriff-clarke-weighs-david-french.

[86] See State v. Henderson, 2001 WI 97, ¶3, 245 Wis. 2d 345, 629 N.W.2d 613 (recognizing that the Fourth Amendment reasonableness inquiry considers whether officers knocked and announced their presence before entry); see also United States v. Gibbons, 607 F.2d 1320, 1326 (10th Cir. 1979) (holding that "a nighttime intrusion is one element in considering the reasonableness of the search"); State v. Jackson, 742 N.W.2d 163, 177 (Minn. 2007) (holding that "the search of a home at night is a factor to be considered in determining whether a search is reasonable under the Fourth Amendment").

[87] All subsequent references to the Wisconsin Statutes are to the 2011-12 version unless otherwise indicated.

[88] See majority op., ¶¶17-27.

[89] The order consolidating the cases for purposes of briefing and oral argument is dated December 16, 2014, and is attached hereto, along with my concurrence and that of Justice Prosser, as Exhibit A.

[90] Oral argument was canceled in the three cases pursuant to an order entered by this court on March 27, 2015. That order, along with my dissent and that of Justice Prosser, is attached hereto as Exhibit B.

[91] Wis. Stat. § 11.001(1).

[92] See majority op., ¶¶10, 41, 50, 57, 66-67, 69.

Issue advocacy is speech that pertains to issues of public concern and does not expressly advocate the election or defeat of a candidate. Fed. Election Comm'n v. Wis. Right to Life, Inc.,

551 U.S. 449, 456 (2007). In contrast, express advocacy is speech that expressly advocates the election or defeat of a candidate. Id. at 453.

[93] "Anything Goes" is a song written by Cole Porter for his musical Anything Goes (1934). Many of the lyrics feature humorous (but dated) references to various figures of scandal and gossip in Depression-era high society. Many modern versions of the song omit the outdated lyrics, replacing them with present-day examples of social and political scandal.

[94] For the importance of the spirit of the law, see Jackson County v. DNR, 2006 WI 96, ¶32, 293 Wis. 2d 497, 717 N.W.2d 713; State v. Dagnall, 2000 WI 82, ¶59, 236 Wis. 2d 339, 612 N.W.2d 680; Harrington v. Smith, 28 Wis. 43, 59 (1871).

[95] Wis. Stat. § 11.001(1) (emphasis added).

[96] See majority op, ¶¶50, 57, 66-67.

[97] See majority op., ¶¶11, 76.

The majority opinion fails to acknowledge that the Special Prosecutor is pursuing multiple theories of criminal activity, not all of which revolve around issue advocacy. For example, the Special Prosecutor states that the John Doe investigation is premised in part "on a reason to believe that certain express advocacy groups who had filed sworn statements indicating they acted independently of certain campaign committees" did not in fact act independently. Despite the majority opinion's invalidating the Special Prosecutor's issue-advocacy-based theory of criminal activity, this express-advocacy-based theory lives on.

The majority opinion also fails to acknowledge that the original action was brought by only two Unnamed Movants. It seems the Special Prosecutor's investigation of individuals and organizations that are not parties to the original action is not affected by this court's decision in the original action. See Madison Teachers, Inc. v. Walker, 2013 WI 91, ¶20, 351 Wis. 2d 237, 839 N.W.2d 388 (holding that a declaratory judgment was binding only insofar as the parties to the lawsuit were concerned; a declaratory judgment is not the equivalent of an injunction binding on the defendant state officers). Indeed, the majority opinion and concurring opinions imply that the original action does not bind the other Unnamed Movants by deciding the second and third John Doe cases within the John Doe trilogy. If the majority opinion's decision in the original action disposes of the John Doe investigation in its entirety, why address the other John Doe cases?

[98] See O'Keefe v. Chisholm, 769 F.3d 936, 942 (7th Cir. 2014). For discussions of the constitutionality of regulating coordinated issue advocacy, see Brent Ferguson, Beyond Coordination: Defining Indirect Campaign Contributions for the Super PAC Era, 42 Hastings Const. L.Q. 471 (2015); Richard Briffault, Coordination Reconsidered, 113 Columbia L. Rev. Sidebar 88 (2013); Bradley A. Smith, Super PACs and the Role of "Coordination" in Campaign Finance Law, 49 Willamette L. Rev. 603 (2013).

[99] See items 1-14 in this court's order dated December 16, 2014 (attached hereto as Exhibit A), setting forth the questions this court accepted for review.

[100] See this court's December 16, 2014, order, attached hereto as Exhibit A (emphasis added).

[101] I refer to the eight challengers to the John Doe proceedings as Unnamed Movants because that has been the parties' practice in briefing. In the case captions for two of the three John Doe cases, the Unnamed Movants are referred to as Unnamed Petitioners.

[102] Wis. Stat. § 11.06(4)(d). See also Wis. Stat. § 11.06(7) (describing independent disbursements as disbursements made by a committee or individual who "does not act in cooperation or consultation with any candidate or authorized committee of a candidate" and who "does not act in concert with, or at the request or suggestion of, any candidate or agent or authorized committee of a candidate").

[103] See majority op., ¶¶50, 57, 66-67.

[104] O'Keefe, 769 F.3d at 937.

[105] See majority op., ¶¶34-36, 97.

[106] See majority op., ¶97.

[107] See majority op., ¶13.

[108] See majority op., ¶¶105-106.

[109] See this court's December 16, 2014, order and my concurrence thereto (attached as Exhibit A) and this court's March 27, 2015, order regarding redactions and my dissent thereto (attached as Exhibit C).

[110] See State v. Subdiaz-Osorio, 2014 WI 87, ¶¶9-10, 357 Wis. 2d 41, 849 N.W.2d 748; State v. Tate, 2014 WI 89, 357 Wis. 2d 172, 849 N.W.2d 798.

[111] See Wis. Stat. § 11.06(4)(d). See also § 11.06(7) (describing independent disbursements as disbursements made by a committee or individual who "does not act in cooperation or consultation with any candidate or authorized committee of a candidate" and who "does not act in concert with, or at the request or suggestion of, any candidate or agent or authorized committee of a candidate").

[112] Wis. Right to Life, 551 U.S. at 456.

[113] The only facts set forth in the petition and briefs filed by Unnamed Movants 6 and 7 are procedural in nature, regarding the appointment of the John Doe Judge and the Special Prosecutor and the issuance and execution of subpoenas and search warrants.

Justice Ziegler's concurrence in the John Doe trilogy is based solely on unsubstantiated allegations made in the parties' briefs regarding the execution of the search warrants issued by the John Doe judge. Although there have been no findings or stipulations of fact regarding the execution of the search warrants, Justice Ziegler nevertheless writes at length to suggest that the execution of the search warrants rendered them unconstitutional under the Fourth Amendment. She states: "[E]ven if the search warrants were lawfully issued, the execution of them could be subject to the reasonableness analysis of the Fourth Amendment . . . ." Justice Ziegler's concurrence, ¶¶309, 340. This issue has not been litigated and is not, in my view, properly before this court.

[114] See Wis. S. Ct. IOP II.B.3. (May 4, 2012), which provides in relevant part as follows:

The Supreme Court is not a fact-finding tribunal, and although it may refer issues of fact to a circuit court or referee for determination, it generally will not exercise its original jurisdiction in matters involving contested issues of fact. Upon granting a petition to commence an original action, the court may require the parties to file pleadings and stipulations of fact.

[115] The Special Prosecutor has a second and related theory based on Wis. Stat. § 11.10(4). Section 11.10(4) provides that a putatively separate committee that "acts with the cooperation of or upon consultation with a candidate or agent or authorized committee of a candidate, or which acts in concert with or at the request or suggestion of a candidate or agent or authorized committee of a candidate is deemed a subcommittee of the candidate's personal campaign committee."

The Special Prosecutor asserts that coordination between various 501(c) entities and the candidate's campaign committee may have rendered one or more of the 501(c) entities statutory subcommittees, whose receipt of contributions and disbursement of funds are reportable by the candidate's campaign committee. Under this theory, the candidate's campaign committee violated Chapter 11 by failing to report issue advocacy disbursements made by a subcommittee of the candidate's campaign committee. The subcommittee theory is not as fully developed in the Special Prosecutor's brief as the theory set forth above. Because I conclude that the Special Prosecutor's primary theory is sufficient to support the continuation of the John Doe proceedings, it is unnecessary to decide whether the subcommittee theory does so as well. Accordingly, I do not address the subcommittee theory.

I note, as well, that the John Doe judge determined that the Special Prosecutor offered no evidence of express advocacy. The Special Prosecutor disagrees. I do not address this factual dispute.

[116] O'Keefe, 769 F.3d at 941.

[117] See Wis. Stat. §§ 11.27 and 11.61(1)(b).

[118] Wis. Right to Life v. Barland (Barland II), 751 F.3d 804, 808 (7th Cir. 2014) (emphasis added).

[119] See, e.g., id.

[120] Section 11.01(6)(a) reads in relevant part as follows:

(6)(a) Except as provided in par. (b), "contribution" means any of the following:

1. A gift, subscription, loan, advance, or deposit of money or anything of value, except a loan of money by a commercial lending institution made by the institution in accordance with applicable laws and regulations in the ordinary course of business, made for political purposes. In this subdivision "anything of value" means a thing of merchantable value.

[121] Section 11.01(7)(a) reads in relevant part as follows:

(7)(a) Except as provided in par. (b), "disbursement" means any of the following:

1. A purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, except a loan of money by a commercial lending institution made by the institution in accordance with applicable laws and regulations in the ordinary course of business, made for political purposes. In this subdivision, "anything of value" means a thing of merchantable value.

[122] Section 11.01(16) reads in full as follows:

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

(a) Acts which are for "political purposes" include but are not limited to:

1. The making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate or a particular vote at a referendum.

2. The conduct of or attempting to influence an endorsement or nomination to be made at a convention of political party members or supporters concerning, in whole or in part, any campaign for state or local office.

(b) A "political purpose" does not include expenditures made for the purpose of supporting or defending a person who is being investigated for, charged with or convicted of a criminal violation of state or federal law, or an agent or dependent of such a person.

[123] Wis. Stat. § 11.01(16)(a).

[124] Wis. Stat. § 11.01(16).

[125] As the United States Supreme Court has explained, "[c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." Buckley v. Valeo, 424 U.S. 1, 42 (1976). See also Wis. Right to Life, 551 U.S. at 456-57 (explaining that the distinction between express advocacy and issue advocacy may dissolve in practice because, as Buckley put it, "[c]andidates . . . are intimately tied to public issues" (quoting Buckley, 424 U.S. at 42)).

[126] Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm. (Colorado II), 533 U.S. 431, 446 (2001) (explaining why independent disbursements made for issue advocacy are "poor sources of leverage for a spender").

[127] Id. at 446 (explaining why coordinated expenditures are treated as contributions under federal law).

This is a point the United States Supreme Court has made again and again. For example, in Buckley, 424 U.S. at 46, the Court stated that "expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution . . . ." Similarly, in McConnell v. Fed. Election Comm'n, 540 U.S. 93, 221-22 (2003), overruled on other grounds by Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010), the Court explained that "expenditures made after a 'wink or nod' often will be 'as useful to the candidate as cash.'"

[128] See, e.g., McConnell, 540 U.S. at 214-15 (explaining that federal law "treats expenditures that are coordinated with a candidate as contributions to that candidate"); Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 611 (1996) (stating that contribution limits in federal campaign finance law apply not only to direct contributions but also to "coordinated expenditures," that is, indirect contributions); Buckley, 424 U.S. at 46 (providing that under federal law, "controlled or coordinated expenditures are treated as contributions rather than expenditures").

United States Supreme Court case law governing the constitutionality of campaign finance statutes discusses "expenditures," not "disbursements," because the word "expenditure" is used in federal law. The word "disbursement" is used in the Wisconsin statutes.

[129] Section 11.06(4) provides in full as follows:

(4) When transactions reportable. (a) A contribution is received by a candidate for purposes of this chapter when it is under the control of the candidate or campaign treasurer, or such person accepts the benefit thereof. A contribution is received by an individual, group or committee, other than a personal campaign committee, when it is under the control of the individual or the committee or group treasurer, or such person accepts the benefit thereof.

(b) Unless it is returned or donated within 15 days of receipt, a contribution must be reported as received and accepted on the date received. This subsection applies notwithstanding the fact that the contribution is not deposited in the campaign depository account by the closing date for the reporting period as provided in s. 11.20(8).

(c) All contributions received by any person acting as an agent of a candidate or treasurer shall be reported by such person to the candidate or treasurer within 15 days of receipt. In the case of a contribution of money, the agent shall transmit the contribution to the candidate or treasurer within 15 days of receipt.

(d) A contribution, disbursement or obligation made or incurred to or for the benefit of a candidate is reportable by the candidate or the candidate's personal campaign committee if it is made or incurred with the authorization, direction or control of or otherwise by prearrangement with the candidate or the candidate's agent.

(e) Notwithstanding pars. (a) to (e), receipt of contributions by registrants under s. 11.05(7) shall be treated as received in accordance with that subsection.

[130] Buckley, 424 U.S. at 46.

[131] Wis. Stat. § 11.06(4)(d). See also Wis. Coalition for Voter Participation, Inc. v. State Elections Bd. (WCVP), 231 Wis. 2d 670, 681, 605 N.W.2d 654 (Ct. App. 1999) (explaining that both federal campaign finance regulations and Chapter 11 "treat expenditures that are 'coordinated' with, or made 'in cooperation with or with the consent of a candidate . . . or an authorized committee' as campaign contributions" (emphasis added)). The majority opinion apparently overrules WCVP to the extent that WCVP implies that the definition of the phrase "for political purposes" in Chapter 11 extends beyond express advocacy and its functional equivalent. See majority op., ¶68 n.23.

[132] See, e.g., Wis. Stat. § 11.06(2) (providing that independent disbursements are reportable only if they are for express advocacy purposes).

[133] See Wis. Stat. § 11.27(1) (providing that "[n]o person may prepare or submit a false report or statement to a filing officer under this chapter"); Wis. Stat. § 11.61(1)(b) (stating that "[w]hoever intentionally violates . . . 11.27(1) . . . is guilty of a Class I felony if the intentional violation does not involve a specific figure or if the intentional violation concerns a figure which exceeds $100 in amount or value").

[134] Center for Individual Freedom v. Madigan, 697 F.3d 464, 479 (7th Cir. 2012) ("In the First Amendment context, vagueness and overbreadth are two sides of the same coin . . . .").

[135] Majority op., ¶11.

[136] In his November 6, 2014, order denying the two Unnamed Movants' motion to have the Special Prosecutor show cause why the John Doe investigation should not be ended, the John Doe judge stated:

[T]here is a strong public interest in having the appellate courts answer the statutory question that is at the heart of this litigation: when Wisconsin's campaign finance laws prohibit coordination between candidates and independent organizations for a political purpose, does that political purpose require express advocacy? This is an important question that has spawned considerable litigation. The citizens of this state need and deserve a definitive answer. They will not get one if I grant the motion.

This order was not publicly released. Other portions of the order refer to matters subject to the John Doe secrecy order. The above-quoted portion does not.

[137] See the John Doe judge's November 6, 2014, order.

[138] O'Keefe, 769 F.3d at 942.

[139] Id. at 941.

[140] The relevant portion of the O'Keefe opinion provided in full as follows:

Plaintiffs' claim to constitutional protection for raising funds to engage in issue advocacy coordinated with a politician's campaign committee [the same claim asserted by Unnamed Movants 6 and 7 in this original action] has not been established "beyond debate." To the contrary, there is a lively debate among judges and academic analysts. The Supreme Court regularly decides campaign-finance issues by closely divided votes. No opinion issued by the Supreme Court, or by any court of appeals, establishes ("clearly" or otherwise) that the First Amendment forbids regulation of coordination between campaign committees and issue-advocacy groups——let alone that the First Amendment forbids even an inquiry into that topic.

O'Keefe, 769 F.3d at 942.

For discussion of whether coordinated issue advocacy is constitutionally protected, see, e.g., Ferguson, supra note 12; Briffault, supra note 12; Smith, supra note 12.

[141] See generally Buckley, 424 U.S. at 14-23. See also Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 345 (2010) ("The Buckley Court explained that the potential for quid pro quo corruption distinguished direct contributions to candidates from independent expenditures.").

[142] Buckley, 424 U.S. at 23-59.

[143] Id.

[144] Id. at 21.

[145] Id. at 25-26.

[146] Id. at 39.

[147] Id. at 47.

[148] As a matter of statutory interpretation (to avoid invalidation on vagueness grounds), the Buckley Court determined that the independent expenditure disclosure requirement applied only to independent expenditures made for express advocacy purposes, not to independent expenditures made for issue advocacy purposes. Buckley, 424 U.S. at 78-80. The Court did not so limit the contribution disclosure requirement. Id. at 78.

[149] Buckley, 424 U.S. at 66.

[150] Id. at 68.

[151] Id. at 78.

[152] Id. at 46-47. See also Ferguson, supra note 12, at 479 (explaining that the United States Supreme Court "continues to clearly signal that the line between contributions and expenditures depends on a spender's independence").

[153] Buckley, 424 U.S. at 46-47.

[154] Colorado II, 533 U.S. at 464-65.

[155] Id. at 446 (citations omitted).

Later on, the Colorado II Court further stated that

[t]here is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate, and there is good reason to expect that a party's right of unlimited coordinated spending would attract increased contributions to parties to finance exactly that kind of spending. Coordinated expenditures of money donated to a party are tailor-made to undermine contribution limits. Therefore the choice here is not, as in Buckley and

Colorado I, between a limit on pure contributions and pure expenditures. The choice is between limiting contributions and limiting expenditures whose special value as expenditures is also the source of their power to corrupt.

Colorado II, 533 U.S. at 464-65.

[156] Federal Election Commission v. Christian Coalition, 52 F. Supp. 2d 45 (D.D.C. 1999).has had a far-reaching impact on state and federal regulation of campaign coordination. See Ferguson, supra note 12, at 481.

[157] Christian Coalition, 52 F. Supp. 2d at 88.

[158] Christian Coalition, 52 F. Supp. 2d at 88. See also McConnell, 540 U.S. at 190 ("[T]he express advocacy restriction [imposed by Buckley] was an endpoint of statutory interpretation, not a first principle of constitutional law.").

[159] Christian Coalition, 52 F. Supp. 2d at 88.

[160] McConnell, 540 U.S. at 221.

[161] Christian Coalition, 52 F. Supp. 2d at 88.

[162] The few Wisconsin authorities available on the subject of coordinated disbursements track the reasoning of Christian Coalition. See, e.g., Wis. Coalition for Voter Participation, Inc. v. State Elections Bd. (WCVP), 231 Wis. 2d 670, 605 N.W.2d 654 (Ct. App. 1999) (addressing Chapter 11's regulation of coordinated issue advocacy disbursements in Justice Jon Wilcox's election campaign). In WCVP, the Wisconsin court of appeals explained that although Buckley imposed limits on the regulation of independent disbursements for issue ads, "neither Buckley nor [Chapter 11] limit the state's authority to regulate or restrict campaign contributions." Id. at 679. The WCVP court further explained that Chapter 11 "treat[s] expenditures that are 'coordinated' with, or made 'in cooperation with or with the consent of a candidate . . . or an authorized committee' as campaign contributions."[162] Id. at 681 Under WCVP, the mere fact that Chapter 11 regulates coordinated disbursements for issue ads does not conflict with the constitutional principles set forth in Buckley.

See also Wis. El. Bd. Op. 00-2 (reaffirmed Mar. 26, 2008) adopting the Christian Coalition approach to examining the conduct of the candidate and the entity disbursing funds and explaining that "the Courts seemed to be willing to merge express advocacy with issue advocacy if 'coordination' between the spender and the campaign is sufficient."

[163] See, e.g., McConnell, 540 U.S. at 221 (2003) ("[T]he rationale for affording special protection to wholly independent expenditures has nothing to do with the absence of agreement and everything to do with the functional consequences of different types of expenditures.").

[164] In Citizens United, 558 U.S. at 368-69, the Court rejected the contention that "the disclosure requirements in § 201 [of the Bipartisan Campaign Reform Act of 2002] must be confined to speech that is the functional equivalent of express advocacy." Id. at 368. The distinction between issue advocacy and express advocacy drawn by the Court in prior cases considering restrictions on independent expenditures should not, the Citizens United Court held, be imported into the realm of disclosure requirements. By making clear that the express/issue advocacy distinction is relevant only with regard to independent expenditures, Citizens United corroborates Christian Coalition's holding that the distinction is irrelevant to the limits and disclosure requirements applicable to coordinated expenditures.

Madigan, 697 F.3d at 484, relies on this discussion in Citizens United to support its conclusion that the express/issue advocacy distinction is constitutionally irrelevant in the context of disclosure requirements:

[M]andatory disclosure requirements are constitutionally permissible even if ads contain no direct candidate advocacy . . . . Whatever the status of the express advocacy/issue discussion distinction may be in other areas of campaign finance law, Citizens United left no doubt that disclosure requirements need not hew to it to survive First Amendment scrutiny. With just one exception, every circuit that has reviewed First Amendment challenges to disclosure requirements since Citizens United has concluded that such laws may constitutionally cover more than just express advocacy and its functional equivalents, and in each case the court upheld the law.

(Citation omitted.)

Madigan cites and relies on other federal cases that reach the same conclusion in light of Citizens United, including The Real Truth About Abortion, Inc. v. Fed. Election Comm'n, 681 F.3d 544, 551 (4th Cir. 2012) (explaining that Citizens United upheld disclosure requirements for communications "that are not the functional equivalent of express advocacy"); Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 54-55 (1st Cir. 2011) ("We find it reasonably clear, in light of Citizens United, that the distinction between issue discussion and express advocacy has no place in First Amendment review of these sorts of disclosure-oriented laws."); and Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990, 1016 (9th Cir. 2010) ("Given the Court's analysis in Citizens United, and its holding that the government may impose disclosure requirements on speech, the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable.").

Since Madigan was decided, additional federal cases have interpreted Citizens United in the same manner, that is, as declaring that campaign finance disclosure requirements can cover more than express advocacy and its functional equivalent without running afoul of the First Amendment. See Vt. Right to Life Comm. v. Sorrell, 758 F.3d 118, 132 (2d Cir. 2014) ("In Citizens United, the [United States] Supreme Court expressly rejected the 'contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy,' because disclosure is a less restrictive strategy for deterring corruption and informing the electorate."); Iowa Right to Life Comm. v. Tooker, 717 F.3d 576, 591 n.1 (8th Cir. 2013) ("Disclosure requirements need not 'be limited to speech that is the functional equivalent of express advocacy.'" (quoting Citizens United); Independence Inst. v. Fed. Election Comm'n, ___ F. Supp. 3d ___, 2014 WL 4959403 (D.D.C. Oct. 6, 2014) (stating that the Citizens United Court

"in no uncertain terms . . . rejected the attempt to limit [federal campaign finance law] disclosure requirements to express advocacy and its functional equivalent").

[165] Barland II, 751 F.3d at 829 (emphasis added).

[166] Id. at 809.

[167] See Wis. Stat. § 11.01(6)(a).

[168] See Wis. Stat. § 11.01(7)(a).

[169] Buckley, 424 U.S. at 39 (emphasis added).

[170] Id. at 42.

[171] Id. at 77.

[172] Id. at 79.

[173] Id. at 80.

[174] Id. at 46-47. See also Colorado II, 533 U.S. at 463-64 (explaining that the imposition of a limiting construction on provisions imposing expenditure limits in Buckley and subsequent federal cases "ultimately turned on the understanding that the expenditures at issue were not potential alter egos for contributions, but were independent . . . . [T]he constitutionally significant fact . . . was the lack of coordination between the candidate and the source of the expenditure" (internal quotation marks and citation omitted) (emphasis added)).

[175] See Buckley, 424 U.S. at 29-30, 78.

[176] See O'Keefe, 769 F.3d at 942.

[177] McConnell, 540 U.S. at 190.

[178] Id. at 191-92 (footnote omitted).

See also Wis. Right to Life, 551 U.S. at 474 n.7 (Roberts, C.J., controlling opinion) ("Buckley's intermediate step of statutory construction on the way to its constitutional holding does not dictate a constitutional test.").

[179] Barland II, 751 F.3d at 834.

[180] Barland II, 751 F.3d at 834 ("As applied to political speakers other than candidates, their committees, and political parties, the statutory definition of 'political purposes' . . . [is] limited to express advocacy and its functional equivalent . . . .") (emphasis added).

[181] See Barland II, 751 F.3d at 837 ("The First Amendment vagueness and overbreadth calculus must be calibrated to the kind and degree of the burdens imposed on those who must comply with the regulatory scheme."). See also United States v. Williams, 553 U.S. 285, 293 (2008) ("[I]t is impossible to determine whether a statute reaches too far without first knowing what the statute covers.").

[182] Buckley, 424 U.S. at 23 n.24 (citations omitted). See also id. at 78-80, which addresses the vagueness challenge brought against disclosure and reporting requirements applicable to contributions and expenditures. The Court denied the challenge insofar as it reached contributions. With regard to expenditures, the Court denied the challenge insofar as it reached non-independent political speakers:

The general requirement that "political committees" and candidates disclose their expenditures could raise similar vagueness problems, for "political committee" is defined only in terms of amount of annual "contributions" and "expenditures," and could be interpreted to reach groups engaged purely in issue discussion. The lower courts have construed the words "political committee" more narrowly. To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Buckley, 424 U.S. at 79 (footnotes omitted).

[183] For a discussion of state and federal campaign finance statutes that regulate or define campaign coordination, see Ferguson, supra note 12. This article argues not only that campaign coordination can be regulated consistent with the First Amendment but also that the coordination subject to regulation should include third-party expenditures that a candidate deems valuable, as evidenced by the candidate's conduct.

[184] McConnell, 540 U.S. at 222 (2003).

[185] Id. (quoted source omitted)

[186] Id.

[187] Id. at 223 (citation omitted).

[188] Id. at 222 (internal quotation marks omitted).

[189] Madigan, 697 F.3d at 470.

[190] Id. at 494 (emphasis added).

[191] Id. at 495.

[192] Id. at 496.

[193] Id.

[194] Id. at 497.

[195] See, e.g., State v. Henley, 2010 WI 12, 322 Wis. 2d 1, 778 N.W.2d 853 (memorandum opinion by Justice Roggensack explaining her decision not to disqualify herself).

See also State v. Allen, 2010 WI 10, 322 Wis. 2d 372, 778 N.W.2d 863. In Allen, the defendant filed a motion before Justice Gableman individually seeking his recusal. Justice Gableman denied the motion without explanation on September 10, 2009. Id., ¶15. The defendant then filed a supplemental motion addressed to the whole court, seeking review of whether Justice Gableman had properly considered whether he could act impartially or whether it appeared he could not act impartially. Id., ¶16. On January 15, 2010, Justice Gableman then filed a supplement to his September 10, 2009, order, explaining why he had denied the recusal motion. Id., ¶17. On February 4, 2010, he withdrew from participation in the court's consideration of the recusal motion. Id., ¶18. The remaining members of the court were evenly divided regarding whether to deny the defendant's recusal motion or order briefs and oral argument on the matter. Accordingly, the motion was not granted.

[196] Early on in the instant litigation (long before any recusal motion was filed), Justice Ann Walsh Bradley advised all parties that she was not participating. Her statement of non-participation is attached hereto as Exhibit D.

[197] Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 877 (2009) (citations omitted).

[198] Id. (citations omitted).

[199] Id. at 885-87.

[200] The Special Prosecutor claims that much of the information the John Doe secrecy orders and this court's redaction orders intended to conceal has been divulged through media leaks. The Special Prosecutor pointedly wonders what the court is going to do, if anything, about these alleged leaks.

I anticipate that a motion to open this court's records and briefs regarding the John Doe trilogy will be filed when the three cases are completed. The sealed and redacted material will not be released, however, without a motion, opportunity to be heard, and court order.

[201] For a full discussion of my reasons for objecting to the extensive sealing and redactions ordered by the court in these cases, please see my dissents in each of the following three orders issued by this court on March 27, 2015: (1) an order denying the Milwaukee Journal Sentinel's motion to intervene in the John Doe cases for the sole purpose of advocating for increased public access (attached hereto as Exhibit E); (2) an order canceling oral argument (attached hereto as Exhibit B); and (3) an order relating to redaction (attached hereto as Exhibit C).

See also my dissents to orders issued by this court on April 1, 2015, and April 17, 2015, as well as a letter dated May 12, 2015 issued by Diane Fremgen, Clerk of Supreme Court.

[202] See, for example, the quote set forth in ¶256 of Justice Prosser's concurrence, pulled from an Unnamed Movant's brief. This quote is redacted in its entirety in the Unnamed Movant's redacted brief.

[203] Majority op., ¶14 n.11.

[204] Justice Prosser's concurrence, ¶145.

[205] See majority op., ¶¶34-36, 75, 97.

[206] See majority op., ¶12.

[207] See majority op., ¶97.

[208] See majority op., ¶81 (quoting State ex rel. Kalal v. Circuit Court, 2004 WI 58, ¶24, 271 Wis. 2d 633, 681 N.W.2d 110 (emphasis added)).

[209] My dissent in the instant case should be read in conjunction with my dissent in the original action. See ¶¶368-486, infra.

[210] State ex rel. Kalal v. Circuit Court, 2004 WI 58, ¶23, 271 Wis. 2d 633, 681 N.W.2d 110.

[211] Id., ¶24.

[212] Id. (emphasis added, citations omitted).

[213] In re Petition of Pierce-Arrow Motor Car Co., 143 Wis. 282, 285, 127 N.W. 998 (1910).

At the time the Pierce-Arrow case was decided, Article VII, Section 3 of the Wisconsin Constitution stated in relevant part as follows: "The supreme court shall have a general superintending control over all inferior courts; it shall have the power to issue writs of . . .

mandamus, injunction . . . and other original and remedial writs, and to hear and determine the same."

Since 1978, Article VII, Section 3(1) of the Wisconsin Constitution has provided that "[t]he supreme court shall have superintending and administrative authority over all courts." Section 3(2) states that "[t]he supreme court may issue all writs necessary in aid of its jurisdiction."

[214] Pierce-Arrow, 143 Wis. at 287.

[215] Pierce-Arrow, 143 Wis. at 286 (emphasis added).

[216] See John D. Wickhem, The Power of Superintending Control of the Wisconsin Supreme Court, 1941 Wis. L. Rev. 153, 163 (1941). This article is generally viewed as the best explanation of the Wisconsin constitutional provision regarding superintending authority and writs.

[217] John D. Wickhem, The Power of Superintending Control of the Wisconsin Supreme Court, 1941 Wis. L. Rev. 153, 161 (1941).

[218] See State ex rel. Hustisford Light, Power & Mfg. Co. v. Grimm, 208 Wis. 366, 371, 243 N.W. 763 (1932).

[219] John D. Wickhem, The Power of Superintending Control of the Wisconsin Supreme Court, 1941 Wis. L. Rev. 153, 161, 164 (1941).

[220] See, e.g., State ex rel. Ampco Metal, Inc. v. O'Neill, 273 Wis. 530, 535, 78 N.W.2d 921 (1956); Madison Metro. Sch. Dist. v. Circuit Court, 2011 WI 72, 336 Wis. 2d 95, 800 N.W.2d 442.

[221] Article VII, Section 5(3) of the Wisconsin Constitution provides: "The appeals court may issue all writs necessary in aid of its jurisdiction and shall have supervisory authority over all actions and proceedings in the courts in the district."

[222] Madison Metro. Sch. Dist., 336 Wis. 2d 95, ¶84.

[223] Id., ¶84.

[224] Id.

[225] Id., ¶85.

[226] See, for example, the following cases explaining that the issuance of a supervisory writ involves the exercise of discretion: Madison Metro. Sch. Dist., 336 Wis. 2d 95, ¶34; Kalal, 271 Wis. 2d at 649; State ex rel. Kurkierewicz v. Cannon, 42 Wis. 2d 368, 375, 166 N.W.2d 255

(1969); State ex rel. Dressler v. Circuit Court, 163 Wis. 2d 622, 630, 472 N.W.2d 532 (Ct. App. 1991).

[227] City of Madison v. DWD, 2003 WI 76, ¶10, 262 Wis. 2d 652, 664 N.W.2d 584. See also majority op., ¶105.

[228] Dressler, 163 Wis. 2d at 630; State ex rel. Storer Broad. Co. v. Gorenstein, 131 Wis. 2d 342, 347, 388 N.W.2d 633 (Ct. App. 1986).

[229] What I refer to as "the third case" comprises five cases. One of the defendants in each case is the chief judge of the county in which the case is pending.

[230] Majority op., ¶105.

[231] Majority op., ¶13.

[232] See majority op., ¶¶95-99 (discussing the plain legal duty issue presented in the second case within the John Doe trilogy), ¶107-132 (discussing the plain legal duty issues presented in the third case within the John Doe trilogy).

[233] The court of appeals has discretion whether to issue a supervisory writ. If the court of appeals misinterpreted or misapplied applicable law, it erroneously exercised its discretion. City of Madison v. DWD, 2003 WI 76, ¶10, 262 Wis. 2d 652, 664 N.W.2d 584. See also majority op., ¶102-106 (setting forth the standard of review applicable to the instant supervisory writ case).

[234] City of Madison v. DWD, 2003 WI 76, ¶10, 262 Wis. 2d 652, 664 N.W.2d 584.

[235] See State ex rel. Individual Subpoenaed v. Davis, 2005 WI 70, ¶¶23, 26, 281 Wis. 2d 431, 697 N.W.2d 803 ("A John Doe judge's authority stems both from the statutes and from powers inherent to a judge. . . . A John Doe judge's powers are not, however, limited to those enumerated in Wis. Stat. § 968.26 [the John Doe statute]. . . . A John Doe judge's inherent authority stems from a John Doe judge's judicial office. . . . [A] John Doe judge's inherent power encompasses all powers necessary for the John Doe judge to 'carry out his or her responsibilities with respect to the proper conduct of John Doe proceedings.'" (quoted source omitted)); In re John Doe Proceeding, 2003 WI 30, ¶54, 260 Wis. 2d 653, 660 N.W.2d 260 ("A John Doe judge is also entitled to exercise the authority inherent in his or her judicial office."); State v. Cummings, 199 Wis. 2d 721, 736, 546 N.W.2d 406 (1996) ("A grant of jurisdiction by its very nature includes those powers necessary to fulfill the jurisdictional mandate.").

Although the legislature created John Doe proceedings, the separation of powers doctrine bars the legislature from "unduly burdening," "materially impairing," or "substantially interfering" with the inherent powers of the judicial branch, including the inherent powers of the John Doe judge in the instant cases. See State v. Holmes, 106 Wis. 2d 31, 68-69, 315 N.W.2d 703 (1982). See also majority op., ¶127, and Justice Prosser's concurrence, ¶¶208-210, 216, 239, both of which improperly allow the legislature to trump the inherent judicial powers of the John Doe judge.

[236] Whether the Special Prosecutor is deprived of competency on account of a procedural defect in his appointment turns on whether the defect was "central" to the purpose of Wis. Stat. § § 978.045(1r) (setting forth conditions for the appointment of a special prosecutor).[236] The court of appeals determined in In re Commitment of Bollig, 222 Wis. 2d 558, 571, 587 N.W.2d 908 (Ct. App. 1998), that the purpose of § 978.045(1r) is to control costs, as the State pays an appointed special prosecutor for work that would ordinarily be performed by a district attorney. It seems implausible to suggest that the costs the State has incurred on account of a single special prosecutor's appointment are substantial enough to render the alleged defect in the Special Prosecutor's appointment central to the cost-controlling objective of § 978.045(1r).

[237] See majority op., ¶¶108-113.

[238] All subsequent references to the Wisconsin Statutes are to the 2011-12 version unless otherwise indicated.

[239] In campaign-finance terminology, "issue advocacy" is generally understood to mean speech about public issues, whereas "express advocacy" refers to campaign or election-related speech. Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 456 (2007).

[240] "A John Doe proceeding is intended as an independent, investigatory tool used to ascertain whether a crime has been committed and if so, by whom." In re John Doe Proceeding, 2003 WI 30, ¶22, 260 Wis. 2d 653, 660 N.W.2d 260. A John Doe proceeding, by virtue of its secrecy, serves as an essential investigative device that protects "'innocent citizens from frivolous and groundless prosecutions.'" Id. (citation omitted).

[241] It is noteworthy that the United States Supreme Court denied certiorari review in O'Keefe v. Chisholm, 769 F.3d 936 (7th Cir. 2014) cert. denied, No. 14-872, 2015 WL 260296 (U.S. May 18, 2015), a case in which the United States Court of Appeals for the Seventh Circuit determined that the Supreme Court has not decided whether the First Amendment prohibits the regulation of coordinated issue advocacy between a candidate or campaign committee and an issue advocacy group. If the Supreme Court eventually determines that the First Amendment allows that type of regulation, the decision would validate the special prosecutor's in-kind contribution argument. As discussed below, it can be argued that Williams-Yulee v. Florida Bar, 135 S. Ct. 1656 (2015), supports the special prosecutor's position, but that decision, while helpful, is certainly not definitive on the issue.

[242] Wisconsin Stat. § 11.06(1) provides, in relevant part: "Except as provided in subs. (2), (3) and (3m) and ss. 11.05(2r) and 11.19(2), each registrant under s. 11.05 shall make full reports . . . of all contributions received, contributions or disbursements made, and obligations incurred." (emphasis added).

[243] Majority op., ¶62.

[244] Majority op., ¶67.

[245] Majority op., ¶66.

[246] Majority op., ¶67.

[247] See majority op., ¶¶62, 67.

[248] Majority op., ¶69.

[249] While I disagree with the majority's dismissal of the special prosecutor's in-kind contribution argument, I do agree with the majority's criticism of some of the purported tactics used in gathering evidence in this particular John Doe investigation. As the majority identifies, some of these methods certainly appear to be improper and open to severe disagreement. See majority op., ¶¶28-29. At this point, the actual facts concerning the tactics used have not been fully established, but the allegations are very troubling.

[250] O'Keefe, 769 F.3d at 942.

[251] Wis. Stat. § 11.01(15) defines a "personal campaign committee" as:

A committee which is formed or operating for the purpose of influencing the election or reelection of a candidate, which acts with the cooperation of or upon consultation with the candidate or the candidate's agent or which is operating in concert with or pursuant to the authorization, request or suggestion of the candidate or the candidate's agent.

[252] To be clear, the special prosecutor's main focus in this investigation is on certain campaign committees' failure to report receipt of in-kind contributions (in the form of coordinated spending on issue advocacy), not on certain issue advocacy groups' failure to report making such in-kind contributions. So what the majority mistakenly refers to as "illegal campaign coordination" is in reality a campaign committee's failure to report its receipt of an in-kind contribution.

[253] Chapter 11 imposes registration requirements on political speakers such as candidates, their campaign committees, political committees, independent groups, and individuals. See Wis. Stat. § 11.05.

[254] The intentional failure to disclose contributions received is a violation of criminal law. See Wis. Stat. §§ 11.27(1) and 11.61(1)(b).

[255] It is worth noting that Buckley found no overbreadth or vagueness concerns with respect to FECA's definition of "contribution" even though that definition included "expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." Buckley v. Valeo, 424 U.S. 1, 78 (1976).

[256] This court previously examined Buckley for the purpose of clarifying the meaning of the term "express advocacy" as used in Wis. Stat. § 11.01(16). See Elections Bd. of State of Wis. v.

Wis. Mfrs. & Commerce, 227 Wis. 2d 650, 597 N.W.2d 721 (1999) (WMC). In WMC, a Wisconsin corporation sought and received assurance from the Elections Board of the State of Wisconsin (the Board) that certain advertisements it wanted to broadcast prior to a general election did not qualify as express advocacy. Id. at 653, 677 n.24. The Board later determined that the ads that were broadcast constituted express advocacy under a context-based approach toward defining the term. Id. at 678-79.

We turned to Buckley to decide whether the corporation had fair warning that its ads constituted express advocacy, ultimately concluding that it did not. Id. at 662-81. As part of our discussion, we recognized that the United States Supreme Court created the express advocacy limitation in Buckley to avoid overbreadth and vagueness concerns with respect to FECA's regulation of independent expenditures. See id. at 664-66. So it would be a mistake to rely on WMC for the proposition that the express advocacy limitation is necessary to cure constitutional infirmities with respect to Chapter 11's regulation of campaign contributions received. See majority op., ¶68 n. 23.

[257] The term "electioneering communication" was defined to encompass "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and appears within 60 days of a federal general election or 30 days of a federal primary election. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 189 (2003) overruled on other grounds by Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[258] The majority states that "Although Barland II did not involve an allegation of coordination, that distinction is meaningless in determining whether the definition of 'political purposes' is vague or overbroad." Majority op., ¶67 n.22. Actually, it makes all the difference. Under Chapter 11, coordinated disbursements are treated as contributions.

[259] For a thorough discussion that supports my interpretation of Buckley's distinction between contributions and independent expenditures, see generally Brent Ferguson, Beyond Coordination: Defining Indirect Campaign Contributions for the Super PAC Era, 42 Hastings Const. L.Q. 471 (2015).

[260] Wisconsin Stat. § 11.06(1) includes the term "obligation" as well. Under Chapter 11, "incurred obligation" is defined as "every express obligation to make any contribution or disbursement . . . for political purposes." Wis. Stat. § 11.01(11). Since that term relies on a promise to make a "contribution" or "disbursement," it is unnecessary to separately analyze it.

[261] Majority op., ¶48.

[262] See majority op., ¶74.

[263] See majority op., ¶¶66-67.

[264] Majority op., ¶67.

[265] Majority op., ¶¶66-67.

[266] Speech that is protected under the First Amendment is not necessarily immune to governmental regulation. See Williams-Yulee, 135 S. Ct. at 1667 ("[N]obody argues that solicitation of campaign funds by judicial candidates is a category of unprotected speech. As explained above, the First Amendment fully applies to Yulee's speech. The question is instead whether that Amendment permits the particular regulation of speech at issue here."). This point appears lost on the majority. See, e.g., majority op., ¶¶66-67.

[267] See majority op., ¶¶78, 101.