

MEMORANDUM

TO: Interested Parties

FROM: Mike Wittenwyler
Godfrey & Kahn, S.C.

DATE: July 16, 2015

SUBJECT: Political Law Update: Wisconsin Supreme Court John Doe Decision

Earlier today, the Wisconsin Supreme Court issued a lengthy decision (over 300 pages) in the matters involving the John Doe investigation into alleged unlawful coordination activities in connection with the 2011 and 2012 recall elections. In short, the Court decided on a 4-2 vote (Justices Abrahamson and Crooks dissented, Justice Bradley did not participate) that the special prosecutor's legal theory underlying the investigation was flawed and, as a result, the John Doe investigation must end.

A few initial thoughts on the majority opinion (authored by Justice Gableman) and where things go from here:

- **The current John Doe investigation will end.** In several instances, the Court goes out of its way to plainly state that the decision will bring an end to the current investigation. “[B]ecause the special prosecutor’s legal theory is unsupported in either reason or law,” it cannot continue in its current form. If the special prosecutor wants to start a new investigation, he would need to demonstrate coordination involving express advocacy communications and, according to today’s decision, he has not alleged such actions.
- **State campaign finance law does not allow for the regulation of issue advocacy.** The Court holds that the definition of “political purpose” in current state law is unconstitutionally vague and overbroad. To cure these deficiencies, the Court limits its application to only include express advocacy and its functional equivalent. Because of the structure of Chapter 11 and Wisconsin campaign finance law around the “political purpose” definition, issue advocacy communications cannot be regulated under current state law.
- **The Court does not establish a coordination standard.** Today’s decision does not establish a new coordination standard other than to make clear that state campaign finance law cannot apply to issue advocacy communications. Accordingly, as it applies to coordination involving independent expenditure (express advocacy) communications, the existing advisory guidance from the Government Accountability Board is still applicable until the state legislature or a court establishes a new standard.

- **The Court reinforces the protection state law must provide for free, unregulated speech and association involving public issues and debate.** Today's decision contains a great deal of language on the need for the Court to protect the freedom of speech and allows for very little regulation of such political speech and association. Through this decision, the Court brings many First Amendment decisions and principles directly into Wisconsin case law.
- **Chapter 11 still needs to be updated.** Similar to last year's 7th Circuit decision, today's Wisconsin Supreme Court decision points out the continuing deficiencies and complexities of current state campaign finance law. It most definitely will influence actions in the state legislature this fall in the event campaign finance laws are debated.
- **Tax laws still apply.** Any coordination between a candidate's campaign and an independent group on issue advocacy communications will very likely taint that activity as "political" under the Internal Revenue Code. As a result, most independent groups that operate as tax-exempt entities will still avoid contact with campaigns or other activity that is inconsistent with a grassroots lobbying purpose.
- **There are still campaign finance laws that need to be followed.** Today's decision does nothing to disrupt state campaign finance law as it applies to express advocacy communications and the regulation of contributions to candidates and political party committees. Accordingly, there are still campaign finance laws that apply to organizations sponsoring independent expenditure communications as well as registration and reporting laws that apply to all regulated entities.

As always, please let us know if you have questions regarding today's decision or would like to discuss further its application to other facts and circumstances.

13996297.1