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Leaked Documents Show Court’s Dismissal of the John Doe Investigation Was Based on a False Premise

CMD analysis finds dark money ads coordinated with Governor Walker and his agents constituted express advocacy—not “issue” advocacy—in violation of Wisconsin law

Significant enforcement issues remain, even under the Wisconsin Supreme Court’s flawed decision, CMD finds

In a controversial ruling in July 2015, the Wisconsin Supreme Court voted 4-2 to shut down the John Doe investigation into Scott Walker’s secret political fundraising scheme, arguing that coordination between Walker, his campaign consultants, and corporate lobby groups didn’t matter because it was all just “issue advocacy.”

When the special prosecutor moved for reconsideration later that year, presenting evidence of express political advocacy, the court’s conservative majority, led by Justice Michael Gableman, promptly fired him.

The court’s novel legal theory about coordination is at odds with a long line of U.S. Supreme Court decisions and has become the subject of an appeal that the nation’s highest court will consider when it reconvenes on September 26.

The big story, however, is that the Wisconsin court’s ruling is based on a false premise.

The Center for Media and Democracy’s analysis of the John Doe documents published by *The Guardian* and political ads aired in 2011 and 2012 reveal that Governor Walker and his campaign staff coordinated at virtually every level on millions of dollars of express advocacy expenditures in violation of Wisconsin law—even under the Wisconsin court’s 2015 ruling.

“There is ample evidence that Governor Walker, his agents, and the dark money groups he coordinated with broke the law, even under the Wisconsin Supreme Court’s cramped reading of things,” said Arn Pearson, CMD’s general counsel, who has 20 years of experience in campaign finance law.

"The Wisconsin court was wrong to say that coordination between a candidate and outside groups only matters if there's express advocacy," said Donald Simon, a Washington, D.C. attorney with over 30 years' experience in campaign finance litigation, and former general counsel of Common Cause. "But even so, it's clear that many of the ads run by the groups involved in the John Doe investigation qualified as express advocacy under U.S. Supreme Court precedent."

According to the John Doe papers, the millions raised by Walker and his team and funneled into Wisconsin Club for Growth (WCFG) were then disbursed for ads run under several groups' names, including the shell group Citizens for a Strong America, funded entirely by WCFG, Wisconsin Family Action, and Wisconsin Manufacturers & Commerce (WMC). Walker's right-hand man, R.J. Johnson, played the lead role in orchestrating the focus of those ads and what groups they would be attributed to.

In addition, Walker's team closely coordinated their efforts with other groups, including the Republican Governor's Association (RGA) and the Republican State Leadership Committee (RSLC), that were registered in Wisconsin as express advocacy organizations and had sworn an oath not to coordinate with candidates or their agents. RGA's Kevin Ayers laid out a [coordinated battle plan](#) for the groups in an email to Walker and Reince Priebus in March 2011, and documents [indicate weekly meetings](#) and other communication between Walker's campaign and RGA.

CMD's review of the ads run by both sets of groups in the recall and state Supreme Court elections in 2011 and 2012 reveals that most, if not all, qualify as the "functional equivalent" of express advocacy under controlling U.S. Supreme Court case law, and not "issue advocacy," as presumed by the Wisconsin court.

The Wisconsin Supreme Court did not analyze any of the ads in its decision to terminate the John Doe investigation.

The leading U.S. Supreme Court case on the matter, *Wisconsin Right to Life v. FEC*, held that an ad is considered the "functional equivalent" of express advocacy "if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U.S. 449 (2007) The ads considered in that case were held to be "genuine issue ad[s]" ads because,

[T]heir content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

The ads at issue in the John Doe investigation, on the other hand, focus on praise or criticism of candidates' character, track record, and qualifications for office. Some then attempt to disguise their political purpose by throwing in a visual or verbal appeal to voters to contact the candidate in the last few seconds.

CMD has attached a link for ten of the ads to the end of this release.

“You cannot magically turn a political ad into an issue ad just by throwing in a last-second vague appeal for voters to call the candidate,” Pearson said.

“For some of the ads in question, it’s hard to believe that any voters thought they were just about the issues—ads that praise or sharply criticize a candidate just before an election are just as effective as ones that directly solicit a vote,” said Brent Ferguson, counsel at the Brennan Center for Justice who has followed the John Doe probe closely.

Indeed, the John Doe documents show that Walker and his allies believed that coordinating the ads was critical to winning the elections they targeted.

Walker boasted of the coordination to Karl Rove in [an email](#), crediting R.J. Johnson and Wisconsin Club for Growth as “key to retaining Justice Prosser” and electing Justice Gableman.

And R.J. Johnson wrote up [talking points](#) for Walker to use in a donor call in which he credited their coordinated efforts as key to holding the Senate during the 2011 recall elections. “We needed to hold four of the six Republican Senators facing recalls last week in order to maintain our conservative majority in the state senate,” Johnson wrote. “With your help and against all odds, we beat back the national unions and held our majority by a margin of 17-16.”

Johnson went on to specifically discuss how Walker’s dark money machine defeated Senate District 14 challenger Fred Clark. “We also defined Democrat Fred Clark early. We used his horrendous driving record, failure to pay child support, and a recording of him saying he wanted to call a female constituent back and smack her around, to illustrate how Clark behaves when he thinks no one’s watching. This angle was particularly helpful in eliminating Clark’s advantage with independent women. We were behind by 2 points when we started this race and we won by 4.”

Coordinated messaging was also key to Walker’s operation. Walker campaign ads said he would take Wisconsin forward and Tom Barrett would take Wisconsin backwards, and ads for RGA and a mysterious group call Wisconsin Recall Action Fund echoed this theme. Wisconsin Recall Action Fund may have been under the control of RGA, the new documents suggest.

The extensive evidence of coordination around those and other political expenditures that meet the “functional equivalent” of express advocacy standard have the potential to trigger new legal tremors in Wisconsin.

“The facts revealed in the emails published by *The Guardian* provide solid grounds for a renewed legal action to enforce laws broken by Governor Walker, his campaign associates, and the groups that collaborated with his dark money machine,” Pearson said.

[Selected Electioneering Ads From the 2011/2012 Wisconsin Elections.](#)