

hearing

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1 STATE OF WISCONSIN CIRCUIT COURT JACKSON COUNTY

2 =====

3 RADCLIFFE FOR ASSEMBLY,

4

Plaintiff,

5

-vs

Case No. 08-CV-204

6

COALITION FOR AMERICA'S FAMILIES,

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Defendant.

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TRANSCRIPT OF PROCEEDINGS

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BY TELEPHONE

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Date: Sunday, November 2, 2008

21

Time: 8:02 o'clock a.m.

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Reported by LINDA KUHLMAN

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1 TRANSCRIPT OF PROCEEDINGS BY TELEPHONE,

2 held in the above-entitled matter, at Godfrey & Kahn,

3 S.C., One East Main Street, in the City of Madison,

4 County of Dane, and State of Wisconsin, on November 2,

□

5 hearing
2008, commencing at 8:02 o'clock a.m.

6
BEFORE THE HONORABLE THOMAS E. LISTER (by telephone)

7
A P P E A R A N C E S

8
MARK RADCLIFFE, (by telephone)
9 RADCLIFFE LAW OFFICE, Attorney at Law,
10 131 Main Street, Black River Falls,
Wisconsin, appearing on his own behalf;

11
DAVID HALBROOKS, (by telephone)
12 Attorney at Law, 2924 East Linwood Avenue,
Milwaukee, Wisconsin, also appearing on
13 behalf of the plaintiff;

14
MICHAEL MAISTELMAN and MATTHEW D. LERNER,
(by telephone)
15 MAISTELMAN & ASSOCIATES, LLC,
Attorneys at Law, 5027 West North Avenue,
16 Milwaukee, Wisconsin, also appearing on
behalf of the plaintiff;

17
MIKE B. WITTENWYLER,
18 GODFREY & KAHN, S.C., Attorneys at Law,
One East Main Street, Madison, Wisconsin,
19 appearing on behalf of the defendant;

20
BENJAMIN L. GINSBERG, WILLIAM J. MCGINLEY, and
KATHRYN BIBER CHEN, (by telephone)
21 PATTON BOGGS, LLP, Attorneys at Law,
2550 M Street NW, Washington, DC,
22 also appearing on behalf of the defendant.

23
ALSO PRESENT: R.J. JOHNSON (by telephone)
DEB JORDAHL (by telephone)

24
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1 THE COURT: First of all, let me --
2 before I get started I want to play a portion of
3 Radcliffe that was provided to me by his counsel,
4 an interview conducted on August 19th which was
5 the same interview quoted by respondent's
6 counsel. I want to play this in order to put the
7 factual context on the record. So for the court
8 reporter I'll play this. I think it's loud enough
9 that you should --

10 hearing
"MS. WAGNER: Carolyn in Eau Claire
11 has been on the line. welcome to The West Side.

12 "CAROLYN: Thank you, Mary Jo, I
13 would like to ask both of these gentlemen about
14 their awareness of and their support of Healthy
15 Wisconsin. When the Senate last year, the State
16 Senate voted for the Healthy Wisconsin plan it
17 wasn't even allowed to be brought up for
18 discussion in the state" --

19 THE COURT: Just a second. It's
20 rebuffering here. I'm going to advance this again
21 so that we can get it to play in full. It takes a
22 second for me to get to the point.

23 "MS. WAGNER: -- Radcliffe is with
24 us. He's an attorney in private practice in the
25 Black River Falls area. He's also the village

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1 attorney for Alma Center.

2 "Curtis Miller is a chaplain and
3 director of the clinical pastoral education
4 program at Franciscan Skemp Hospital in Sparta.

5 "This is The West Side. To call us
6 1-800-228-5615.

7 "welcome back to primary election
8 coverage on The West Side. In western Wisconsin,
9 I'm Mary Jo Wagner. This hour we're talking with
10 candidates in the 92nd Assembly District. Their
11 republican Representative Terry Musser announced
12 he would not run again saying, 'I decided after
13 two decades it was easier to reason with cattle
14 than with some of the people in Madison.'

15 hearing
16 "well, we have two democrats with
17 us who are willing to go down to Madison and take
18 their chance. One of them will go on to challenge
19 republican Dan Hellman in November.

20 "My guests are Curtis Miller. He
21 ran against Representative Musser two years ago.
22 He's a chaplain and director of the clinical
23 pastoral education program at Franciscan Skemp
24 Hospital in Sparta. Mark Radcliffe is an attorney
25 who opened a private practice in 1999 in Black
 River Falls.

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1 "what questions, west side
2 listeners, would you like to ask these
3 candidates? You can join us at 1-800-228-5615.
4 Right now Carolyn in Eau Claire has been on the
5 line. welcome to The West Side.

6 "CAROLYN: Thank you, Mary Jo. I
7 would like to ask both of these gentlemen about
8 their awareness of and their support of Healthy
9 Wisconsin. When the Senate last year, the State
10 Senate bid for the Healthy Wisconsin plan it
11 wasn't even allowed to be brought up for
12 discussion in the state assembly, and I suppose
13 that the democrats would have the thought that
14 they would like to have at least a discussion of
15 that plan again when the session begins when one
16 of these gentlemen hopefully will be there. I
17 would just like to hear them both weigh in on the
18 topic of Healthy Wisconsin as a plan for health
19 care reform for Wisconsin.

20 hearing
"MS. WAGNER: All right. Thanks
21 for question. Curtis Miller, you worked in health
22 care.

23 "MR. MILLER: There are -- the
24 health care situation is actually one that I was
25 curious how people would be thinking about it when

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1 I went out to the doors from comparison to two
2 years ago. Obviously the problem hasn't gone
3 away. With the downturn in the economy, things
4 are getting worse. Healthy Wisconsin was
5 proposed, it was passed by the Senate and the
6 Assembly wouldn't even touch it.

7 "MS. WAGNER: Because it was so
8 expensive.

9 "MR. MILLER: When I went to grade
10 school I was taught not only how to add but also
11 how to subtract. When you subtract the savings
12 from the cost you actually (inaudible) up to
13 savings for every person in Wisconsin. This would
14 save Wisconsin money. It would be good for the
15 economy. It would be good for the people of
16 Wisconsin.

17 "MS. WAGNER: So you're totally a
18 backer of it. Mark Radcliffe, are you?

19 "MR. RADCLIFFE: I'm glad that
20 we're discussing the issue of Healthy Wisconsin.
21 It's a topic that we absolutely need to continue
22 to talk about and put on the forefront. You know,
23 it's my firm belief that everybody in this country
24 should have access to affordable health care, and

hearing

4 The court was first contacted regarding this
5 matter on Friday, and it wasn't until nearly the
6 close of court Friday that I was presented with
7 the authority that I had requested for considering
8 the temporary restraining order.

9 I had been notified, I guess, early
10 in the afternoon that an action had been filed by
11 Radcliffe which was supported by an affidavit, and
12 the pleadings requested a temporary restraining
13 order, restraining radio stations from playing the
14 ads.

15 I indicated to Mr. Radcliffe and to
16 his counsel, Mr. Halbrooks, I think --

17 MR. HALBROOKS: Halbrooks, yeah.

18 THE COURT: -- that I would require
19 authority to support the application for the
20 temporary restraining order. As I said before, I
21 did not receive any of that until late in the day
22 when my staff had left, when the clerk of court
23 had also left and I was alone in the courthouse.

24 In the meantime, however, I
25 contacted Kevin Kennedy, now with the Government

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1 Accountability Board, to ask for his input and his
2 advice and his help in analyzing whether or not
3 the court should or could issue a temporary
4 restraining order. He -- I also inquired of him
5 as to whether or not he knew of the Coalition of
6 America's Families, as I was contemplating that if
7 I should issue a TRO, that those parties would
8 need to be notified.

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hearing

9 He advised me that he was not
10 familiar with the Coalition but that he was
11 familiar with an attorney that he believed would
12 most likely represent the Coalition, and that's
13 when he gave me Mike's name. He gave me Mike's
14 telephone number as well.

15 MR. WITTENWYLER: Your Honor, I'm
16 sorry to interrupt. This was Friday night he gave
17 you my number?

18 THE COURT: He gave it to me Friday
19 afternoon between the time that the action was
20 filed -- no, I guess -- yeah, between the time the
21 action was filed and the time that I was presented
22 with the authority being argued by Mr. Radcliffe's
23 side.

24 Then, as I said, toward the end of
25 the day on Friday I met with Mr. Radcliffe and his
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1 counsel by -- his counsel by telephone, and even
2 during the course of that discussion once again
3 contacted Kevin Kennedy with respect to the issue
4 of who the TRO is being directed to.

5 Like I said before, initially the
6 TRO request seemed to be directed at the radio
7 stations, and I contacted the Federal
8 Communications Commission to ask for their
9 assistance in enlightening the court as to whether
10 or not temporary restraining orders or injunctions
11 against radio stations were even possible.

12 I was advised by the Federal
13 Communications Commission that they were not and

hearing

14 that it would be deemed a violation of the First
15 Amendment to restrain media or radio stations from
16 playing political ads and that the radio stations
17 may be vested with discretion as to what they
18 might play, but that TRO would not be
19 appropriate.

20 when I advised Mr. Radcliffe and
21 his counsel of that fact they indicated that was
22 not actually what they sought to do, that they
23 wanted a temporary restraining order against the
24 sponsor of the ad, the Coalition. At that point
25 in time I called Kevin Kennedy while that

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1 conference was going on and advised him that the
2 TRO was not being sought against the radio
3 stations but was being sought against the
4 Coalition.

5 So that was the background that
6 occurred first on Friday. I then considered --

7 MR. WITTENWYLER: Your Honor, I'm
8 sorry again, and all of this was after the close
9 of business with the court?

10 THE COURT: Not all of it. As I
11 said, my call to the FCC was during the afternoon
12 hours. My first call to Kevin Kennedy was during
13 the afternoon hours, but essentially the
14 conference with Mr. Radcliffe and his counsel I
15 think began around, I want to say 4 o'clock or
16 4:15.

17 MR. HALBROOKS: This is David
18 Halbrooks. I think that's right, and I would just

hearing

19 add for Mr. Wittenwyler that I don't believe we
20 ever had a discussion about Mr. Kennedy's
21 observation that Mike Wittenwyler might be the
22 attorney.

23 THE COURT: That's right. I spoke
24 with Mr. Kennedy -- I might have reflected what he
25 had to say, but I spoke with Mr. Kennedy outside

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1 of my chambers of where Mr. Radcliffe was seated.

2 I then considered the authority and
3 read the statute in the evening on Friday and
4 again very early in the morning on Saturday. In
5 reviewing the temporary injunction statute 813.02,
6 I read subsection (1)(b) which provides that prior
7 to granting a temporary injunction or a temporary
8 restraining order, the court may attempt to
9 contact the party sought to be restrained or his
10 or her counsel, if known, and allow all the
11 parties to be heard on the equities between the
12 parties.

13 I contacted then Mike because Kevin
14 Kennedy was suspicious that Mike might well be
15 counsel for the party that I was contemplating
16 restraining, and I called Mike and explained to
17 him who I was, what I was confronted with and that
18 I was considering a temporary restraining order.

19 I asked him if he represented the
20 Coalition. He indicated to me that he actually
21 represents many folks in this position but not the
22 Coalition per se, but that he did know the
23 director of the Coalition and that he would

hearing

24 attempt to contact that person to advise them of
25 the situation and to ask them whether or not they

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1 did wish for him to represent them in the matter
2 or had other counsel.

3 Mike promised me that he would call
4 me back, and I waited and Mike was good to his
5 word and he did call me back. I don't know
6 whether it was an hour later or so, and Mike
7 advised me that he had been unsuccessful in
8 contacting anyone at the Coalition.

9 At that point in time I indicated
10 to Mike that I might well go ahead under those
11 circumstances and issue a temporary restraining
12 order but that he should stay in contact with me,
13 and he promised me he would. He indicated that
14 should he have success contacting the Coalition
15 that he would get back to me.

16 I signed the temporary restraining
17 order. Mr. Radcliffe came to my home. I gave him
18 the temporary order. Shortly thereafter within a
19 matter of a couple of hours I received a call from
20 the Milwaukee Journal Sentinel regarding my
21 issuance of the temporary restraining order, and I
22 believe it wasn't long after that that I got a
23 call back from Mike indicating that a Mr. Johnson
24 of the Coalition had contacted him and asked him
25 to represent the Coalition.

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1 Mike then asked me if there was any

2 way that I could or would move up a hearing on
3 this matter before the scheduled hearing on Monday
4 at noon for considering a temporary injunction. I
5 indicated to Mike that I would make every effort
6 (inaudible) the parties, and I would hold this
7 hearing at the earliest possible time arranged.

8 Mike was without the benefit of the
9 pleadings or their papers. I advised him that I
10 would contact Mr. Radcliffe's -- that I would
11 contact Mr. Radcliffe and try to obtain the
12 pleadings for him and copy of my order.

13 I contacted Mr. Radcliffe's law
14 office where he also conducts some political work
15 and no one was there. I left a message. I then
16 contacted his home. No one was there and I left a
17 message, and the court had no access to
18 Mr. Radcliffe's cell number. In any case, I
19 advised him of Mike's request to receive all of
20 these pleadings as well as contact information for
21 Mr. Radcliffe and his legal counsel.

22 Thereafter, I think, received one
23 or two more calls back from Mike again just
24 pursuing questions of process, asking me
25 (inaudible). I indicated to Mike that I'd be

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1 happy to do it at this time so long as it could be
2 on the record. My court reporter is from Camp
3 Douglas, which is nearly 40 miles from Black River
4 Falls. I could not, was not going to bring her
5 (inaudible). I told Mike about this and told Mike
6 that it would be the responsibility of the parties

7 hearing
to make sure that a court reporter (inaudible) to
8 record the proceedings.

9 The parties sent to me last evening
10 their memorandums supported by case law. I also
11 then received correspondence from representatives
12 for Mr. Radcliffe. The context of the --

13 MR. HALBROOKS: Judge, this is
14 David Halbrooks. Some of your comments keep
15 blanking out. I don't know what's causing it, but
16 I'm only hearing about half of what you're saying.

17 THE COURT: Can you hear me better
18 now?

19 MR. HALBROOKS: Yes. Yes, thank
20 you.

21 THE COURT: I received last evening
22 the case law from Mike's side. It consisted of, I
23 think, seven cases, a couple hundred pages. I
24 nevertheless stayed up last night and read the
25 cases.

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1 I also received last evening from
2 Mr. Radcliffe's side the directive to this
3 interview, a part and parcel of which was cited by
4 Mike in his respondent's brief. So with that
5 background, gentlemen, you know where the court
6 stands.

7 I do want preliminarily to find out
8 a couple of things. First, I am interested in
9 when these ads were first run in the 92nd
10 District, when Mr. Radcliffe first learned that
11 the ads were being run. Can anybody shine any

12 hearing
light on that for me?

13 MR. WITTENWYLER: Sure, Your Honor.
14 This is Mike Wittenwyler. The ads began last
15 Tuesday, the 28th of October, and they will run
16 through tomorrow, Monday, November 3rd.

17 MR. RADCLIFFE: And Judge, this is
18 Mark Radcliffe, and the first time I heard them
19 was when I got a call on Wednesday that they were
20 being run, and I think the first time I actually
21 heard it myself was either later that night or
22 Thursday morning.

23 THE COURT: All right. Thank you.
24 I will -- before I discuss further the basis and
25 any decision I might make I need to hear from the

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1 parties regarding their respective equitable
2 positions, and so Mr. Radcliffe, I'll hear from
3 your side first as you are obviously the
4 petitioners here.

5 MR. HALBROOKS: All right. This is
6 David Halbrooks, and I'll rely on Mr. Radcliffe to
7 fill in the facts. Obviously he's there on the
8 ground. So I wanted him to just briefly address
9 the factual background for this, which is we've
10 now been provided the supposed authority from the
11 Coalition for their statement in their ad.

12 we provided the digital copy of the
13 entire interview where the answer -- the provided
14 paragraph is an answer to a question which
15 presupposes that Mr. Radcliffe's position is
16 different than his opponent's and that he doesn't

17 support Healthy ^{hearing} Wisconsin and he was agreeing with
18 the questioner.

19 We also received the cases last
20 night, and if I could start pulling them up on the
21 screen, they essentially deal with a number --
22 about three different categories of issues, and if
23 I may start with the Bantam decision as well as
24 the Rickert and the Vote Yes decisions, those
25 three decisions -- and I guess one of the things

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1 that I'm concerned about is the phrase that these
2 are, whatever, eerily similar to the case at hand,
3 when in fact they're not at all similar.

4 These cases involve the executive
5 branch making a determination. In other words, if
6 the Government Accountability Board has this
7 authority to make a determination on an issue as
8 arose in Rickert, then we would have something
9 that's comparable. These cases are not comparable
10 because it is the court that has to make the
11 decision, not the executive branch.

12 The strict scrutiny referred to is
13 whether the government has enough of an interest
14 that it's -- in the limitation of the speech to
15 become involved in actually limiting the speech.
16 In this case the executive branch is not involved
17 in any way, shape or form and as such the court
18 can make that determination and filter those
19 issues as it makes its decision.

20 The second group of cases with
21 regard to the constitutional issues, we don't

22 hearing
23 have -- I don't see in their motion a challenge to
24 the constitutionality of 12.05 and as such it's
25 not on the table and, of course, it can't be
 considered today because we don't have the

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1 attorney general involved.

2 So the court is left with 12.05 and
3 the law as it relates to the complaint for
4 defamation and malice. The point -- that brings
5 me then to the Tatur case, which talks about 12.05
6 as it relates to defamation. The court will
7 recall that our argument was simpler than the
8 argument in that particular case because our
9 argument was based on Mr. Radcliffe filing a
10 verified complaint with the district attorney, the
11 district attorney being subpoenaed to the hearing
12 on Monday and to present the issues as to whether
13 or not there would be an investigation.

14 The motion for the temporary
15 injunction was based on the presumed violation of
16 the law for the false statements, and so the Tatur
17 case does not lie for the purpose that counsel has
18 suggested, but also the Tatur case does indicate
19 that it doesn't -- that their decision doesn't lie
20 in all cases, that a case for defamation may be
21 possible.

22 And I think when you look at the
23 language of the commercial which indicates that,
24 "what's more, Mark Radcliffe's \$15 billion health
25 care plan creates so many new taxes that wisconsin

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hearing

1 will become the highest taxed state in the country
2 hands down. The wall Street Journal reported
3 Radcliffe's plan represented an average of \$510 a
4 month higher taxes."

5 Those statements are false in that
6 Mr. Mark Radcliffe has a clear and uncontroverted
7 position against Healthy Wisconsin. That would be
8 part of our proof in the hearing and that was part
9 of our basis for seeking a TRO. The only
10 statement in the entire campaign that counsel can
11 rely on is this vague statement. And I'm sorry,
12 it does not in any way, shape or form indicate
13 support for Healthy Wisconsin.

14 If the entire interview is listened
15 to, Mr. Radcliffe is asking for doctors and nurses
16 to participate. He is requiring that the document
17 be reviewed. He is obviously appearing against an
18 opponent who is attempting to put him in a box on
19 this particular issue, and consequently there
20 isn't any authority for the statement, and there
21 is no way that this statement can be -- that the
22 statement in the commercial can be true. As such,
23 the district attorney must become involved, and
24 the court can rely on that proceeding for its
25 analysis.

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1 Additionally, if I could go through
2 the motion, and I appreciate the court's and
3 Mr. Wittenwyler's background on what happened with
4 what we were not involved, but when it says in
5 paragraph 3 that at no time prior to the entry of

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6 the order did the defendant have notice, there
7 wasn't -- what we have is an address with a Post
8 Office Box at a UPS store where they have a
9 registered agent listed as presumably standing by
10 at the UPS store. So there was no way whatsoever
11 to contact the Coalition.

12 So there isn't any, I think, legal
13 concern as to what happened with the temporary
14 restraining order for an out-of-state corporation
15 that lists a Post Office Box and a registered
16 agent address as the Post Office Box.

17 The issue as it relates to
18 paragraph 5 of the motion, which talks about the
19 defendant's rights being irreparably harmed if the
20 criticism is stifled, there is no -- nothing in
21 our motion that -- nothing in our request that
22 limits the criticism of Mark Radcliffe by the
23 Coalition for America's Families by any -- in any
24 way, shape or form. What the request asks is for
25 them to stop saying false statements.

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1 So there isn't prior restraint --
2 it isn't a prior restraint request as framed in
3 No. 5 because it is simply go ahead, say whatever
4 you want but the statements must be true, and to
5 suggest that a cookie-cutter commercial that is
6 being -- the same exact language that is being
7 used around the state for candidate after
8 candidate based on some point in time where
9 Healthy Wisconsin crossed their lips, to then take
10 that and say this is Mr. Radcliffe's plan when he

hearing

11 is clearly -- and we can have, we think, multiple
12 types of proof when we ultimately get to a
13 hearing, that his statements at publicly, at
14 privately and to various groups at forums have
15 been that he is opposed to Healthy Wisconsin. We
16 presume Mr. Radcliffe's opponent knows very good
17 and well that Mr. Radcliffe is against Healthy
18 Wisconsin.

19 So there doesn't appear to be
20 anything in the motion -- we can't get to the
21 constitutional issues as it relates to 12.05
22 today. The cases on the government entities don't
23 seem to be appropriate, and finally the -- again,
24 this is, as it relates to 12.05, the court's
25 analysis is, is this a false statement. Can we

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1 prove -- are we ultimately going to be able to
2 prove it's a false statement.

3 And the question of who is being
4 harmed is a balancing test that obviously a
5 temporary restraining order analysis requires, and
6 certainly it seems that the harm to Mr. Radcliffe
7 and the maintenance of the status quo is --
8 certainly takes precedent over the ability of the
9 Coalition to continue making false statements.

10 THE COURT: Mr. Wittenwyler?

11 MR. WITTENWYLER: Good morning,
12 Your Honor, and since we didn't do it at the
13 beginning I'd just -- so we can get the
14 appearances in here, Your Honor, this is Mike
15 Wittenwyler on behalf of the Coalition for

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16 America's Families, acting as local counsel for
17 them.

18 I'm also joined today on the phone
19 by the attorneys at Patton Boggs, who are general
20 outside counsel to the Coalition for America's
21 Families, Ben Ginsberg, William McGinley and Katie
22 Biber Chen.

23 Your Honor, first off -- and I
24 apologize to do this, but I didn't want to
25 interrupt you before. I just want to clarify for

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1 the record, the order that you entered was
2 entered, though, before you heard from anyone
3 yesterday from the organization, correct? The
4 temporary restraining order was entered before
5 anyone from the coalition called you back?

6 Your Honor? Judge Lister? Do we
7 still have everyone else on the call?

8 MR. HALBROOKS: This is David, I'm
9 here.

10 MS. BIBER CHEN: I'm here.

11 MR. LERNER: Matt Lerner is still
12 here.

13 MR. HALBROOKS: Maybe the judge
14 heard enough, Mike.

15 (Discussion off the record)

16 MR. WITTENWYLER: We're going to
17 reconnect the judge here.

18 THE COURT: Tom Lister.

19 MR. WITTENWYLER: Judge Lister?

20 THE COURT: Yes, I'm sorry, Mike.

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hearing

21 I lost you right before you were --

22 MR. WITTENWYLER: Making notices of
23 appearances?

24 THE COURT: Actually that was
25 right. All I heard was "thank you, Judge," and I
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25

1 didn't hear anything further. So if you want to
2 go ahead.

3 MR. WITTENWYLER: Mr. Halbrooks
4 thought you had just heard enough and it was time
5 for you to go. No. Good morning, sir. So this
6 is Mike Wittenwyler. I'm appearing as local
7 counsel on behalf of the Coalition for America's
8 Families, and also with us on the call today are
9 the Coalitions outside counsel, Patton Boggs,
10 represented by Ben Ginsberg, Bill McGinley and
11 Katie Biber Chen.

12 And Your Honor, what I wanted to do
13 was just get a point of clarification before I
14 began. I didn't interrupt you before, but I would
15 just like to state for the record that the order,
16 the temporary restraining order that you entered
17 yesterday, you did it before you heard back from
18 anyone at the Coalition for America's Families,
19 correct?

20 THE COURT: That's right, Mike. I
21 issued the temporary restraining order after you
22 and I had first talked, after you had returned my
23 call advising me that you couldn't reach anyone at
24 the Coalition. At that point I issued the TRO.

25 MR. WITTENWYLER: Got you. Okay.

hearing

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1 We just wanted to clarify that for the record, and
2 the other point just is, again, you and I, the
3 first time we spoke was Saturday morning, it was
4 not on Friday when you had gotten the phone call
5 from Kevin Kennedy?

6 THE COURT: That's also correct,
7 and there's one other thing the court wants to
8 add. I spoke -- and I can't remember who it was.
9 Someone advised me that I might be able to
10 locate --

11 MR. WITTENWYLER: That was me, Your
12 Honor, the information at the television stations
13 or the radio stations?

14 THE COURT: Yes.

15 MR. WITTENWYLER: Yes. When we
16 first spoke yesterday morning I asked whether or
17 not counsel for the other side had gone to the
18 radio stations or the TV stations to get the
19 public file information so that they could find
20 out who the contact is since that's required of
21 every broadcaster.

22 THE COURT: That's right. And so
23 what I did immediately after that was I contacted
24 Mr. Radcliffe and asked him that question. He
25 told me that he had not done so but he would do so

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1 immediately. Within a few minutes after that he
2 called me back, told me that he had located some
3 contact information and gave me the name of the

4 hearing
treasurer of the Coalition as well as one other
5 name.

6 The treasurer's number was the one
7 with a 608 area code there in Madison and because
8 the address present on the pleading was the
9 Madison address I took the number and I called
10 that number. I got a recording from the
11 Coalition. I don't know -- the person did not
12 identify themselves. They simply said that I had
13 reached the offices of the Coalition and could
14 leave a message.

15 So I just wanted to let everyone
16 know that I did follow up on Mike's suggestion
17 trying to contact the Coalition about this matter.

18 MR. WITTENWYLER: And that's where
19 you left a voice mail yesterday, sir?

20 THE COURT: Yes. There's a voice
21 mail there.

22 MR. WITTENWYLER: But that was --
23 again, that was after the order had been entered
24 that the voice mail was left?

25 THE COURT: That's right.

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1 MR. WITTENWYLER: Thank you.

2 MR. RADCLIFFE: This is Mark
3 Radcliffe. Just for clarification on that, there
4 was -- I got the information from WWIF Radio where
5 the ad is playing, and they gave me three names --
6 Valerie Johnson, Donna Lamone and Judy Sallas.

7 MR. WITTENWYLER: And
8 Mr. Radcliffe, though, you guys didn't bother

14 hearing
clarification for the record because you said
15 that's what you wanted to do.

16 MR. WITTENWYLER: Mr. Radcliffe,
17 I'm not at all suggesting that you're not
18 competent to try this. I'm just suggesting
19 that -- I'm just trying to determine the diligence
20 that was done on your end to find contact
21 information for the defendants who you then
22 decided to sue.

23 MR. RADCLIFFE: And I told you what
24 I did.

25 MR. WITTENWYLER: Right. And when
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1 did you first talk to Mr. Maistelman?

2 MR. HALBROOKS: Wait, wait, wait.
3 Your Honor, this has turned into a deposition.
4 The question is was the statute followed -- this
5 is David Halbrooks -- was the statute followed,
6 did the court try to contact the organization, and
7 I believe there's a record to that effect.

8 MR. WITTENWYLER: I'm sorry,
9 David. I'll go back then to talking about what's
10 at issue in front of us. Your Honor, I think
11 where we need to start with is looking what is in
12 front of us this morning. And what we're looking
13 at is we're looking at prior restraint of speech,
14 which is just, you know, in our country is
15 something that's unheard of.

16 The assumption that we start with
17 in this country is that government, whether it's
18 court, a statute, an agency, shouldn't interfere

19 hearing
20 or sensor speech or the dissemination of
21 information. Except in the most extraordinary
22 circumstances speech is permitted to occur.

23 And in this situation we just don't
24 have those extraordinary circumstances. We don't
25 have an area where prior restraints have been
 upheld. We don't have a clear and present danger

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1 to public safety. We don't have any invasion of
2 privacy. We don't have obscenity. We don't have
3 indecentcy. Instead what we have here is public
4 discourse over public policy with a public
5 figure. This is what the First Amendment was
6 designed to protect. This is where prior
7 restraint is totally inappropriate, and it's just
8 unprecedented.

9 with that in mind, I would -- I
10 listened to the tape, Your Honor, last night as
11 well. I listened to it before we made the filing
12 yesterday. We included the excerpt in there. I
13 walk away from that audiotape to show that
14 Mr. Radcliffe is supporting Healthy Wisconsin.

15 He had a clear opportunity to say
16 he doesn't support it. He had a clear opportunity
17 to somehow caveat, you know, qualify, equivocate
18 on his statement and he didn't do it. You know,
19 he passed on a clear opportunity to say anything
20 other than he's supporting Healthy Wisconsin.

21 And I listened to it again and
22 again, and I think even when you listen to the
23 whole context it shows that he supports Healthy

24 hearing
wisconsin and he went even further to talk about
25 his support for universal health care.

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1 On that point as well, Your Honor,
2 I think everything that we provided to the court
3 also demonstrates not only the accuracy of
4 Mr. Radcliffe's position and his statements, it
5 indicates the accuracy of everything else that's
6 said in the ad, the support for illegal aliens,
7 the support for out-of-state residents, the fact
8 that it's going to double taxes in the state, all
9 of that is supported.

10 Even though, Your Honor, let's just
11 for sake of argument, for the sake of argument
12 suggest that somehow this statement was false,
13 which I'm not at all conceding --

14 MR. MAISTELMAN: Mike, I'm getting
15 some feedback. Can you talk a little softer.

16 MR. WITTENWYLER: Sure. That's
17 difficult for me to do.

18 MR. MAISTELMAN: Thank you. Just
19 talk a little softer. Thank you.

20 MR. WITTENWYLER: Even if you take
21 it on its face as being false, which we don't
22 concede at all, but if you were to even take it on
23 its face as being false, plaintiff's complaint as
24 drafted is insufficient and its reliance on 12.05
25 is misplaced.

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1 12.05 is enforced by the Government
2 Accountability Board, district attorneys, the
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hearing

3 attorney generals. Mr. Maistelman and the
4 democratic party have been trying for the last two
5 weeks to get any of those parties to act on their
6 12.05 complaints, and as far as I know not a
7 single person in the state has acted on those
8 efforts.

9 12.05 doesn't provide a civil
10 action. It doesn't provide a private cause of
11 action. It's an action for the state to take, not
12 Mr. Radcliffe. So even if it is false, he doesn't
13 have a remedy under 12.05.

14 Mr. Halbrooks is somehow alluding
15 to that this is some sort of defamation case. The
16 pleading that we provided is not a defamation
17 complaint. Wisconsin law is very clear on how one
18 must plead a defamation case, and they have not
19 done so. This is not a defamation case.

20 THE COURT: Mr. Wittenwyler?

21 MR. WITTENWYLER: Yes.

22 THE COURT: Let me clarify for the
23 parties in order to save a lot of time, I think,
24 that the court does not believe that I have any
25 authority to issue a TRO based on 12.05. There

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1 are a number of reasons for that, but the primary
2 reason is that 12.05 is a criminal statute. 12.05
3 would have to be enforced by a district attorney.

4 Unless or until I was advised that
5 a district attorney had decided to issue a charge
6 under 12.05, it would be impossible for the court
7 to conclude that there was a reasonable

hearing

8 probability that the petitioner could succeed in
9 obtaining a -- I'm sorry, could ultimately succeed
10 in prevailing in the action.

11 Obviously, unless or until a DA
12 brought a charge -- of course, the DA can not
13 bring that charge unless the DA believes that
14 beyond a reasonable doubt he can prove the
15 charge -- the court would have no basis for
16 issuing a TRO based on that.

17 So nobody needs to discuss 12.05,
18 because 12.05 is not considered by the court as a
19 basis for whether I do or do not continue a TRO,
20 and it was not considered by the court in deciding
21 to issue the TRO in the first instance.

22 MR. WITTENWYLER: Well, Your Honor,
23 I guess I'm confused by the two references to
24 12.05 in the court's order, and I would ask then
25 what was the basis for the order being issued?

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1 what was the legal issue?

2 THE COURT: The basis for the order
3 that the court issued was the allegation made by
4 Mr. Radcliffe that he was being defamed, and it
5 considered the fact that there is the additional
6 element in a defamation action involving a
7 political or public figure of actual malice. I
8 recognize that because he is, in the court's
9 opinion, a public figure that there would have to
10 also be proof of actual malice as actual malice is
11 defined.

12 The court, when I looked at the
Page 29

hearing

13 allegations of the defamation, looked at his sworn
14 affidavit and his pleadings which he signed as an
15 attorney, the court concluded that there was
16 reasonable probability that he would succeed in
17 the defamation action and that to not issue the
18 TRO would give him a right without a remedy.

19 MR. WITTENWYLER: Your Honor, was
20 there another complaint issued, a second
21 complaint, because I see no mention of defamation
22 anywhere in this complaint.

23 THE COURT: The court relied
24 primarily on the affidavit --

25 MR. WITTENWYLER: But even the
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1 affidavit doesn't properly frame a defamation
2 complaint, sir.

3 THE COURT: whether you think it
4 does or not, the court concluded that a defamation
5 action was properly before me.

6 MR. WITTENWYLER: Your Honor, it's
7 not what I believe, it's what the statute states.
8 For a defamation complaint Wisconsin law requires
9 it to be pled in a particular manner.

10 THE COURT: All right. Just so
11 everybody understands, I wanted to address 12.05.

12 MR. WITTENWYLER: So Your Honor,
13 can I just be clear then, you're suggesting that
14 the complaint and the order --

15 MR. MAISTELMAN: Mike, can you talk
16 a little softer. I'm having feedback on this
17 again.

hearing

18 MR. WITTENWYLER: Your Honor, so
19 you're suggesting that neither the complaint nor
20 the order was based on 12.05?

21 THE COURT: Mr. Wittenwyler, what
22 I'm telling you is that I read an affidavit in
23 support of the motion for the ex parte order which
24 provided in the second paragraph an allegation
25 that the defendant -- I'm sorry, Mr. Radcliffe was

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1 being falsely accused of supporting a plan to
2 double taxes, et cetera, et cetera, et cetera, and
3 that those allegations were false and that they
4 not only allege they violated Wisconsin Statute
5 12.05 but that they were false representations,
6 and he then in his complaint again referenced the
7 fact that these references were false.

8 MR. HALBROOKS: I can't hear.

9 THE COURT: And that they were, as
10 he alleges in paragraph No. 5, made with actual
11 malice. If he makes a representation that they
12 are false statements and are made with actual
13 malice, the court deems that sufficient to allege
14 defamation.

15 Now, I did indicate to
16 Mr. Radcliffe that he may wish to amend his
17 pleadings insofar as they were seeking restraining
18 orders against radio stations, because the court
19 would not, could not and should not issue such a
20 restraining order. Whether there is any amended
21 pleading that's been filed on Saturday morning, I
22 don't know. I haven't seen them.

hearing

23 MR. MAISTELMAN: Your Honor, this
24 is Attorney Mike Maistelman. I just want to let
25 the court know that I just found a newspaper

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1 article from about ten days ago when we initially
2 tried to get these ads off the air because we said
3 that they were false, deceptive and misleading,
4 and I just found that there's a quote from R.J.
5 Johnson from the Coalition saying he's not
6 concerned about these letters because he thinks
7 they're true.

8 So over ten days ago the Coalition
9 was apparently on notice, according to this
10 newspaper article, that we were making attempts to
11 try to take them down because they were not true.
12 And I can send that around. I found it on the
13 Pierce County Herald.

14 MR. WITTENWYLER: And Mike.
15 Mr. Maistelman, is there a quote in that article
16 from Mr. Radcliffe saying that these are false?

17 MR. MAISTELMAN: No.

18 MR. WITTENWYLER: Okay. When was
19 the first time he made that statement public?

20 MR. MAISTELMAN: I would ask Mark
21 to answer that, but we attempted to inform the
22 Coalition and go after them, telling them that
23 these statements were not true, and your client
24 was quoted basically in the newspaper saying we
25 don't care --

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hearing

1 MR. WITTENWYLER: Well,
2 Mr. Maistelman, with respect to Mr. Radcliffe I
3 would argue that the first time we received notice
4 that he disagreed with these statements was
5 yesterday.

6 MR. RADCLIFFE: This is Mark --

7 MR. HALBROOKS: This is David.
8 Hold on. Let's get back to the discussion at hand
9 here.

10 MR. WITTENWYLER: Okay. You're
11 right, David. So Your Honor, even if we take this
12 then as a defamation complaint somehow -- which
13 again I'm not conceding at all that it is. I
14 think this is an interesting oddity of a
15 complaint. But even then, you still don't have
16 legal backing for a temporary restraining order.
17 There's no memorandum of law and there's nothing
18 in here at all that talks about how the status quo
19 is going to be preserved.

20 Quite frankly, Your Honor, entering
21 the TRO changes the status quo because it allows
22 Mr. Radcliffe to avoid a debate over Healthy
23 Wisconsin with these ads and his support for it.
24 The temporary restraining order changes the status
25 quo, and what a temporary restraining order is

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1 supposed to do is preserve the status quo, which
2 it does not do.

3 Lastly, this is -- the order that
4 was entered yesterday is not the least restrictive
5 means. Let's go back to 12.05. Let's even say

11 hearing
restraining order to stop speech.

12 Prior restraint is not the answer,
13 and with that, sir, we ask you to vacate this
14 order.

15 THE COURT: Mr. Wittenwyler, I
16 wanted to just further clarify. I looked again at
17 the complaint. The allegations in the complaint
18 were that there were false statements. There's an
19 allegation that those false statements were
20 intended to harm the plaintiff and lower his
21 esteem in the community and it further alleges the
22 additional element required where the person is a
23 political or public figure alleging actual malice.

24 Are you telling me that there are
25 additional elements to defamation that are not

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1 included in this complaint?

2 MR. WITTENWYLER: Yes. There's a
3 requirement that you need to plainly state the
4 communication that's made. You have to write
5 about publication. There are elements about the
6 way that all of these things that he included in
7 here need to be framed to a court, sir.

8 THE COURT: All right. And the
9 court is convinced that the complaint under
10 Wisconsin's notice pleading requirements does meet
11 the requirements of a defamation complaint.

12 Mr. Wittenwyler, I have an
13 additional question for you. Are you familiar
14 with the Election Board of the State of Wisconsin
15 versus Wisconsin Manufacturer's and Commerce

16 case? hearing

17 MR. WITTENWYLER: Yes, yes, very
18 familiar, sir. We represented WMC in that case.

19 THE COURT: In that case, as I
20 understand it, legislators sought injunctive
21 relief in the circuit courts on, and this is kind
22 of ironic, on October 31st, the same date that I
23 was confronted with this problem. In 1996 the
24 Dane County Circuit Court ordered temporary
25 injunctions restraining the respondent from

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1 broadcasting advertisements, and the circuit
2 courts that were involved in the related suits
3 around the state swiftly did the same.

4 MR. WITTENWYLER: It was later
5 overturned at appeal, sir.

6 THE COURT: All right. And were
7 the -- as I understand it, the Court of Appeals
8 granted a writ in part and denied it in part
9 leaving the injunctions in place, isn't that
10 correct?

11 MR. WITTENWYLER: I don't believe
12 so, sir, but I can pull the file and check.

13 THE COURT: well, let me put it
14 this way.

15 MR. WITTENWYLER: The ads continued
16 on the air, sir.

17 THE COURT: Let me just put it this
18 way. I'm quoting from the decision.

19 MR. WITTENWYLER: which decision is
20 this?

21 hearing
THE COURT: The decision in 227
22 wisconsin 2d 650 --

23 MR. WITTENWYLER: You're reading
24 from the facts section of the Supreme Court
25 decision?

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1 THE COURT: Yes.

2 MR. WITTENWYLER: Okay.

3 THE COURT: And it states, and I
4 quote, "The legislators sought injunctive relief
5 under wisconsin Stats Sec 11.66 in circuit courts
6 around the state. On October 31st, 1996, the Dane
7 County Circuit Court ordered a temporary
8 injunction restraining IMC from broadcasting its
9 advertisements. The circuit courts involved in
10 the related suits swiftly did the same.

11 "IMC filed an emergency petition
12 for a supervisory writ with the Court of Appeals.
13 The Court of Appeals granted the writs in part and
14 denied it in part, leaving the injunctions in
15 place."

16 MR. WITTENWYLER: Right, but the
17 ads continued on the air, sir. I can pull the
18 file, sir.

19 THE COURT: Mr. Wittenwyler, just
20 listen. I'm asking you, isn't it a fact that TROs
21 issued under those circumstances and that the
22 injunctions remained in place?

23 MR. WITTENWYLER: But sir, not with
24 respect to the speech. What it had to do with was
25 registration with the Government Accountability --

1 with the Elections Board at the time as a
2 political committee, which was then appealed to
3 the State Supreme Court. But the speech was
4 allowed to occur, sir.

5 THE COURT: All right. Are there
6 further arguments that any of you wish to make to
7 the court or any additional information or
8 evidence that you wish to present?

9 MR. HALBROOKS: Just briefly, Your
10 Honor. We agree with --

11 THE COURT: Please identify
12 yourself.

13 MR. HALBROOKS: This is David
14 Halbrooks. I'm sorry. Mr. Wittenwyler says the
15 DA doesn't have the authority to stop speech. We
16 agree with that. That's why we're in front of a
17 court. The court does have the authority to issue
18 this injunction.

19 we did discuss in the temporary
20 restraining order hearing enforcement by the
21 district attorney and indicated to the court that
22 as soon as the district attorney was available
23 that we would make that complaint and request the
24 investigation, so that is -- should be part of the
25 record.

1 The issue here as it relates to
2 malice is was there reckless disregard, and the
3 commercial clearly is reckless disregard. The
4 question about whether or not there's prior

hearing

5 restraint stopping criticism of a public official,
6 Mr. Radcliffe welcomes his public criticism. I
7 can think of a number of criticisms that could
8 come from the statements cited by the defendant,
9 but the statement they're making as a result of
10 the statement from August 19, 2008 is not true.

11 THE COURT: Anyone else want to
12 weigh in on anything? All right. There are a
13 number of references that the court wishes to --
14 oh, I have an additional question for all of you.

15 The issue of prior restraint is one
16 that is somewhat confusing to the court. My
17 understanding from what I am able to read so far
18 about prior restraint is when there is a
19 preemptory restraint of speech opposed to the
20 imposition of a restraint of speech which occurs
21 sort of midstream, that is, after the
22 communications have been made or while they are
23 ongoing, a court steps in and stops them. Is that
24 a prior restraint?

25 MR. WITTENWYLER: Yes, sir, because
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1 it's chilling -- it's freezing speech at a point
2 in time.

3 THE COURT: All right. And is
4 there any argument from the other side regarding
5 that issue?

6 MR. WITTENWYLER: And Your Honor,
7 what I would point to in that case is look at the
8 Nebraska Press Association case that we sent to
9 you, at 559 talks about how it freezes speech at a

hearing

10 particular point in time.

11 THE COURT: I thank you.

12 MR. HALBROOKS: I think it is
13 confusing, but I do believe that that's the case.
14 what we're talking about are the commercials that
15 are yet to run. Is that your argument, Michael?

16 MR. WITTENWYLER: Yes.

17 MR. HALBROOKS: That's the
18 agreement. So that is not the point. The point
19 is, is that this does not fall within the
20 standards in those cases.

21 THE COURT: would you explain
22 further to me why not?

23 MR. HALBROOKS: In this case we
24 have reckless disregard.

25 MR. WITTENWYLER: How do we have

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1 reckless disregard? The first time we learned of
2 Mr. Radcliffe's statements were yesterday.

3 MR. HALBROOKS: whoa, I was talking
4 to the judge. It is reckless disregard to suggest
5 that Mr. Radcliffe's \$15 billion plan -- he does
6 not have a plan. He is on public record
7 disagreeing with that. Any amount of research
8 would indicate that.

9 To suggest from the statement in
10 paragraph 11 which you did not -- the defendants
11 did not include the question which presupposes
12 that he doesn't agree with Healthy Wisconsin and
13 then suggest that Healthy Wisconsin is his plan
14 and that the wall Street Journal reported on

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hearing

15 Radcliffe's plan is not the case.

16 when we get into the hearing as
17 this case progresses, the court will hear from
18 individuals who know that -- nonpartisan
19 individuals who know that Mr. Radcliffe's position
20 is against Healthy Wisconsin and are being
21 confused by this statement. This statement is not
22 adding to public criticism. This statement is a
23 falsehood that is done with reckless disregard.

24 The Wall Street Journal did not
25 report on Radcliffe's plan. We would like them to

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1 report on it, but they haven't necessarily asked
2 at this point, and to place Mr. Radcliffe's name
3 in a commercial that was drafted for some other
4 candidate around the state that the Wall Street
5 Journal may or may not have reported on, is not
6 true.

7 So under that scenario where we
8 have reckless disregard, the court is able to step
9 in through -- in between the crevices of the other
10 cases and say this commercial does -- not the
11 radio station where we would, I think, get to a
12 higher level of scrutiny but that the Coalition
13 for America's Families must stop telling these
14 falsehoods about Radcliffe's plan.

15 MR. WITTENWYLER: And Your Honor, I
16 think we have to look at what Mr. Radcliffe said,
17 "I am in support of, like I said before, access to
18 affordable health care for everybody, and Healthy
19 Wisconsin is a start. We need to continue to

hearing

20 discuss the best way to get affordable health care
21 to somebody, and what Healthy Wisconsin has done
22 is to put that to the forefront and for that I
23 commend it. And now we need to continue to work
24 on that document to get it through."

25 where in there does he caveat,

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1 couch or at all qualify his support for this plan?

2 MR. HALBROOKS: Previously he
3 indicates that he wants to bring in doctors and
4 nurses. In that plan he indicates --

5 MR. WITTENWYLER: In his support of
6 that plan.

7 MR. RADCLIFFE: This is Mark
8 Radcliffe. I think I can add a little insight
9 into this because obviously, you know,
10 Mr. Wittenwyler would like to continue to argue
11 his point. But the point of the matter is, is
12 that I have never been in support of Healthy
13 Wisconsin. I've been on record in numerous public
14 forums that were open to the public, put in
15 newspapers that the defendant's group would have
16 access to come to.

17 And that question in that radio
18 program was basically questioning am I in support
19 of it, and my answer to that question was no, it
20 needed to continue to be worked on, and I was
21 referencing my prior statement that we need to
22 continue to bring doctors and nurses into it.

23 And when you look at what I say as
24 a whole, and I mean a plain reading of it, it is

hearing

25 very clear --

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1 MR. WITTENWYLER: Mr. Radcliffe, I
2 listened to it --

3 MR. RADCLIFFE: Let me finish.
4 -- that it is an absolute reckless, false
5 disregard for the truth, and that is why I filed
6 my complaint.

7 They are -- when you look at the
8 actual language that I put in my complaint and in
9 my affidavit that I'm complaining about -- because
10 I'm not complaining about every single statement
11 in their radio commercial. I am complaining about
12 certain particular statements. That when you
13 listen to what I said in that radio commercial as
14 a whole, there is no way you can make a stretch
15 that I support what they say I support.

16 And I just ask the court to take a
17 plain reading and actually listen, like you have
18 already, to the question that I was actually asked
19 when I gave that final answer, and in the fact
20 that I referenced my prior statement about three
21 minutes before, it's clear to see that I do not
22 support Healthy Wisconsin as it is, and that's the
23 question I was asked.

24 And they are taking a stretch, and
25 when they stretch it and say the three or four

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1 things that I particularly point out in my
2 complaint and in my affidavit, it becomes clear

3 hearing
4 that they just recklessly decided to slander my
5 good name in order to affect the outcome of this
6 election. And that is what this is really about.

7 And they complain that they have
8 the right to their free speech, but that is not an
9 absolute right, and there is no doubt about that.
10 The court has the power to grant injunctive relief
11 in this exact type of situation. That's why we
12 have statute 813.02. That's why we have the case
13 law that the court has pointed out.

14 This is the kind of case that is
15 exactly on point. The Nebraska case is not on
16 point. Every single case that they've cited can
17 be clearly defined as different. Criticism of a
18 public official is not the same as a blatant,
19 false misrepresentation.

20 Robust, caustic and unpleasantly
21 sharp attacks, as in New York, is not the same as
22 lying, and what they have done in this case is
23 they have completely lied about what I have stood
24 for, and it is a blatant misrepresentation. It's
25 reckless, and that is what is being argued here.

 And the court has to decide, which

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1 I think it already has in issuing the TRO, that
2 those were exactly as I said that they were, and
3 that's the focus that we need to get back on.

4 MR. WITTENWYLER: But Your Honor,
5 I don't see anywhere in plaintiff's affidavit or
6 complaint that he talks about this radio ad, and
7 sir, I've listened to this multiple times now, and

8 hearing
I don't hear the words that Mr. Radcliffe spoke
9 this morning anywhere in that interview. There is
10 not a single place in there that he says he does
11 not support Healthy Wisconsin.

12 MR. RADCLIFFE: And there's nowhere
13 in there that I say I support it in the way that
14 you put in your radio commercial. That is
15 absolutely clear.

16 MR. HALBROOKS: This is David.
17 Maybe we can solve this by asking the defendants
18 to produce the Wall Street Journal analysis of
19 Mr. Radcliffe's plan. That would probably cut
20 this hearing much shorter.

21 MR. WITTENWYLER: The Wall Street
22 Journal article is attached to the pleadings we
23 filed yesterday.

24 MR. HALBROOKS: I'm talking about
25 the one that analyzes Mr. Radcliffe's plan.

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1 MR. WITTENWYLER: Mr. Radcliffe
2 supports Healthy Wisconsin and that's the plan the
3 Wall Street Journal article refers to.

4 MR. HALBROOKS: And see, that's --
5 we could have Mr. Wittenwyler and Mr. Radcliffe
6 give Mr. Radcliffe's positions, but I believe that
7 Mr. Radcliffe is prepared to go under oath. There
8 are individuals from the community, nonpartisan
9 individuals who have made statements, who have
10 listened to Mr. Radcliffe, who continue to
11 indicate that this is false.

12 MR. RADCLIFFE: I mean, Judge, one

13 hearing
14 of the reasons I filed this lawsuit was, like I
15 said earlier, somebody brought it to my attention
16 that these were being played. The person that
17 brought it to my attention was a Gundersen
18 Lutheran employee who had invited the public and
19 myself to a forum on health care, who herself
20 asked me whether I supported Healthy Wisconsin so
21 that they could report that to the 6,200 employees
22 of Gundersen Lutheran, and my response was no.

23 MR. WITTENWYLER: Why didn't you
24 say that on the radio, sir?

25 MR. HALBROOKS: Judge, these
 questions to Mr. Radcliffe don't seem to be

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1 appropriate in the context of this hearing. If
2 Mr. Radcliffe wants to get on the stand, we can do
3 that at a hearing sometime later this week.

4 THE COURT: Yeah, I don't think
5 this is the appropriate time for examination or
6 cross-examination. I'm looking for evidentiary
7 input from the parties.

8 MR. WITTENWYLER: And Your Honor,
9 I'm sorry, but I just get excited because there
10 isn't any evidentiary information that was
11 provided with the documents that were filed by
12 Mr. Radcliffe related to this radio ad or to
13 indicate where else he indicated that he did not
14 support Healthy Wisconsin.

15 He's bringing that to us today.
16 He's saying that there are people in the
17 community, but he didn't provide the court with

23 hearing
24 is a healthy place to start the continuing
25 discussion. And so in that sense I do not believe
 that that interview -- whoever is shuffling

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1 papers, if they'd stop please. I do not believe
2 that he in that interview clearly endorsed the
3 Senate's Healthy Wisconsin plan.

4 The court does not fully
5 (inaudible) the law of prior restraint. It looks
6 like it would take a semester for me, but prior
7 restraint does seem to be distinguished from a
8 court's intervention of prior communication, and
9 it is in that context that I see the TRO being
10 used here.

11 I did not issue an order that
12 stopped someone from communicating in the first
13 instance. I did not preclude publication. I did
14 not censor someone's proposed actions. These
15 communications have been published. They have
16 been broadcast. The public has heard them.

17 What the court was being asked to
18 do is not to issue prior --

19 MR. WITTENWYLER: Your Honor,
20 you're cutting out again.

21 THE COURT: The court is not being
22 asked to issue a prior restraint. The court is
23 being asked to intervene to avoid irreparable harm
24 to a plaintiff alleging defamation who is a
25 political figure approaching an election, whose

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1 only true remedy for the actions about which he's
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hearing

2 complaining is to stop them. The court has
3 already indicated that 12.05 is not and will not
4 be the basis of any decision that I make.

5 The court is troubled by a second
6 issue. That is, that an injunction is really to
7 be issued to preserve the status quo, and I have
8 to acknowledge Mr. Wittenwyler's argument that
9 perhaps the issuance of a TRO here is not keeping
10 the parties at status quo, because it essentially
11 stops the action by one party.

12 But that's what the Wisconsin
13 courts did in the Election Board of the State of
14 Wisconsin versus Wisconsin Manufacturer's and
15 Commerce, et al., case, and so clearly there the
16 TROs issued were -- did not keep the parties at
17 status quo. They stopped advertisements.

18 So it's the court's position that
19 after hearing all of the arguments and trying to
20 review all of the law, that what is occurring here
21 is a defamation action where the court believes
22 that there is a reasonable probability given the
23 facts and circumstances that Mr. Radcliffe may
24 prevail in his defamation action and that were the
25 court not to impose the TRO, that he might have a

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1 right but he would not have a remedy.

2 No one following an election could
3 prove that they lost the election because of a
4 particular advertisement. The ability to bring an
5 action or continue an action after an election is
6 essentially hollow in that regard.

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hearing

7 I, when considering all of the
8 input here, conclude that the temporary
9 restraining order should stay in place. The court
10 is mindful that Mr. Wittenwyler is able and
11 prepared to take this matter to the Appellate
12 Court tomorrow morning at 7:15. I understand he's
13 already been in touch with two Appellate judges,
14 that they've assured him of his access to the
15 court.

16 This court has an evidentiary
17 hearing scheduled on the temporary injunction for
18 noon tomorrow. I will keep that date and time
19 open and available to the parties to address these
20 matters further. You know those issues as I've
21 just explained which concern me or trouble me or
22 give me pause, and if you wish to address them at
23 greater length tomorrow at noon, I'll be happy to
24 hear them.

25 I was not aware that the district

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1 attorney had been contacted. I was not aware that
2 a complaint had been filed with the district
3 attorney. The issues regarding 12.05 are in his
4 bailiwick and not in mine.

5 And also the court welcomes the
6 intervention and welcomes the input of the Court
7 of Appeals here. I'm sure they have far more
8 time, far more resources than I do to address
9 these issues which appear to be emergencies for
10 both sides.

11 MR. HALBROOKS: Your Honor, I'm
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hearing

12 sorry, the district attorney has been contacted
13 but the complaint has not yet been filed. I just
14 wanted to make that clear.

15 THE COURT: I understand. I did
16 not know the district attorney had even been
17 contacted. The district attorney in this county
18 was gone last week. He's in the military and was
19 training in Virginia.

20 MR. HALBROOKS: Right. We've made
21 the contact, but we haven't actually talked to him
22 yet.

23 THE COURT: Well, again, the
24 court's not considering anything to do with
25 12.05.

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1 MR. HALBROOKS: No. But I'm
2 concerned about the matter being scheduled -- the
3 temporary injunction -- I didn't know whether this
4 was taking the place of the temporary injunction
5 hearing. Certainly, if we're going to have the
6 temporary injunction hearing tomorrow, it would
7 seem the Court of Appeals jumping in would be
8 somewhat premature given there's another matter
9 scheduled at noon.

10 THE COURT: If Mr. Wittenwyler, in
11 order to seek an emergency writ, wants me to
12 consider this as a temporary injunction in order
13 to aid him in trying to effectuate a legal remedy,
14 I'll do that. I just wanted to keep communication
15 open between the parties to give you the
16 opportunity, if you wish, to further pursue this.

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hearing

17 MR. HALBROOKS: I understand, Your
18 Honor. I do believe that we would like the court
19 to hear from witnesses tomorrow regarding these
20 issues, so I don't believe -- I believe what the
21 court has done is appropriate under 813 as it
22 relates to a temporary restraining order.

23 The temporary injunction hearing,
24 if the court is not considering this, is we would
25 appreciate that because we look forward to the

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1 opportunity to actually present the facts to the
2 court in a hearing, which is the next step in the
3 process.

4 THE COURT: What I don't want to do
5 is I don't want to, by my schedule, put a hurdle
6 in Mr. Wittenwyler's way with respect --

7 MR. HALBROOKS: We'll do that.

8 THE COURT: -- with respect to
9 approaching the Court of Appeals. So
10 Mr. Wittenwyler, can I hear from you on that?

11 MR. WITTENWYLER: Sure. Your
12 Honor, I need to confer with the client over what
13 our process is going to be, but assuming we do
14 decide to do the emergency writ for the appeal,
15 we'll be in touch, and what we would ask at that
16 point is to stay the hearing tomorrow or
17 reschedule it.

18 THE COURT: All right.

19 MR. WITTENWYLER: But let us
20 discuss it first, and we'll be in touch with the
21 parties and we'll let them know our decision.

hearing

22 THE COURT: All right. Thank you,
23 everyone, for entertaining me on an early Sunday
24 morning.

25 MR. HALBROOKS: Thank you, Your
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1 Honor.

2 MR. RADCLIFFE: So the TRO that the
3 court signed is still in effect? We don't need to
4 draft any additional documentation for the court's
5 signature?

6 THE COURT: The TRO is in effect.

7 MR. MAISTELMAN: But the TRO has
8 recorded that we're to have a hearing, though,
9 tomorrow at noon?

10 THE COURT: That is to convert the
11 TRO to a temporary injunction.

12 MR. HALBROOKS: Correct.

13 THE COURT: Anything further?

14 MR. HALBROOKS: No.

15 MR. MAISTELMAN: Thank you, Your
16 Honor.

17 THE COURT: Thank you, gentlemen.
18 (9:25 a.m.)

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C E R T I F I C A T E

I, LINDA KUHLMAN, hereby certify that as
the duly-appointed shorthand reporter, I took in
shorthand the proceedings had in the above-entitled
matter on November 2, 2008 commencing at 8:02
o'clock a.m., and that the attached is a transcription
of the proceedings so taken.

Dated at Madison, Wisconsin this 2nd day of
November, 2008.

Notary Public, State of Wisconsin

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