No. 15-1416

In the Supreme Court of the United States

JOHN T. CHISHOLM, ET AL., PETITIONERS,

v.

TWO UNNAMED PETITIONERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court review a decision of the Wisconsin Supreme Court terminating a John Doe investigation, where the John Doe investigation cannot lawfully be restarted for state law procedural reasons not challenged by the Petition?

2. Should this Court grant review to decide a splitless First Amendment issue that the Wisconsin Supreme Court did not decide, and that, in any event, will have no impact on the outcome of this case?

3. Should this Court review a fact-bound decision by two Justices of the Wisconsin Supreme Court to decline a request that they recuse themselves from this case, where no federal question is presented?

PARTIES TO THE PROCEEDING

The Petition's list of parties to the proceeding is correct with the exception of one party that needs to be substituted under Supreme Court Rule 35.3. On February 12, 2016, the underlying John Doe proceedings were reassigned from Judge Gregory A. Peterson to Judge David J. Wambach. Supp. App. 1a–5a.

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INTRODUCTION

Starting in 2012, some local prosecutors began investigating individuals who worked for issue-advocacy groups for allegedly coordinating with a candidate. The prosecutors conducted this investigation in secret, using a Wisconsin judicial procedure known as a John Doe proceeding, while seizing or subpoenaing millions of personal effects and documents, including many items unrelated to the investigation, and retaining the items collected for years. Pet. App. 16a–17a. The John Doe judge—whom the Wisconsin Department of Justice has represented throughout this case—ended this sprawling investigation in 2014, holding that Wisconsin law does not apply to issue advocacy, whether coordinated with a candidate or not, and then ordered the return of the numerous seized items. The Wisconsin Supreme Court correctly affirmed, agreeing with the John Doe judge that Wisconsin law does not apply to issue advocacy.

The Wisconsin Legislature then: (1) unambiguously codified the interpretation of Wisconsin campaign finance law that the John Doe judge and the Wisconsin Supreme Court had adopted; and (2) provided that no John Doe investigation can look into campaign finance violations. The people of Wisconsin thus made as clear as they possibly could that they wish to put this unfortunate chapter behind them.

The Petition is an effort by a few prosecutors to continue to use a John Doe procedure that is no longer

available under state law to restart an inquest into alleged conduct that was, and continues to be, entirely lawful under state law. The Petition should be denied for multiple reasons.

As a threshold matter, resolution of the questions presented is irrelevant to the outcome of this case. Several months after the Wisconsin Supreme Court issued its merits decision, the Legislature provided that John Doe proceedings could no longer be used to investigate alleged campaign finance violations. *See* Wis. Stat. § 968.26(1b)(a) (effective Oct. 25, 2015). Accordingly, Petitioners' John Doe investigation is simply over, regardless of how this Court might resolve their questions presented.

Petitioners' first question is—by its own terms—a splitless request for error correction relating to whether a State can pass a properly drawn statute that requires disclosures relating to coordinated issue advocacy. Petitioners' splitless question was not decided below. The Wisconsin Supreme Court decided, as a matter of state-law statutory construction, that the key statutory triggering term "political purposes" does not apply to *any* issue advocacy. Pet. App. 23a–24a. The state court made absolutely clear that its statutory decision did not turn on whether the issue advocacy was coordinated or not. Pet. App. 44a–45a, 40a n.22. Notably, the Wisconsin Legislature has since clarified that, in fact, Wisconsin campaign finance laws do not apply to any issue advocacy. Wis. Stat. § 11.0100 (effective Jan. 1, 2016).

Petitioners' remaining argument deals with the proper resolution of a request for recusal of two Justices of the Wisconsin Supreme Court. Petitioners admit that they are merely seeking error correction on the recusal question, which is reason enough to deny review. In any event, the recusal question involves no federal question at all, since the federal Due Process Clause—the only source of authority Petitioners rely upon—protects persons against the State, not the other way around. *See South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966), *abrogated on other grounds by Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013). And Petitioners' various recusal arguments are incorrect on the merits, given that they overlook many of the critical limitations that this Court noted in *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009).

JURISDICTION

This Court lacks jurisdiction because, as explained below, the Wisconsin Supreme Court's decision can be upheld on independent state law grounds. *See Harris v. Reed*, 489 U.S. 255 (1989).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions, in addition to those referenced in the Petition, are involved here:

Wis. Stat. § 11.0100 (effective Jan. 1, 2016):

> **Construction**. . . . Nothing in this chapter may be construed to regulate issue discussion, debate, or advocacy; grassroots outreach or lobbying; nonpartisan voter registration or turnout efforts; or the rights of the media.

Wis. Stat. § 968.26(1b)(a) (effective Oct. 25, 2015), limits John Doe investigations to certain crimes, none of which include campaign finance crimes (which are enumerated in Wis. Stat. § 11.1401):

> (1b) In this section:
>
> (a) "Crime" means any of the following:
>
> 1. Any Class A, B, C, or D felony under chs. 940 to 948 or 961.
>
> 2. A violation of any of the following if it is a Class E, F, G, H, or I felony:
>
> [Various crimes in Chapters 940–48]
>
> 3. A violation of s. 940.03.
>
> 4. A violation of s. 946.83 or 946.85, if the racketeering activity is listed in s. 946.82 (4) and in subd. 1., 2., or 3.
>
> 4m. A solicitation, conspiracy, or attempt to commit any violation under subd. 1., 2., 3., or 4.
>
> 5. Any conduct that is prohibited by state law and punishable by fine or imprisonment or both if the individual who allegedly participated in the conduct was a law

> enforcement officer; a correctional officer; or a state probation, parole, or extended supervision officer and the individual was engaged in his or her official duties at the time of the alleged conduct.

STATEMENT

A. Legal Background

1. Before 2016, Wisconsin's campaign finance law was a "complex" and "comprehensive" "PAC-like registration and reporting system," which was "triggered" by "a few key terms." *Wis. Right To Life, Inc. v. Barland*, 751 F.3d 804, 812–16, 832 and n.20; 840–842 (7th Cir. 2014) (*Barland II*); Pet. App. 34a. The "lynchpin" was the phrase "political purposes," such that "contributions" and "disbursements" (called "expenditures" in federal election law) were only "subject to regulation" if they were "done for 'political purposes.'" Pet. App. 37a.

In particular, as relevant here, Wisconsin at the time of the ruling below required candidates, committees, and independent organizations, making "contributions" or "disbursements" in excess of $300 in a calendar year, to register with the State and to report "contributions" made and received. *See Barland II*, 751 F.3d at 812–15; Wis. Stat. §§ 11.05–11.06 (2014). A "contribution" was defined as "[a] gift, subscription, loan, advance, or deposit of money or anything of value . . . made for *political purposes*." Wis. Stat.

§ 11.01(6)(a) (2014) (emphasis added). An act for "political purposes" was defined as an act done "for the purpose of influencing an election . . . of any individual to state or local office, [or] for the purpose of influencing the recall from or retention in office of an individual holding a state or local office . . . ." Wis. Stat. § 11.01(16) (2014). This "include[d] but [was] not limited to: 1. The making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate." *Id.*

Effective on January 1, 2016, the Wisconsin Legislature clarified that Wisconsin's campaign finance laws only regulate "activities expressly advocating for or against candidates for office," and do not regulate "issue discussion, debate, or advocacy." *See* Wis. Stat. § 11.0100; 2015 Wis. Act 117, § 24. As explained below, this confirmed the interpretation that the Wisconsin Supreme Court reached in the present case. *See infra* Part II.B. The Legislature also entirely removed the phrase "political purposes" from Chapter 11. 2015 Wis. Act 117.

2. A John Doe proceeding is a judicially managed process for the investigation of a potential crime under Wisconsin law. *See* Pet. App. 49a, 56a–57a. As relevant here, a John Doe judge convenes a proceeding at the request of a district attorney and may then issue discovery orders. *See* Wis. Stat. § 968.26. The judge decides whether a crime has been committed and, if so, by whom. Pet. App. 49a–50a. At the time that the investigation at issue here began, John Doe

proceedings could apply to any crime, did not have any durational limitation, and could (with the judge's approval) be conducted in complete secrecy. Pet. App. 50a–53a; Wis. Stat. § 968.26(3) (2013–14).

Effective on October 25, 2015, the Wisconsin Legislature revised the John Doe procedures. 2015 Wis. Act 64. Now, *inter alia*, these John Doe proceedings may only investigate a limited category of crimes, *see* Wis. Stat. § 968.26(1b)(a), may last no longer than six months absent a special extension, Wis. Stat. § 968.26(5)(a)1.b., and may only involve limited secrecy orders, Wis. Stat. § 968.26(4)(a). Most relevant here, the limited categories of crimes now covered by John Doe proceedings do not include violations of campaign finance law. Wis. Stat. § 968.26(1b)(a). That means that no campaign finance crimes can be investigated under John Doe procedures, whether in the present case or in any future case. *See infra* Part I.

B. Factual Background

1. On August 23, 2012, the Milwaukee County District Attorney filed a petition to commence a John Doe proceeding in the Milwaukee County Circuit Court, alleging unlawful coordination between certain issue-advocacy groups and a candidate for elective office. *See* Pet. App. 3a, 12a.

Judge Kluka was originally assigned to be the John Doe judge and managed the proceedings' early

stages. Pet. App. 12a–13a. In July and August 2013, separate John Doe proceedings were commenced in four other Wisconsin counties, alleging the same violations. Pet. App. 14a–15a. Judge Kluka was assigned to be the John Doe judge in the additional four John Doe proceedings, and she appointed a single special prosecutor in all five proceedings. Pet. App. 14a–16a. In October 2013, Judge Kluka authorized subpoenas and search warrants addressed to the targets of the proceeding ("unnamed movants"). Pet. App. 3a–4a, 16a. In executing these orders, the prosecution team "seized business papers, computer equipment, phones, and other devices, while their targets were restrained under police supervision and denied the ability to contact their attorneys. . . . Such documents were subpoenaed and/or seized without regard to content or relevance . . . [including] wholly irrelevant information, such as retirement income statements, personal financial account information, personal letters, and family photos." Pet. App. 16a–17a.

In October 2013, Judge Kluka recused herself and Judge Gregory Peterson was assigned to replace her as the John Doe judge. Pet. App. 17a–18a.

2. The Wisconsin Department of Justice first became directly involved in this case in November 2013, as a representative of John Doe Judge Peterson, in his

official capacity.[1] In November 2013, three of the unnamed petitioners filed a petition for a supervisory writ in the Wisconsin Court of Appeals, seeking to prohibit the proceedings based upon certain alleged procedural defects not at issue in the present Petition. Pet. App. 18a. Judge Peterson was the respondent in that writ appeal. The Wisconsin Department of Justice undertook to represent Judge Peterson, as authorized by State law, *see* Wis. Stat. § 165.25(6)(a), and as is customary, *see, e.g., Robins v. Madden*, 766 N.W.2d 542 (Wis. 2009); *Hipp v. Murray*, 750 N.W.2d 837 (Wis. 2008). The Wisconsin Department of Justice thereafter continued to represent Judge Peterson, in his official capacity. The Department now represents Judge David J. Wambach, in his official capacity, given that he replaced Judge Peterson as the John Doe judge on February 12, 2016. Supp. App. 1a–5a.

3. The issues at stake in the present Petition arose from an appeal from Judge Peterson's decision to quash the subpoenas previously issued by Judge Kluka, and to require return of the seized property. Pet. App. 435a–41a. On January 10, 2014, Judge Peterson determined that there was not probable cause to believe that any crime had been committed because Wisconsin campaign finance law only prohibits coordination between candidates and independent organizations for "political purposes," because the term

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[1] The Wisconsin Department of Justice had declined to become involved in the investigation itself. Pet. App. 13a–14a.

"political purposes" requires express advocacy, and because the special prosecutor did not claim that any of the targets engaged in express advocacy. Pet. App. 19a–21a.

Judge Peterson's decision quashing the subpoenas and ending the John Doe investigation came to the Wisconsin Supreme Court by way of two separate tracks. First, the special prosecutor filed a petition for a supervisory writ with the Wisconsin Court of Appeals, seeking to vacate Judge Peterson's decision. Pet. App. 23a. The unnamed movant respondents then filed a motion to bypass the Court of Appeals, and seeking to take the appeal directly to the Wisconsin Supreme Court. Pet. App. 23a. Separately, two unnamed movants filed a petition to commence an original action in the Wisconsin Supreme Court, seeking a declaration that coordinated issue advocacy of the kind alleged by the special prosecutor was not regulated by Wisconsin campaign finance law, the same issue that Judge Peterson had decided in their favor. Pet. App. 22a. In December 2014, the Wisconsin Supreme Court granted both the petition to bypass the court of appeals in the supervisory writ case and the petition to commence an original action. Pet. App. 5a–6a, 22a–23a.[2]

[2] The court also granted review on the alleged procedural defects referenced above. *See supra* p. 9.

4. On February 11, 2015, the special prosecutor filed a motion requesting recusal of Wisconsin Supreme Court Justices Michael Gableman and David Prosser under state law recusal rules and *Caperton*, 556 U.S. 868. Pet. App. 538a–66a. In July 2015, Justice Gableman and Justice Prosser separately entered orders denying the motion. Pet. App. 297a-300a.

Justice Prosser subsequently issued an explanation of his reasons for denying the recusal motion. Pet. App. 301a–29a. He extensively reviewed the statutes and Wisconsin Supreme Court rules regarding recusal, Pet. App. 302a–13a, explaining the justification behind the court's rules that judges do not need to recuse themselves based solely on prior "campaign contribution[s]" or "independent communication[s]" by parties in the proceeding. Pet. App. 313a (discussing Wis. S.C.R. § 60.04 (7) and (8)). He then described the particular circumstances of his election, Pet. App. 313a–17a, and explained in detail why recusal was not necessary. Pet. App. 317a–24a. Justice Prosser emphasized that "[*Caperton*] due process claims against judges are normally not asserted by the State." Pet. App. 323a. Finally, he addressed the special prosecutor's "additional specific concerns," explaining why they did not change his analysis. Pet. App. 324a–29a.

5. On July 16, 2015, the Wisconsin Supreme Court issued its decision that ended the John Doe investigation, which was entirely consistent with Judge Peterson's decision.

The court reached this decision based upon a statutory construction of the term "political purposes." Pet. App. 23a–24a. The Court explained that because the special prosecutor's theories of this case had "evolved over the course of the various legal challenges to his investigation," Pet. App. 32a–33a, it was necessary to determine "the scope of conduct regulated by" Wisconsin's campaign finance law. *See* Pet. App. 40a. In deciding that scope, the Court found, as a matter of Wisconsin state law, that there was "no support for the special prosecutor's theories" in Wisconsin's campaign finance laws. Pet. App. 33a.

To support this statutory holding, the court looked to cannons of constitutional avoidance. The court explained that the "definition of 'political purposes'" in Wisconsin's campaign finance laws "is both overbroad and vague and thus unconstitutionally chills speech because people 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'" Pet. App. 33a (quoting *Citizens United v. FEC*, 558 U.S. 310, 328 (2010) (additional citation omitted)). To avoid this constitutional problem, the court adopted a limiting construction: "political purposes" are "confine[d] . . . to express advocacy and its functional equivalent." Pet. App. 38a (quoting *Barland II*, 751 F.3d at 833). This interpretation "place[d] issue advocacy . . . beyond the reach of" Wisconsin's campaign finance law. Pet. App. 39a–40a (quoting *Barland II*, 751 F.3d at 815). The court made clear that its holding did not turn on whether the issue advocacy was coordinated. Pet. App. 40a n.22.

The court also noted that this interpretation of "political purposes" was consistent with the Seventh Circuit's recent interpretation of that same term in *Barland II*. Pet. App. 37a–40a; *see infra* Part II.B.

This statutory holding required "the end of the John Doe investigation," Pet. App. 23a, because the special prosecutor's theories all "depend[ed] on" an interpretation of "political purposes" covering issue advocacy. Pet. App. 40a–42a, 43a–45a. Accordingly, the court ordered the special prosecutor to cease all related activities, return all seized items, and permanently destroy all copies of information and other materials obtained. Pet. App. 45a–46a, 82a. The court also held that Judge Peterson "did not" "violate[ ] a plain legal duty when he quashed the subpoenas and search warrants and ordered the return of all seized property." Pet. App. 58a. Indeed, "as a result of our interpretation" of Wisconsin's campaign finance law, "Judge Peterson's interpretation is correct as a matter of law." Pet. App. 60a n.30.

6. On December 2, 2015, the Wisconsin Supreme Court issued a *per curiam* decision responding to the special prosecutor's motion for reconsideration. The court held that the special prosecutor's authority had terminated because his appointment was invalid, permitted certain district attorneys to intervene, denied the special prosecutor's reconsideration request, and modified the mandate of the earlier decision as it related to the return of the evidence seized during the investigation. Pet. App. 330a–402a. The court also

held that the special prosecutor had forfeited any argument that this case involved an investigation into coordinated express advocacy by not raising that argument before Judge Peterson. Pet. App. 345a–46a. Then, on January 12, 2016, the court granted the intervention motion of three of the five district attorneys, who are Petitioners here. Pet. App. 419a–420a.

The Wisconsin Legislature thereafter confirmed that Judge Peterson's and the Wisconsin Supreme Court's statutory interpretation holdings were correct, making clear that Wisconsin's campaign finance laws do not apply to issue advocacy. *See* Wis. Stat. § 11.0100 (effective Jan. 1, 2016); 2015 Wis. Act 117, § 24.

REASONS FOR DENYING THE PETITION

I. The Questions That Petitioners Present Are Irrelevant To The Outcome Of This Case Because John Doe Investigations Of Alleged Campaign Finance Violations Are No Longer Permitted Under Wisconsin Law

The Petition involves certain prosecutors' challenge to the Wisconsin Supreme Court's decision to close a John Doe investigation into alleged campaign finance violations, after the court concluded that the conduct alleged is not a violation of Wisconsin law. Pet. App. 8a–9a. Petitioners seek to restart that investigation, asking this Court to overturn that decision on both substantive grounds, Pet. 18–27, and

recusal grounds, Pet. 27–41. This Court should deny the Petition because the resolution of the questions presented would be "irrelevant to the ultimate outcome of the case." Stephen M. Shapiro et al., Supreme Court Practice 249 (10th ed. 2013); *accord The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959).

An amendment to Wisconsin law, effective on October 25, 2015 (after the Wisconsin Supreme Court's decision in this case), specifically removed all prosecutors' authority to investigate *any* campaign finance crimes using the John Doe procedure. *See* Wis. Stat. § 968.26(1b)(a). As the special prosecutor was forced to concede below: "[a]fter October 24, 2015 [the date of publication], a John Doe investigation is limited" to a list of particular crimes, from which alleged "campaign finance" violations are "excluded." Supp. App. 9a–10a. Petitioners thus have no authority to use John Doe proceedings to investigate alleged campaign finance violations. Given that the various appeals to the Wisconsin Supreme Court involved whether these particular John Doe proceedings looking into alleged campaign finance violations could continue, this case is now over on independent, state-law grounds. Put another way, even if this Court agrees with all of the arguments in the Petition, the John Doe investigation is over for state law reasons not at issue in any of the questions presented.

Notably, the only role that a John Doe judge can play now is following the instruction of the Wisconsin

Supreme Court in unwinding the prior John Doe investigation. *See* Pet. App. 353a–54a (requiring the special prosecutor to file an affidavit with "this court *and the John Doe judge*" regarding return of certain property seized during the John Doe investigation (emphasis added)).

II. The Wisconsin Supreme Court Did Not Decide The Splitless First Amendment Question That Petitioners Seek To Present

A. Petitioners' first question is whether "strict scrutiny appl[ies] to a state campaign finance statute which requires the public reporting of candidate-controlled expenditures made by third parties." Pet. i. Petitioners assert that this case "must be accepted," so that this Court can apply this case's "rare" "facts to First Amendment law." Pet. 18. If Petitioners' account of their own question is to be believed, this would be a textbook example of a request for fact-bound, rarely occurring error correction, where no split has been alleged. Indeed, Petitioners only cite two cases that they believe raise their First Amendment issue: a district court decision and a Wisconsin state appellate court decision, which, to the extent it were to be considered inconsistent with the Wisconsin Supreme Court's decision in the present case, would be superseded under Wisconsin law. Pet. 18 (citing *FEC v. The Christian Coalition*, 52 F. Supp. 2d 45, 48–49 (D.D.C. 1999), and *Wis. Coal. for Voter Participation, Inc. v. State Elections Bd.*, 605 N.W.2d 654, 659–60 (Wis. Ct. App. 1999)).

Given that Petitioners do not allege that there is a division of authority among the federal "court[s] of appeals" or "state court[s] of last resort" on their question presented, Sup. Ct. R. 10, this Court should deny the Petition, *see* Shapiro, *supra*, at 352.

B. Review should also be denied because the question presented was not resolved below, *see Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999), and would be "irrelevant to the ultimate outcome of the case," Shapiro, *supra*, at 249. The Wisconsin Supreme Court did not decide whether "strict scrutiny appl[ies] to a state campaign finance statute which requires the public reporting of candidate-controlled expenditures made by third parties." Pet. i. Instead, the Court held, as a matter of "statutory interpretation," that Wisconsin's convoluted statutory regime did not apply to "issue advocacy, *whether coordinated or not*." Pet. App. 8a–9a, 23a–24a (emphasis added). This statutory decision—while informed by federal constitutional overbreadth and vagueness concerns, Pet. App. 23a–24a—did not turn on whether strict scrutiny applies to a properly-drawn, non-vague disclosure requirement for coordinated issue advocacy, given that it is undisputed that Wisconsin does not have such a targeted regime.

To understand the holding below, repeating a little statutory context is helpful. Before 2016, Wisconsin's campaign finance law created a "complex" and "comprehensive" "PAC-like registration and reporting system," which was "triggered" by "a few key terms."

Barland II, 751 F.3d at 832 and n.20; 840–42; *id.* at 812–16; Pet. App. 34a. The central term was "political purposes," which was vaguely defined and triggered a wide range of requirements, including complex registration and reporting mandates. Pet. App. 37a. The same term—"political purposes"—acted as the critical trigger regardless of whether speech was coordinated or uncoordinated. Pet. App. 37a, 44a–45a.

In *Barland II*, the Seventh Circuit considered an as-applied challenge to the constitutionality of Wisconsin's campaign finance laws, including the key triggering term "political purposes." The Seventh Circuit began its discussion by opining that, because the Wisconsin Supreme Court had not yet offered a definitive "limiting construction," "we must take the regulatory scheme as we find it, testing it against federal constitutional standards." 751 F.3d at 808. The Seventh Circuit then observed that if "political purposes" was interpreted to cover issue advocacy, it would be overly vague and overbroad because of the wide range of the provisions that the term "political purposes" triggered. *Id.* at 810, 815, 822, 832–34. The state election board had "suggest[ed] a limiting construction to confine the definitions [including 'political purposes'] to express advocacy and its functional equivalent." *Id.* at 833. The Seventh Circuit adopted this proposed limiting construction "[a]s applied to political speakers other than candidates, their committees, and political parties," noting that this

construction was "reasonable, readily apparent, and likely to be approved by the state courts." *Id.* at 834.

In the present case, the Wisconsin Supreme Court agreed with *Barland II*'s general approach and went a step further, holding that—in *all contexts*, as a matter of state-law statutory interpretation—the term "political purposes" extended only to express advocacy. The court articulated the same essential point as did the Seventh Circuit in *Barland II*: "the definition of 'political purposes'" in Wisconsin's campaign finance laws "is both overbroad and vague and thus unconstitutionally chills speech." Pet. App. 33a (citation omitted)). The reason it was overbroad, however, was not because of its effect on *coordinated* issue advocacy. In fact, the court stated that the "allegation of coordination . . . is meaningless in determining whether the definition of 'political purposes' is vague or overbroad." Pet. App. 40a n.22. Instead, like the Seventh Circuit, the Wisconsin Supreme Court found the definition of "political purposes" "so broad that it sweeps in protected speech," in particular, "issue advocacy aired during the closing days of an election cycle." Pet. App. 38a–39a. Therefore, the court fully adopted the limiting construction that the Seventh Circuit had accepted in an as-applied challenge, namely that "political purposes" are "confine[d] . . . to express advocacy and its functional equivalent." Pet. App. 38a (citation omitted). This construction effectively "place[d] 'issue advocacy . . . beyond the reach of [Wisconsin's] regulatory scheme.'" Pet. App. 40a (quoting *Barland II*, 751 F.3d at 815). Put another

way, the argument that the particular speech in the present case was allegedly coordinated did not impact the court's conclusion that the term "political purposes" needed a narrowing construction.

The Petition is premised upon the unstated, false assumption that the Wisconsin Supreme Court may adopt a different interpretation of state law, on remand, if this Court were to hold that "strict scrutiny [does not] apply to a state campaign finance statute which requires the public reporting of candidate-controlled expenditures made by third parties." Pet. i. But the Wisconsin Supreme Court did not confront a "simple[ ]," "event-driven disclosure requirement," *Barland II*, 751 F.3d at 841. Rather, the court addressed Wisconsin's "dizzying array of statutes and rules," which imposed a "complex" and "comprehensive" "system" of "PAC-like registration and reporting requirements." *Id.* at 807, 840–41. And this entire regulatory scheme was premised upon a single statutory definition: the "broad and imprecise[ly defined]" "political purposes," which triggered requirements for *all* issue advocacy, both coordinated and uncoordinated. Pet. App. 34a, 39a (emphasis added). So, even if this Court were to decide "strict scrutiny [does not] apply" to a properly-drawn, non-vague disclosure mandate for coordinated issue advocacy, the Wisconsin Supreme Court's "statutory interpretation" of the phrase "political purposes" would not change. As the State's highest court's heavy reliance on *Barland II* makes clear, the court was concerned with the fact that the phrase "political purposes"—if not given a

limiting construction—would both be vague and sweep in wholly protected speech. Pet. App. 38a–40a. The court did not have cause to decide whether a narrowly drawn statute, requiring disclosure of only coordinated speech, would be permissible.

Petitioners also appear to argue that, because Wisconsin could have regulated coordinated issue advocacy in a properly-drawn, non-vague statute, the Wisconsin Supreme Court should have construed "political purposes" as applying to issue advocacy when dealing with coordinated speech, but then construed that *same term* as *not* applying to issue advocacy when dealing with uncoordinated speech. *See* Pet. 26–27. One of the dissenting Justices below urged the same approach after pointing out that *Barland II* did not involve allegations of coordination. Pet. App. 223a. But it is a well-accepted cannon of statutory construction that the same statutory term should not have two different meanings "at the same time." *Clark v. Martinez*, 543 U.S. 371, 378 (2005). At the very minimum, the Wisconsin Supreme Court had the authority to decide how to apply cannons of statutory construction to interpret state-law statutory terms, *Wainwright v. Goode*, 464 U.S. 78, 84 (1983), including declining to adopt an interpretation of the term "political purposes" that gives the term two different meanings at the same time, when applied to different conduct.

C. In any event, the merits of Petitioners' preferred resolution of the interpretive puzzle of the undifferentiated statutory term "political purposes" are irrelevant now, given that the Wisconsin Legislature has since removed that term from the statute, 2015 Wis. Act 117, and confirmed that Wisconsin's campaign finance law does not apply to "issue discussion, debate, or advocacy." Wis. Stat. § 11.0100 (2015). This applies to both coordinated and uncoordinated issue advocacy, *id.*, making Petitioners' argument an irrelevant relic.

III. Petitioners' Recusal Arguments Are A Splitless Request For Error Correction, Involving No Federal Question

A. Petitioners' remaining arguments are that two Justices of the Wisconsin Supreme Court should have recused themselves under the Due Process Clause principles articulated in *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009). Pet. 27–41. In *Caperton*, this Court confronted an "extraordinary" set of circumstances, "extreme by any measure." 556 U.S. at 887. There, a newly elected Justice on the West Virginia Supreme Court of Appeals voted with the majority in a 3-2 decision to reverse a $50 million jury verdict against a corporation whose president and CEO had spent $3 million on the Justice's campaign *after* the $50 million judgment had been entered and when it was "reasonably foreseeable . . . that the pending case would be before the newly elected justice." *Id.* at 886. This Court concluded that the Due

Process Clause required the Justice to recuse himself because "a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case . . . *when the case was pending or imminent*." *Id.* at 884 (emphasis added). This Court emphasized various relevant facts, including "the contribution's relative size" to the campaign's funds, the "total amount spent in the election," the "apparent effect" of the contribution, and "critical[ly]," the "temporal relationship between the campaign contributions, the justice's election, and the pendency of the case." *Id.* at 884, 886. The case had such "extreme facts" that this Court was not aware of any comparable case. *Id.* at 884, 886–87.

Petitioners do not allege any division of authority regarding how to apply *Caperton*. Petitioners' request for splitless error correction should thus be denied. *See* Shapiro, *supra*, at 352.

B. Separately, Petitioners' recusal argument raises no "federal question" at all. Sup. Ct. R. 10(b). *Caperton* based its holding on the Due Process Clause. 550 U.S. at 872. But the interests of prosecutors representing *the State* and seeking recusal of state court judges *in the State's favor* are not grounded in that Clause. After all, the Clause only guards against deprivations of a "*person*[*'s*]" "life, liberty or property" *by* the "State," which protections do not apply to shield a State seeking to prosecute. U.S. Const. amend. XIV (emphasis added); *see South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966) ("The word 'person' in the

context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union.") *abrogated on other grounds by Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013); *accord Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 183 n.28 (D.C. Cir. 2015); *South Dakota v. U.S. Dept. of Interior*, 665 F.3d 986, 990 (8th Cir. 2012); *Alabama v. EPA*, 871 F.2d 1548, 1554 (11th Cir. 1989); *Conn. Dept. of Social Servs. v. Leavitt*, 428 F.3d 138, 147 (2d Cir. 2005); *Pennsylvania v. Riley*, 84 F.3d 125, 130 n.2 (3d Cir. 1996).[3] What Petitioners label the "process due the litigating state" in state court, Pet. 39, is grounded in state rules, state statutes and/or state constitutional provisions, the application of which is not a "federal question." Sup. Ct. R. 10(b).[4] Tellingly, Petitioners do not cite to a single example of any federal court reviewing a state judge's decision not to recuse at the request of a prosecutor.

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[3] Given that the prosecutors here are seeking to conduct the John Doe proceeding in the name of the State, this case does not implicate the question as to whether "a state's political subdivisions are afforded due process under the Fifth Amendment." *South Dakota*, 665 F.3d at 990 n.4. Nor is *Alberti v. Klevenhagen*, 46 F.3d 1347 (5th Cir. 1995), relevant because, as the Petition acknowledges, the Fifth Circuit simply held that a district court's actions "met due process requirements," *id.* at 1360, "without analy[zing]" whether due process protections even apply to the State. Pet. 38.

[4] In the case of a federal proceeding, these concerns may be addressed by federal rules, federal statutes, or Article III.

C. Petitioners also make several legal arguments in their recusal discussion under *Caperton* standards. These arguments are all meritless.

First, Petitioners misapprehend the requirements of *Caperton* in their discussion of Justice Prosser's decision not to recuse. A "critical" fact in *Caperton* was that a party in the case—with a $50 million stake—"had a significant and disproportionate influence in placing the judge on the case . . . *when the case was pending or imminent*." 556 U.S. at 884, 886 (emphasis added). As Justice Prosser properly explained, "there was no 'pending or imminent' case against any individual or entity who made expenditures . . . at the time the expenditures were made." Pet. App. 321a. And unlike the *recent* campaign spending in support of a *newly elected* Justice in *Caperton*, Justice Prosser "had been a member of [the] court for almost 13 years before the expenditures were made," Pet. App. 321a, and the expenditures were made "four years" before Justice Prosser ruled in this case, Pet. App. 324a. Hence, this case does not present "extreme" and "extraordinary" circumstances as in *Caperton*, 556 U.S. at 887, but instead involves a commonplace scenario in States where judicial officers are elected: a party who contributed to, or spent money in support of, a judicial officer's campaign later appearing before that officer's court. Both Justice Prosser and the Wisconsin Supreme Court's recusal rules recognize that such campaign spending cannot always require recusal, or else recusal would no longer be "rare," *Caperton*, 556 U.S. at 890, and parties could strategically "change

the composition of the court that will hear its case." Pet. App. 321a; Wis. S.C.R. § 60.04(7), (8) and corresponding comments (any other rule "would permit the sponsor of an independent communication to dictate a judge's non-participation in a case").

The Petition insinuates that "the Prosser campaign [may] have coordinated [issue advocacy] with outside groups," and therefore argues that Justice Prosser should have recused himself to avoid being a "judge in his own case," citing *In re Murchison*, 349 U.S. 133, 136 (1955) and *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986). Pet. 30–31. These cases are entirely inapposite because there has never been a case, investigation, or even formal allegation that Justice Prosser or his campaign coordinated with outside groups. The Petition merely cites an email showing that outside groups were working to support Justice Prosser's campaign, Pet. 28, and a thank-you letter sent to a campaign volunteer, Pet. 28–29. Justice Prosser fully addressed these documents in his order denying the motion for recusal. *See* Pet. App. 325a–26a; 326a–27a.

Second, Petitioners make similar mistakes with regard to Justice Gableman. Pet. 31–34. The Petition states that the fact "that a case was not pending when [ ] expenditures [on Gableman's campaign] were made" is "inconsequential," Pet. 33—even though this Court in *Caperton* said that the "temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is [ ]

critical." 556 U.S. at 886 (emphasis added). And Justice Gableman's election in 2008, *seven years* before he ruled in this case, is even further removed "temporal[ly]" than Justice Prosser's reelection was. *Id.*[5]

[5] The Petition's citations to *In re Murchison*, 349 U.S. 133, and *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973), are equally inapposite. Pet. 32–34. As this Court explained in *Caperton*, the "extreme facts" in *Murchison* involved a judge who both "charged" and "convict[ed]" a defendant of contempt, essentially acting as a "one-man grand-jury." 556 U.S. at 880–81, 887 (citation omitted). And *Gibson* involved a direct pecuniary interest—a "board composed of optometrists . . . presid[ing] over a hearing against competing optometrists." 556 U.S. at 878–79. Neither "rare" circumstance was present in this case. *Id.* at 890.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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August 2016

STATE OF WISCONSIN **CIRCUIT COURT** **MILWAUKEE COUNTY**

For Official Use Only

In the Matter of a John Doe Proceeding

Application and Order for Specific Judicial Assignment

Assignment Number: 2016SP048414

Case No. 2012JD000023

Case Information

Current Court Official	Code	Branch No.	District No.
Gregory A. Peterson	0847		1
Date Case Filed	**Case Type**	**Class Code and Description**	
08/23/2011	John Doe	34001 - John Doe	

Case Status Information

Last Activity in Case	Date
Next Scheduled (or to be scheduled) Activity in Case	Date

☐ Jury Trial ☐ Bench Trial ☐ Post-Judgment Case ☐ Other:

Additional information that will be helpful to the Chief Judge and the Judge to be assigned. (e.g., time limits waived or not waived, defendant in custody, speedy trial demand, prior judicial substitutions or disqualifications, other attorneys, etc.):

Attorney/Party Information

Other Attorney(s) (and role: e.g., GAL, Adversary Counsel, etc.):

Reason for Assignment Application

Reason	Description
Other	Case reassigned per Wis. Stat. 968.26(1b)(b)

Current Court Official Approval

Application Prepared by:

☒ Approved
☐ Denied (Explain):

Assignment Source:

February 12, 2016
Date

Application Order and Order of Assignment

☒ **It is Ordered** the judge named below is assigned this case.
☐ This assignment is denied.

Patience Roggensack
Chief Justice

By: Electronically signed by
Denis Moran
Chief Judge/Deputy Chief Judge/DCA/Director/Chief Justice

February 12, 2016
Date

Name of Judge Assigned:

David Wambach (#2540)

STATE OF WISCONSIN **CIRCUIT COURT** **IOWA COUNTY** *For Official Use Only*

In the Matter of John Doe

Application and Order for Specific Judicial Assignment

Assignment Number: 2016SP048443 Case No. 2013JD000001

Case Information

Current Court Official	Code	Branch No.	District No.
Gregory A. Peterson	0847		7
Date Case Filed	**Case Type**	**Class Code and Description**	
07/25/2013	John Doe	34001 - John Doe	

Case Status Information

Last Activity in Case	Date
Next Scheduled (or to be scheduled) Activity in Case	**Date**
Unknown	

☐ Jury Trial ☐ Bench Trial ☐ Post-Judgment Case ☐ Other:

Additional information that will be helpful to the Chief Judge and the Judge to be assigned. (e.g., time limits waived or not waived, defendant in custody, speedy trial demand, prior judicial substitutions or disqualifications, other attorneys, etc.):

Attorney/Party Information

Other Attorney(s) (and role: e.g., GAL, Adversary Counsel, etc.):

Reason for Assignment Application

Reason	Description
Other	Case reassigned per Wis. Stat. 968.26(1b)(b)

Current Court Official Approval	**Application Order and Order of Assignment**
Application Prepared by:	☒ **It is Ordered** the judge named below is assigned this case. ☐ This assignment is denied.
☒ Approved ☐ Denied (Explain): Assignment Source: February 12, 2016 Date	Patience Roggensack Chief Justice By: Electronically signed by Denis Moran Chief Judge/Deputy Chief Judge/DCA/Director/Chief Justice February 12, 2016 Date
	Name of Judge Assigned: David Wambach (#2540)

STATE OF WISCONSIN **CIRCUIT COURT** **DANE COUNTY** *For Official Use Only*

In the Matter of John Doe

Application and Order for Specific Judicial Assignment

Assignment Number: 2016SP048444 Case No. 2013JD000009

Case Information

Current Court Official	Code	Branch No.	District No.
Gregory A. Peterson	0847		5
Date Case Filed	**Case Type**	**Class Code and Description**	
08/21/2013	John Doe	34001 - John Doe	

Case Status Information

Last Activity in Case	Date
Next Scheduled (or to be scheduled) Activity in Case	Date

☐ Jury Trial ☐ Bench Trial ☐ Post-Judgment Case ☐ Other:

Additional information that will be helpful to the Chief Judge and the Judge to be assigned. (e.g., time limits waived or not waived, defendant in custody, speedy trial demand, prior judicial substitutions or disqualifications, other attorneys, etc.):

Attorney/Party Information

Other Attorney(s) (and role: e.g., GAL, Adversary Counsel, etc.):

Reason for Assignment Application

Reason	Description
Other	Case reassigned per Wis. Stat. 968.26(1b)(b)

Current Court Official Approval	**Application Order and Order of Assignment**
Application Prepared by:	☒ **It is Ordered** the judge named below is assigned this case. ☐ This assignment is denied.
☒ Approved ☐ Denied (Explain): Assignment Source: February 12, 2016 Date	Patience Roggensack Chief Justice By: Electronically signed by Denis Moran Chief Judge/Deputy Chief Judge/DCA/Director/Chief Justice February 12, 2016 Date
	Name of Judge Assigned: David Wambach (#2540)

STATE OF WISCONSIN **CIRCUIT COURT** **COLUMBIA COUNTY** *For Official Use Only*

In the Matter of John Doe

Application and Order for Specific Judicial Assignment

Assignment Number: 2016SP048445 Case No. 2013JD000011

Case Information

Current Court Official	Code	Branch No.	District No.
Gregory A. Peterson	0847	1	6
Date Case Filed	**Case Type**	**Class Code and Description**	
07/29/2013	John Doe	34001 - John Doe	

Case Status Information

Last Activity in Case	Date
Next Scheduled (or to be scheduled) Activity in Case	Date

☐ Jury Trial ☐ Bench Trial ☐ Post-Judgment Case ☐ Other:

Additional information that will be helpful to the Chief Judge and the Judge to be assigned. (e.g., time limits waived or **not** waived, defendant in custody, speedy trial demand, prior judicial substitutions or disqualifications, other attorneys, etc.):

Attorney/Party Information

Other Attorney(s) (and role: e.g., GAL, Adversary Counsel, etc.):

Reason for Assignment Application

Reason	Description
Other	Case reassigned per Wis. Stat. 968.26(1b)(b)

Current Court Official Approval	**Application Order and Order of Assignment**
Application Prepared by:	☒ **It is Ordered** the judge named below is assigned this case. ☐ This assignment is denied.
☒ Approved ☐ Denied (Explain): Assignment Source: February 12, 2016 Date	Patience Roggensack Chief Justice By: Electronically signed by Denis Moran Chief Judge/Deputy Chief Judge/DCA/Director/Chief Justice February 12, 2016 Date
	Name of Judge Assigned: David Wambach (#2540)

GF-168S(CCAP), 04/09 Application and Order for Specific Judicial Assignment SCR 70, §§757.19, 801.58, Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

STATE OF WISCONSIN **CIRCUIT COURT** **DODGE COUNTY** *For Official Use Only*

In the Matter of John Doe

Application and Order for Specific Judicial Assignment

Assignment Number: 2016SP048446 Case No. 2013JD000006

Case Information

Current Court Official	Code	Branch No.	District No.
Gregory A. Peterson	0847	2	6
Date Case Filed	**Case Type**	**Class Code and Description**	
07/26/2013	John Doe	34001 - John Doe	

Case Status Information

Last Activity in Case	Date
Next Scheduled (or to be scheduled) Activity in Case	Date

☐ Jury Trial ☐ Bench Trial ☐ Post-Judgment Case ☐ Other:

Additional information that will be helpful to the Chief Judge and the Judge to be assigned. (e.g., time limits waived or not waived, defendant in custody, speedy trial demand, prior judicial substitutions or disqualifications, other attorneys, etc.):

Attorney/Party Information

Other Attorney(s) (and role: e.g., GAL, Adversary Counsel, etc.):

Reason for Assignment Application

Reason	Description
Other	Case reassigned per Wis. Stat. 968.26(1b)(b)

Current Court Official Approval	**Application Order and Order of Assignment**
Application Prepared by:	☒ **It is Ordered** the judge named below is assigned this case. ☐ This assignment is denied.
☒ Approved ☐ Denied (Explain): Assignment Source: February 12, 2016 Date	Patience Roggensack Chief Justice By: Electronically signed by Denis Moran Chief Judge/Deputy Chief Judge/DCA/Director/Chief Justice February 12, 2016 Date
	Name of Judge Assigned: David Wambach (#2540)

SUPREME COURT OF WISCONSIN
Case No. 2013AP2504 - 2508-W
Case No. 2014AP296-0A
Case No. 2014AP417 - 421-W

STATE OF WISCONSIN *ex rel*. THREE UNNAMED PETITIONERS,

Petitioner,

v. Case No. 2013AP2504 - 2508-W

THE HONORABLE GREGORY A. PETERSON, John Doe Judge, THE HONORABLE GREGORY POTTER, Chief Judge, and FRANCIS D. SCHMITZ, Special Prosecutor

Respondents,

L.C. Nos. 2013JD11, 2013JD9, 2013JD6, 2013JD1, 2012JD23

[Additional captions excluded]

RESPONDENT - SPECIAL PROSECUTOR'S RESPONSE TO MOVANT NO. 2's NOTICE OF STATUTORY CHANGES

The Special Prosecutor and Respondent, Francis D. Schmitz, files this response to the "Notice of Stat-

utory Changes" dated October 28, 2015 filed by Movant No. 2[1] in the above captioned cases. The "Notice of Statutory Changes" is a misnomer; the filing should be considered a motion because it seeks to expand the relief sought in prior filing(s) with the Court.

The Movant assumes in the "Notice" that Wisconsin Act 64 is retroactive in its entirety. The Movant's assumption is legally wrong. On the face of the statute, Wisconsin Act 64 demonstrates a legislative intent that it have no retroactive applicability, but for the provisions of section 12j. That section provides that changes to Wis. Stat. §968.26(4)(a) are applicable to secrecy orders issued prior to the effective date of Act 64.[2] Since only Section 12j and Wis. Stat. Section 968.26(4)(a) are expressly retroactive, by necessary inference and pursuant to standard rules of statutory construction, all other provisions have only prospective application. See Section II.B below. Additionally, the legislative history of the Act supports such a reading. See Section II.C below.

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[1] Inasmuch as only Movant No. 2 has filed this Notice, it will be referenced as "Movant" hereafter.

[2] Section 12j provides: "(1) A secrecy order entered under section 968.26 of the statutes that is in effect on the effective date of this subsection may apply only to persons listed in section 968.26(4)(a) of the statutes, as created by this act. A secrecy order covering persons not listed in section 968.26(4)(a) of the statutes, as created by this act, is terminated on the effective date of this subsection."

Moreover, as to all sections of Act 64 including Section 12j, if the legislation were to be construed as having retroactive applicability, it would violate the separation of powers doctrine. This is because the retroactive application of Act 64 would invalidate pre-existing court orders which were valid and lawful at the time such orders were entered. See Section III below.

Finally, all forms of relief requested in the Notice should be denied. These requests duplicate—in substantial part—various post-decision requests made by the Movant. Discussed in Sections IV and V below, the passage of Act 64 does not bolster these requests, and they should be denied.

I. WISCONSIN ACT 64

Wisconsin Act 64, which makes substantive changes to John Doe proceedings commenced under Wisconsin Statutes §968.26, was recently approved by the legislature and signed into law by Governor Walker. The changes to the statute became effective on October 24, 2015, the date of publication. The relevant changes to the statute are described below.

1. John Doe Judges. After October 24, 2015, no permanent or temporary reserve judge may issue the orders required of a "judge" in a John Doe proceeding.

2. Special Prosecutors. After October 24, 2015, no special prosecutor may be appointed to assist the district attorney in "John Doe proceedings" unless the

judge determines that the appointment is justified by one of the eight factors in the special prosecutor statute, Wis. Stat. § 978.045(lr)(bm).

3. Notice to Parties Whose Communications Were Seized. After October 24, 2015, "[i]f property was seized during a [John Doe], the judge shall, at the close of the proceeding, order notice as he or she determines to be adequate to all persons who have or may have an interest in the property." See Wis. Stat. § 968.26(7).

4. Secrecy Orders. After October 24, 2015, secrecy orders "may apply to only the judge, a district attorney or other prosecuting attorney who participates in a proceeding under this section, law enforcement personnel admitted to a proceeding under this section, an interpreter who participates in a proceeding under this section, or a reporter who makes or transcribes a record of a proceeding under this section. No secrecy order under this section may apply to any other person." See Wis. Stat. 968.26(4)(a).

5. Offenses Subject to a John Doe Investigation. After October 24, 2015, a John Doe investigation is limited to any Class A, B, C, or D felonies in chs. 940 to 948 and 961, Stats., certain specified Class E, F, G, or I felonies, felony murder, racketeering, or a solicitation, conspiracy, or attempt to commit such offenses. Previously, any crime could be the subject of a John Doe investigation. Crimes under Chapter 11, the

campaign finance regulations, and Chapter 12, the election laws, are now excluded.

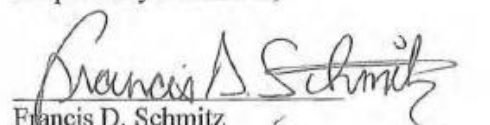
6. <u>Search Warrants</u>. After October 24, 2015, a search warrant may only be issued by a judge not presiding over the John Doe proceeding.

II. WISCONSIN ACT 64 APPLIES PROSPECTIVELY, EXCEPT FOR §968.26(4)(a), AS REFERENCED IN NON-STATUTORY SECTION 12j.

. . .

Dated this 11th day of November, 2015.

Respectfully Submitted,



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