UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

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ORDER

June 19, 2014

Before

FRANK H. EASTERBROOK, *Circuit Judge*

Nos.: 14-1822, 14-1888, 14-1899, 14-2006, 14-2012 14-2023,	ERIC O'KEEFE and WISCONSIN CLUB FOR GROWTH INCORPORATED, Plaintiffs - Appellees v. JOHN T. CHISHOLM, BRUCE J. LANDGRAF and DAVID ROBLES, Defendants - Appellants
Originating Case Information:	
District Court No: 2:14-cv-00139-RTR Eastern District of Wisconsin District Judge Rudolph T. Randa	

The following is before the court:

1. **LETTER OF NOTICE OF INTENT TO FILE EMERGENCY MOTION TO INTERVENE**, filed on June 16, 2014, by counsel for unnamed intervenors.

2. **UNAMED INTERVENORS' JOINT MOTION TO SEAL**, filed on June 17, 2014, by counsel for the unnamed intervenors.

3. **EMERGENCY JOINT MOTION TO INTERVENE AND STAY PENDING MOTION FOR RECONSIDERATION(REDACATED)**, filed on June 17, 2014, by counsel for the unnamed intervenors.

4. **DEFENDANTS-APPELLANTS RESPONSE IN OPPOSITION TO UNNAMED INTERVENORS' EMERGENCY MOTIONS TO INTERVENE AND SEAL (DOC. NOS. 47, 48)**, filed on June 18, 2014, by

- over

counsel for appellants John Chisholm, Bruce Landgraf and David Robles.

IT IS ORDERED that the motion to intervene and seal documents is **DENIED**. The clerk of this court shall file the unredacted exhibits attached to docket entry 29 in the public record.

The proposed intervenors did not file unredacted documents in this court, so it is unnecessary to rule on their motion to seal their disclosure statement and the unredacted motion to intervene.

EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ERIC O'KEEFE and WISCONSIN CLUB FOR GROWTH, Inc.,

Plaintiffs,

-vs-

FRANCIS SCHMITZ, in his official and personal capacities,

JOHN CHISHOLM, in his official and personal capacities,

BRUCE LANDGRAF, in his official and personal capacities,

DAVID ROBLES, in his official and personal capacities,

DEAN NICKEL, in his official and personal capacities, and

GREGORY PETERSON, in his official capacity,

Defendants.

Case No. 14-C-139

DECISION AND ORDER

This case requires the Court to decide the limits that government can place on First Amendment political speech. It comes to the Court with more than the usual urgency presented by First Amendment cases because the defendants seek to criminalize the plaintiffs' speech under Wisconsin's campaign finance laws. Defendants instigated a secret John Doe investigation replete with armed raids on

homes to collect evidence that would support their criminal prosecution. Plaintiffs move for a preliminary injunction to stop the defendants' investigation.

I. Background

Eric O'Keefe is a veteran volunteer political activist who has been involved in political and policy advocacy since 1979. O'Keefe is a director and treasurer for the Wisconsin Club for Growth ("WCFG" or "the Club"), a corporation organized under the laws of Wisconsin and recognized as a non-profit entity under Section 501(c)(4) of the Internal Revenue Code. WCFG is a local, independent affiliate of the national organization Club for Growth. Its purpose is to advance free-market beliefs in Wisconsin.

O'Keefe's advocacy came to the forefront during the political unrest surrounding Governor Scott Walker's proposal and passage of 2011 Wisconsin Act 10, also known as the Budget Repair Bill. The Bill limited the collective bargaining rights of most public sector unions to wages. The Bill also increased the amounts that state employees paid in pension and health insurance premiums. O'Keefe, the Club, and its supporters immediately recognized the importance of the Bill to the Club's mission of promoting principles of economic freedom and limited government. The Club viewed the Bill as a model that, if successful, might be replicated across the country.

Throughout this period, the Club enlisted the advice of Richard "R.J." Johnson, a long-time advisor to WCFG. Johnson is a veteran of Wisconsin politics and is intimately familiar with the political lay of the land. WCFG generally trusted

Johnson's professional judgment as to the best methods of achieving its advocacy goals.

Because of the intense public interest surrounding the Bill, O'Keefe and Johnson believed that advocacy on the issues underlying the Bill could be effective in influencing public opinion. O'Keefe and Johnson were also concerned about the large amounts of money being spent by unions and other left-leaning organizations to defeat the bill. Accordingly, O'Keefe raised funds nationwide to support issue advocacy in favor of the Bill, and Johnson took an active role in creating WCFG's communications and, where appropriate, advising WCFG to direct funding to other organizations that would be better suited to publish communications strategically advantageous to advancing the Club's policy goals. One notable advocacy piece, which was fairly typical, aired in major markets in February of 2011. In it, WCFG argued that the reforms of the Budget Repair Bill were fair because they corrected the inequity of allowing public workers to maintain their pre-recession salaries and benefits while the salaries and benefits of private sector employees were being reduced. This piece did not name a candidate and did not coincide with an election. The Club was the first group to run communications supporting the collective bargaining reforms. *See Support Governor Walker's Budget Repair Bill*, YouTube.com (Uploaded Feb. 14, 2011).[1] More generally, the Club's issue advocacy related to the Budget Repair Bill,

[1] http://www.youtube.com/watch?v=yYEgoxdxzA0.

issues in the 2011 Wisconsin Supreme Court campaign, key issues in the 2011 and 2012 Senate recall campaigns, and key issues in the 2012 general election campaign. WCFG did not run issue communications related to the Walker campaign or the Walker recall petition.

The Milwaukee Defendants — District Attorney John Chisholm, along with Assistant District Attorneys Bruce Landgraf and David Robles — had been investigating Governor Walker through the use of a John Doe proceeding beginning in 2010. The initial focus of the first proceeding was the embezzlement of $11,242.24 that Milwaukee County had collected for the local Order of the Purple Heart while Walker was serving as Milwaukee County Executive. From there, the first John Doe developed into a long-running investigation of all things Walker-related. *See, e.g.*, ECF No. 7-2, Declaration of David B. Rivkin, Ex. 17 (Dave Umhoefer and Steve Schultze, *John Doe Investigation Looks Into Bids to House County Worker*, Milwaukee Journal Sentinel (Jan. 25, 2012))[2], Ex. 18 (*Assistant D.A. Still Silent on Doe Records Request*, Wisconsin Reporter (Oct. 10, 2012)).[3] The first John Doe resulted in convictions for a variety of minor offenses, including illegal fundraising

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[2] http://m.jsonline.com/topstories/138020933.htm.

[3] http://watchdog.org/58691/wiassistant-d-a-still-silent-on-doe-records-request/.

and campaigning during work hours. *Id.*, Ex. 20 (Steve Schultze, *Former Walker Aide Pleads Guilty, Will Cooperate with DA*, Milwaukee Journal Sentinel (Feb. 7, 2012)).[4] During this timeframe, Walker was elected governor and survived a recall election.

In August of 2012, Milwaukee County District Attorney John Chisholm initiated a new John Doe proceeding in Milwaukee County. Drawing on information uncovered in the first John Doe, the new investigation targeted alleged "illegal campaign coordination between Friends of Scott Walker [FOSW], a campaign committee, and certain interest groups organized under the auspices of IRC 501(c)(4)" — in other words, social welfare organizations like the Club. *Id.*, Ex. 28 (Chisholm Letter to Judge Kluka, Aug. 22, 2013).

In early 2013, Chisholm asked Wisconsin Attorney General J.B. Van Hollen to take the investigation statewide. Van Hollen refused, citing conflicts of interest. Van Hollen also explained as follows:

> This is not a matter, however, where such devices should be employed, even if they could be employed effectively. This is because there is no necessity, at this time, for my office's involvement because there are other state officials who have equal or greater jurisdictional authority without the potential disabilities I have mentioned. The Government Accountability Board has statewide jurisdiction to investigate campaign finance violations, which may be civil or criminal in nature. Thus, there is no jurisdictional necessity to involve my office. Should the Government Accountability Board, after investigation, believe these matters are appropriate for civil enforcement, they have the statutory authority to proceed. Should the Government Accountability Board determine, after investigation, that criminal enforcement is appropriate,

[4] http://www.jsonline.com/news/milwaukee/former-walker-aide-pleads-guilty-to-cooperate-withda-oc43ojt-138874409.html.

> they may refer the matter to the appropriate district attorney. Only if that district attorney and a second district attorney declines to prosecute would my office have prosecutorial authority.

Id., Ex. 29 (Van Hollen Letter to Chisholm, May 31, 2013). Accordingly, Van Hollen was under the apparent impression that the GAB was not involved in the investigation, advising Chisholm that the GAB "as a lead investigator and first decisionmaker is preferable in this context." *Id.* In reality, Chisholm had already consulted with the GAB, and it appears that the GAB was involved since the outset of the investigation. ECF No. 109-1, Chisholm's Supplemental Response Brief at 16; ECF No. 120-7, Plaintiffs' Supplemental Memorandum, Ex. I.

In June of 2013, the GAB issued a unanimous resolution authorizing the use of its powers under Wisconsin Statutes, including "the issuance of subpoenas to any organization or corporation named in the John Doe materials, its agents and employees, and to any committee or individual named in the John Doe materials . . ." ECF No. 120, Declaration of Samuel J. Leib, Ex. A. The GAB resolution also provided that the Board's agents "may investigate any action or activity related to the investigation's purpose, including criminal violations of Chapter 11." *Id.*

Thereafter, District Attorneys from four other counties — Columbia, Dane, Dodge, and Iowa — opened parallel John Doe proceedings. Concerned that the investigation would appear partisan, Chisholm wrote to then-presiding Judge Barbara Kluka that "the partisan political affiliations of the undersigned elected District Attorneys will lead to public allegations of impropriety. Democratic prosecutors will

be painted as conducting a partisan witch hunt and Republican prosecutors will be accused of 'pulling punches.' An Independent Special Prosecutor having no partisan affiliation addresses the legitimate concerns about the appearance of impropriety." Rivkin Dec., Ex. 28 (Aug. 22, 2013 Letter). Accordingly, at Chisholm's request, Judge Kluka appointed former Deputy United States Attorney Francis Schmitz as special prosecutor to lead the five-county investigation.

Early in the morning of October 3, 2013, armed officers raided the homes of R.J. Johnson, WCFG advisor Deborah Jordahl, and several other targets across the state. ECF No. 5-15, O'Keefe Declaration, ¶ 46. Sheriff deputy vehicles used bright floodlights to illuminate the targets' homes. Deputies executed the search warrants, seizing business papers, computer equipment, phones, and other devices, while their targets were restrained under police supervision and denied the ability to contact their attorneys. Among the materials seized were many of the Club's records that were in the possession of Ms. Jordahl and Mr. Johnson. The warrants indicate that they were executed at the request of GAB investigator Dean Nickel.

On the same day, the Club's accountants and directors, including O'Keefe, received subpoenas demanding that they turn over more or less all of the Club's records from March 1, 2009 to the present. The subpoenas indicated that their recipients were subject to a Secrecy Order, and that their contents and existence could not be disclosed other than to counsel, under penalty of perjury. The subpoenas' list of advocacy groups indicates that all or nearly all right-of-center groups and individuals

in Wisconsin who engaged in issue advocacy from 2010 to the present are targets of the investigation. *Id.*, Ex. 34 (O'Keefe Subpoena); *see also* Ex. 33 (*Wisconsin Political Speech Raid*, Wall Street Journal (Nov. 18, 2013), explaining that the subpoenas target "some 29 conservative groups, including Wisconsin and national nonprofits, political vendors and party committees").[5]

The Club moved to quash the subpoenas and also to suspend inspection of privileged documents seized from its political associates. In response, the prosecutors argued that the subpoena targets and others were engaged in a "wide-ranging scheme to coordinate activities of several organizations with various candidate committees to thwart attempts to recall Senate and Gubernatorial candidates" through a "nationwide effort to raise undisclosed funds for an organization which then funded the activities of other organizations supporting or opposing candidates subject to recall." *Id.*, Ex. 38, State's Consolidated Response to Motions to Quash. According to the prosecutors, R.J. Johnson controlled WCFG and used it as a "hub" to coordinate fundraising and issue advocacy involving FOSW and other 501(c)(4) organizations such as Citizens for a Strong America, Wisconsin Right to Life, and United Sportsmen of Wisconsin. *Id.* Judge Gregory Peterson, who became the presiding judge after Judge Kluka's recusal, granted the motion to quash the subpoenas because there was "no evidence of express advocacy." He then stayed his order pending appeal. *Id.*, Ex. 48, 49.

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[5] http://online.wsj.com/news/articles/SB10001424052702304799404579155953286552832.

The current John Doe investigation has "devastated" O'Keefe's ability to undertake issue advocacy with WCFG. O'Keefe Dec., ¶ 40. O'Keefe lost most of his fundraising abilities for the Club immediately because: (1) it would be unethical to raise money without disclosing that he is a target in a criminal investigation; (2) it would be unwise for prospects to invest the time required for them to independently evaluate any risks; (3) the secrecy order purports to bar O'Keefe from disclosing the facts of the investigation and the reasons he believes that WCFG is not guilty of any crimes; and (4) O'Keefe cannot assure donors that their information will remain confidential as prosecutors have targeted that information directly. As a result, O'Keefe estimates that the Club has lost $2 million in fundraising that would have been committed to issue advocacy. *Id.*, ¶ 49.

Moreover, O'Keefe is an active board member in several national organizations engaging in issue advocacy outside of WCFG. O'Keefe's activities with those groups have been "dramatically impaired" in the following ways. First, O'Keefe's own time has been diverted from national issues and investment activities to the response and defense against the John Doe investigation. Second, many of the people O'Keefe works with are named in the subpoenas and likely received subpoenas themselves, putting them on notice of the investigation and leading them to believe that O'Keefe may be in legal trouble and that they may suffer consequences by association. Third, the mailing of subpoenas around the country has disclosed to O'Keefe's political network that there are risks to engaging in politics in Wisconsin.

Many of the people O'Keefe has previously dealt with apparently do not want to communicate with O'Keefe about political issues. The subpoenas serve as a warning to those individuals that they should not associate with the Club. *Id.*, ¶ 50.

Ultimately, and perhaps most importantly, the timing of the investigation has frustrated the ability of WCFG and other right-leaning organizations to participate in the 2014 legislative session and election cycle. *Id.*, ¶ 60.

II. Analysis

To obtain a preliminary injunction, O'Keefe and the Club must establish that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of preliminary relief, that the "balance of equities" tips in their favor (i.e., denying an injunction poses a greater risk to O'Keefe and the Club than it does to the defendants), and that issuing an injunction is in the public interest. *Smith v. Exec. Dir. Of Ind. War Mem'l Comm'n*, 742 F.3d 282, 286 (7th Cir. 2014). Since "unconstitutional restrictions on speech are generally understood not to be in the public interest and to inflict irreparable harm that exceeds any harm an injunction would cause," the plaintiffs' "main obstacle to obtaining a preliminary injunction" is "demonstrating a likelihood of success on the merits." *Id.* (citing *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012)).

A. Likelihood of Success

> **"Congress [and hence the States via application of the Fourteenth Amendment] shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.**

It bears repeating that we are a country with a government that is of the people, by the people, and for the people. Said another way, it is a country with a government that is of the Constitution, by the Constitution, and for the Constitution. The Constitution is a pact made between American citizens then and now to secure the blessings of liberty to themselves and to their posterity by limiting the reach of their government into the inherent and inalienable rights that every American possesses.

In this larger sense, the government does not run the government. Rather, the people run their government, first within the framework of the restrictions placed on government by the Constitution, and second by the constitutional rights each citizen possesses that are superior to the operation of government.

One of these rights is the First Amendment right to speak freely, which "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). The First Amendment is "[p]remised on mistrust of governmental power," *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010), and its vigorous use assures that government of the people remains so. When government attempts to regulate the exercise of this constitutional right, through campaign finance laws or otherwise, the danger always exists that the high purpose of campaign regulation and its enforcement may conceal self-interest, and those regulated by the Constitution in turn become the regulators. *See generally* Allison R. Hayward, *Revisiting the Fable of Reform*, 45 Harv. J. on

Legis. 421 (2008). And "those who govern should be the *last* people to help decide who *should* govern." *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1441-42 (2014) (emphasis in original). In this respect, First Amendment protection "reaches the very vitals of our system of government," as explained by Justice Douglas:

> Under our Constitution it is We the People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. It is therefore important — vitally important — that all channels of communication be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community.

United States v. Int'l Union United Auto., Aircraft & Agric. Workers of Am., 352 U.S. 567, 593 (1957) (dissenting opinion).

Therefore any attempt at regulation of political speech is subject to the strictest scrutiny, meaning that it is the government's burden to show that its regulation is narrowly tailored to achieve the only legitimate goal of such regulation — preventing *quid pro quo* corruption or the appearance thereof as it pertains to elected officials or candidates. Applying strict scrutiny to this case, the plaintiffs have shown, to the degree necessary on the record before the Court, that their First Amendment rights are being infringed by the defendants' actions.

The defendants are pursuing criminal charges through a secret John Doe investigation against the plaintiffs for exercising issue advocacy speech rights that on their face are not subject to the regulations or statutes the defendants seek to enforce. This legitimate exercise of O'Keefe's rights as an individual, and WCFG's rights as a

501(c)(4) corporation, to speak on the issues has been characterized by the defendants as political activity covered by Chapter 11 of the Wisconsin Statutes, rendering the plaintiffs a subcommittee of the Friends of Scott Walker ("FOSW") and requiring that money spent on such speech be reported as an in-kind campaign contribution. This interpretation is simply wrong.

The defendants further argue that the plaintiffs' expenditures are brought within the statute because they were coordinated by enlisting the support of R.J. Johnson, a representative and agent of FOSW. Coupled with Governor Walker's promotion and encouragement, defendants go on to argue that this activity is the type of coordination and pre-planning that gives rise to a *quid pro quo* corruption appropriate for prosecution. This additional factor also fails as a justification for infringing upon the plaintiffs' First Amendment rights. A candidate's promotion and support of issues advanced by an issue advocacy group in its effort to enhance its message through coordination cannot be characterized as *quid pro quo* corruption, "[t]he hallmark of [which] is the financial *quid pro quo*: dollars for political favors." *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm'n*, 470 U.S. 480, 497 (1985).

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court established a distinction between spending for political ends and contributing to political candidates. Contribution limits are subject to intermediate scrutiny, but expenditure limits get higher scrutiny because they "impose significantly more severe restrictions on

protected freedoms of political expression and association." *Buckley* at 23. "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19. Therefore, laws that burden spending for political speech "get strict scrutiny and usually flunk." *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 153 (7th Cir. 2011) (collecting cases).

The standard to apply in these cases was recently made clear by the Supreme Court in *McCutcheon*. Any campaign finance regulation, and any criminal prosecution resulting from the violation thereof, must target activity that results in or has the potential to result in *quid pro quo* corruption. As the Court has explained:

> In a series of cases over the past 40 years, we have spelled out how to draw the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire simply to limit political speech. We have said that government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. 'Ingratiation and access . . . are not corruption.' They embody a central feature of democracy – that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.
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> Any regulation must target instead what we have called '*quid pro quo*' corruption or its appearance. That Latin phrase captures the notion of a direct exchange or an official act for money. 'The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.' Campaign finance restrictions that pursue other objectives, we have explained, impermissibly inject the Government 'into the debate over who should govern.' And those who govern should be the *last* people to help decide who *should* govern.

McCutcheon, 134 S. Ct. at 1441-42 (emphases in original) (internal citations omitted). In short, combating *quid pro quo* corruption, or the appearance thereof, is the only interest sufficient to justify campaign-finance restrictions. "Over time, various other justifications for restricting political speech have been offered — equalization of viewpoints, combating distortion, leveling electoral opportunity, encouraging the use of public financing, and reducing the appearance of favoritism and undue political access or influence – but the Court has repudiated them all." *Barland* at 153-54 (collecting cases). The First Amendment "prohibits such legislative attempts to 'fine-tune' the electoral process, no matter how well intentioned." *McCutcheon* at 1450.

Stated another way, the "constitutional line" drawn in *McCutcheon* after its 40-year analysis is a ringing endorsement of the full protection afforded to political speech under the First Amendment. This includes both express advocacy speech — i.e., speech that "expressly advocates the election or defeat of a clearly identified candidate," *Buckley* at 80, and issue advocacy speech. Only limited intrusions into the First Amendment are permitted to advance the government's narrow interest in preventing *quid pro quo* corruption and then only as it relates to express advocacy speech. This is so because express advocacy speech is enabled by the infusion of money which can be called "express advocacy money." Express advocacy money is viewed in two ways. The fundamental view is that express advocacy money represents protected First Amendment speech. Another view of express advocacy money, along

with its integrity as First Amendment political speech, is the view that it may have a *quid pro quo* corrupting influence upon the political candidate or political committee to which it is directly given. That view holds that unlimited express advocacy money given to a political candidate may result in the *quid pro quo* corruption that *McCutcheon* and other cases describe as "dollars for political favors," or the "direct exchange of an official act for money." Hence regulation setting contribution limits on express advocacy money and preventing the circumvention of those limits by coordination is permitted.

Conversely, issue advocacy, which is enabled by what we can call "issue advocacy money," is not subject to these limitations because it is viewed only one way, and that is as protected First Amendment speech. This is not a recognition that *quid pro quo* corruption is the only source of corruption in our political system or that issue advocacy money could not be used for some corrupting purpose. Rather, the larger danger is giving government an expanded role in uprooting all forms of perceived corruption which may result in corruption of the First Amendment itself. It is a recognition that maximizing First Amendment freedom is a better way to deal with political corruption than allowing the seemingly corruptible to do so. As other histories tell us, attempts to purify the public square lead to places like the Guillotine and the Gulag.

The Court now turns to the defendants' efforts to regulate the plaintiffs' issue advocacy speech. As stated, this type of speech is viewed by the Supreme Court as

pure First Amendment speech, does not have the taint of *quid pro quo* corruption that exists with express advocacy speech, and is not subject to regulation. Under Wisconsin's campaign finance law, an expenditure or "disbursement," Wis. Stat. § 11.01(7), is for "political purposes" when it is done "for the purpose of influencing" an election. § 11.01(16). These types of expenditures and disbursements are subject to reporting requirements. §§ 11.05, 11.06. Failure to comply with these requirements subject the speaker to civil and criminal penalties. §§ 11.60, 11.61.

In *Buckley*, the Court held that the same operative language — "for the purpose of influencing" an election — can only apply to "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular . . . candidate." *Buckley* at 80. Later, for the "reasons regarded as sufficient in *Buckley*," the Court refused to adopt a test which turned on the speaker's "intent to affect an election. The test to distinguish constitutionally protected political speech from speech that [the government] may proscribe should provide a safe harbor for those who wish to exercise First Amendment rights. . . . A test turning on the intent of the speaker does not remotely fit the bill." *Fed. Election Comm'n v. Wis. Right to Life, Inc. (WRTL)*, 551 U.S. 449, 467-68 (2007). This is because an intent-based standard "offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." *Buckley* at 43. Accordingly, "a court should find that an ad is the functional equivalent of

express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL* at 469-70; *Buckley* at 44 n.52 (statute's reach must be limited to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat, 'reject'").

It is undisputed that O'Keefe and the Club engage in issue advocacy, not express advocacy or its functional equivalent. Since § 11.01(16)'s definition of "political purposes" must be confined to express advocacy, the plaintiffs cannot be and are not subject to Wisconsin's campaign finance laws by virtue of their expenditures on issue advocacy.

However, the defendants argue that issue advocacy does not create a free-speech "safe harbor" when expenditures are coordinated between a candidate and a third-party organization. *Barland* at 155 (citing *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001)); *see also Republican Party of N.M. v. King*, 741 F.3d 1089, 1103 (10th Cir. 2013). O'Keefe and the Club maintain that they did not coordinate any aspect of their communications with Governor Walker, Friends of Scott Walker, or any other candidate or campaign, and the record seems to validate that assertion.[6] However, the Court need not make that type of factual finding because — once again — the phrase "political purposes" under Wisconsin law means express advocacy and coordination of expenditures for issue

[6] Plaintiffs' Exhibit H, ECF No. 120-6.

advocacy with a political candidate does not change the character of the speech. Coordination does not add the threat of *quid pro quo* corruption that accompanies express advocacy speech and in turn express advocacy money. Issue advocacy money, like express advocacy money, does not go directly to a political candidate or political committee for the purpose of supporting his or her candidacy. Issue advocacy money goes to the issue advocacy organization to provide issue advocacy speech. A candidate's coordination with and approval of issue advocacy speech, along with the fact that the speech may benefit his or her campaign because the position taken on the issues coincides with his or her own, does not rise to the level of "favors for cash." Logic instructs that there is no room for a *quid pro quo* arrangement when the views of the candidate and the issue advocacy organization coincide.[7]

Defendants' attempt to construe the term "political purposes" to reach issue advocacy would mean transforming issue advocacy into express advocacy by interpretative legerdemain and not by any analysis as to why it would rise to the level of *quid pro quo* corruption. As the defendants argue, the Club would become a "subcommittee" of a campaign committee simply because it coordinated therewith. Wis. Stat. § 11.10(4). If correct, this means that any individual or group engaging in any kind of coordination with a candidate or campaign would risk forfeiting their right

[7] Moreover, if Wisconsin could regulate issue advocacy — *coordinated or otherwise* — it would open the door to a trial on every ad "on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue. No reasonable speaker would choose to run an ad . . . if its only defense to a criminal prosecution would be that its motives were pure." *WRTL* at 468.

to engage in political speech. The legislative tail would wag the constitutional dog.[8]

Maximizing the capability of 501(c)(4) organizations maximizes First Amendment political freedom, squares with Justice Douglas' exhortation in *Int'l Union*, *supra*, that "all channels of communication" should be open to the citizenry, and may be the best way, as it has been in the past, to address problems of political corruption. As long ago as 1835, Alexis de Tocqueville recognized that the inner strength of the American people is their capacity to solve almost any problem and address any issue by uniting in associations. Among those associations were citizen political associations utilized to prevent the "encroachments of royal power." *Democracy in America* 595 (Arthur Goldhammer trans., Library of America ed., 2004). Because associations can serve the same purpose today, their efforts should be encouraged, not restricted.

To sum up, the "government's interest in preventing actual or apparent corruption — an interest generally strong enough to justify *some* limits on contributions to candidates — cannot be used to justify restrictions on independent

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[8] For example, if the Boy Scouts coordinated a charitable fundraiser with a candidate for office, the Boy Scouts would become a campaign subcommittee subject to the requirements and limitations of Wisconsin campaign-finance laws, exposing them to civil and criminal penalties for touting the candidate's support. *See, e.g, Clifton v. Fed. Election Comm'n*, 114 F.3d 1309, 1314 (1st Cir. 1997) ("it is beyond reasonable belief that, to prevent corruption or illicit coordination, the government could prohibit voluntary discussions between citizens and their legislators and candidates on public issues"). Similarly, if a 501(c)(4) organization like the Club coordinated a speech or fundraising dinner with a Wisconsin political candidate, all of its subsequent contributions and expenditures would be attributable to that candidate's committee and subject to the limitations of Wisconsin law. This would preclude the organization from making *any* independent expenditures after initially engaging in coordinated issue advocacy. Wis. Stat.§§ 11.05(6), 11.16(1)(a). It would also bar the organization from accepting corporate contributions which could then, in turn, be used for independent expenditures. § 11.38.

expenditures." *Barland* at 153 (citing *Citizens United* at 357). "Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations." *Citizens United* at 365.

Issue ads by a 501(c)(4) corporation "are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them." *WRTL* at 478-79. To equate these ads to contributions is to "ignore their value as political speech." *Id.* at 479. While advocating a certain viewpoint may endear groups like the Club to like-minded candidates, "ingratiation and access . . . are not corruption." *Citizens United* at 360. O'Keefe and the Club obviously agree with Governor Walker's policies, but coordinated ads in favor of those policies carry no risk of corruption because the Club's interests are already aligned with Walker and other conservative politicians. Such ads are meant to educate the electorate, not curry favor with corruptible candidates. "Spending large sums of money in connection with elections, *but not in connection with an effort to control the exercise of an officeholder's official duties*, does not give rise to . . . *quid pro quo* corruption." *McCutcheon* at 1450 (emphasis added). While the defendants deny that their investigation is motivated by animus towards the plaintiffs' conservative viewpoints, it is still unlawful to target the plaintiffs for engaging in vigorous advocacy that is beyond the state's regulatory reach.

The defendants stress that 501(c)(4) corporations command huge sums of

money because there are no restrictions on contributions, and are therefore subject to abuse if they are coordinated. In addition, they emphasize that donors have a right to remain anonymous which flies in the face of the public's right to know. Again, the answer to the first concern is simply that the government does not have a right to pursue the *possibility of corruption*, only that which evinces a *quid pro quo* corruption. Defendants' view that the subject coordination could result in *quid pro quo* corruption is "speculation" that "cannot justify . . . substantial intrusion on First Amendment rights." *McCutcheon* at 1456. For it is not the extent of the coordination that matters, it is whether the issue advocacy money is used for express advocacy, and the clearest evidence of whether or not it is used for express advocacy is the type of speech produced by the money used to produce it. "The First Amendment protects the *resulting speech*." *Citizens United* at 351 (emphasis added). As it relates to the facts of this case, no investigation, much less a secret one, is required to discover any abuse of Chapter 11 of the Wisconsin Statutes. As to the second concern of anonymity, the law simply states that 501(c)(4) donors have a right to remain anonymous. The supporting rationale is that these donors serve the First Amendment by promoting issue advocacy, and that does not trigger the need for the disclosure required when one is engaged in express advocacy.

"Political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws. Our Nation's speech dynamic is changing, and informative voices should not have to circumvent onerous restrictions to exercise their

First Amendment rights." *Citizens United* at 364 (internal citations omitted). The plaintiffs have found a way to circumvent campaign finance laws, and that circumvention should not and cannot be condemned or restricted. Instead, it should be recognized as promoting political speech, an activity that is "ingrained in our culture." *Id.*

Therefore, for all of the foregoing reasons, the plaintiffs are likely to succeed on their claim that the defendants' investigation violates their rights under the First Amendment, such that the investigation was commenced and conducted "without a reasonable expectation of obtaining a valid conviction." *Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1975); *see also Collins v. Kendall Cnty., Ill.*, 807 F.2d 95, 101 (7th Cir. 1986); *Wilson v. Thompson*, 593 F.2d 1375, 1387 n.22 (5th Cir. 1979).

B. Remaining Factors

Having established that the plaintiffs are likely to succeed, the remaining factors can be addressed summarily, if at all. The "'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,' and the 'quantification of injury is difficult and damages are therefore not an adequate remedy.'" *Alvarez*, 679 F.3d at 589 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) and *Flower Cab Co. v. Petitte*, 685 F.2d 192, 195 (7th Cir. 1982)). Moreover, "if the moving party establishes a likelihood of success on the merits, the balance of harms normally favors granting preliminary injunctive relief because the public interest is not harmed by preliminarily enjoining the enforcement of a statute

that is probably unconstitutional." *Id.* (citing *Joelner v. Vill. of Wash. Park, Ill.*, 378 F.3d 613, 620 (7th Cir. 2004)). Put another way, "injunctions protecting First Amendment freedoms are always in the public interest." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006).

Defendants argue that the issuance of an injunction would throw into question the validity of GAB's interpretation and administration of Wisconsin's campaign finance laws, allowing candidates to solicit large amounts of money through the guise of a 501(c)(4) organization and then direct those expenditures to benefit the candidates' campaign. This is just another way of saying that the public interest is served by enforcing a law that restricts First Amendment freedoms. Obviously, the public interest is served by the exact opposite proposition.

C. Security

Federal Rule of Civil Procedure 65(c) provides that courts can issue preliminary injunctive relief "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." The Court will not require the plaintiffs to post security, although it will consider a renewed application if the defendants choose to file one. *See, e.g., N.Y. Civil Liberties Union v. N.Y. City Transit Auth.*, 675 F. Supp. 2d 411, 439 n.37 (S.D.N.Y. 2009) (refusing to require security in a First Amendment case because there was "no evidence in the record to support a finding that Defendant will suffer any monetary damages as a result of this injunction"); *see*

also Huntington Learning Ctr., Inc. v. BMW Educ., LLC, No. 10-C-79, 2010 WL 1006545, at *1 (E.D. Wis. March 15, 2010) (noting that the Court can dispense with the bond requirement when there is "no realistic likelihood of harm to the defendant from enjoining his or her conduct. Furthermore, [a] bond may not be required . . . when the movant has demonstrated a likelihood of success") (internal citations omitted).

III. Conclusion

Buckley's distinction between contributions and expenditures appears tenuous. *McCutcheon* at 1464 ("today's decision, although purporting not to overrule *Buckley*, continues to chip away at its footings") (Thomas, J., concurring). As Justice Thomas wrote, "what remains of *Buckley* is a rule without a rationale. Contributions and expenditures are simply 'two sides of the same First Amendment coin,' and our efforts to distinguish the two have produced mere 'word games' rather than any cognizable principle of constitutional law." *Id.* Even under what remains of *Buckley*, the defendants' legal theory cannot pass constitutional muster. The plaintiffs have been shut out of the political process merely by association with conservative politicians. This cannot square with the First Amendment and what it was meant to protect.

***

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT the plaintiffs' motion to preliminarily enjoin Defendants Chisholm, Landgraf, Robles, Nickel and Schmitz from continuing to conduct the John

Doe investigation is **GRANTED**. The Defendants must cease all activities related to the investigation, return all property seized in the investigation from any individual or organization, and permanently destroy all copies of information and other materials obtained through the investigation. Plaintiffs and others are hereby relieved of any and every duty under Wisconsin law to cooperate further with Defendants' investigation. Any attempt to obtain compliance by any Defendant or John Doe Judge Gregory Peterson is grounds for a contempt finding by this Court.

Dated at Milwaukee, Wisconsin, this 6th day of May, 2014.

BY THE COURT:

HON. RUDOLPH T. RANDA
U.S. District Judge

EXHIBIT 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ERIC O'KEEFE and
WISCONSIN CLUB FOR GROWTH, Inc.,

Plaintiffs,

-vs-

FRANCIS SCHMITZ, in his official and personal capacities,

JOHN CHISHOLM, in his official and personal capacities,

Case No. 14-C-139

BRUCE LANDGRAF, in his official and personal capacities,

DAVID ROBLES, in his official and personal capacities,

DEAN NICKEL, in his official and personal capacities, and

GREGORY PETERSON, in his official capacity,

Defendants.

DECISION AND ORDER

This matter comes before the Court on the plaintiffs' motion to certify the defendants' appeals from the Court's April 8, 2014 Decision and Order as frivolous. Specifically, the plaintiffs request certification regarding the defendants' appeal of the Court's ruling on sovereign immunity, qualified immunity, and absolute (prosecutorial) immunity.

Previously, the Court deferred ruling on this motion. The Court did so because it was satisfied that the Court had jurisdiction to consider the plaintiffs' motion for a preliminary injunction, even in spite of the defendants' appeals. ECF No. 171, May 1, 2014 Decision and Order Denying Motion to Stay.[1] In so doing, the Court noted that it was "inclined to agree that the appeals are frivolous, especially as [they] pertain to the defendants' argument that the plaintiffs somehow failed to state a claim under *Ex Parte Young*, [209 U.S. 123 (1908)]." May 1 Decision and Order at 1.

Days later, on May 6, the Court granted the plaintiffs' motion for a preliminary injunction. ECF No. 181. On May 7, the Seventh Circuit Court of Appeals stayed the Court's injunction and directed the Court to rule on the plaintiffs' motion to certify as it relates to the *Ex Parte Young* claim.

In *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir. 1989), the Seventh Circuit described a procedure wherein the district court can certify a collateral-order appeal as frivolous. In such situations, district courts "are not helpless in the face of manipulation," and the notice of appeal does not transfer jurisdiction to the court of appeals. *Id.* at 1339. "Such a power must be used with restraint, . . . But it is there, and it may be valuable in cutting short the deleterious effects of unfounded appeals." *Id.*

The defendants argued that they are entitled to sovereign immunity "to the

[1] The Court also deferred ruling because defendants' qualified and absolute immunity arguments do not impact the plaintiffs' request for injunctive relief. ECF No. 83, April 8 Decision and Order at 14.

extent that O'Keefe seeks injunctive relief against them in their official capacity." The Court held that this argument was "simply wrong. O'Keefe's complaint rather easily states a claim under *Ex Parte Young*. 'In determining whether the doctrine of *Ex Parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" ECF No. 83, April 8 Decision and Order at 13-14. In other words, the complaint clearly alleges that the defendants are engaged in an ongoing violation of federal law (retaliation against plaintiffs' First Amendment-protected advocacy) and seeks prospective relief (that the defendants be forced to stop). *All* of the defendants (save Judge Peterson) are participants in this ongoing deprivation. The complaint clearly states as such.

For example, Francis Schmitz argues that the complaint fails to explain how he is "involved" in any ongoing deprivations. But Schmitz is the *appointed leader* of the investigation. Even if he's just a figurehead, Schmitz is clearly "involved." Schmitz further disclaims any retaliatory motive, but as the Court explained in its injunction order, such a finding is not necessary for the entry of injunctive relief. ECF No. 181 at 21. Similarly, John Chisholm, Bruce Landgraf, and David Robles (the Milwaukee Defendants) complain that they are "entitled to an explanation as to how plaintiffs' complaint seeks relief that is properly-characterized as prospective with respect to them specifically." ECF No. 158. The Court is left to wonder if the Milwaukee Defendants actually read the complaint because the complaint does seek relief that is

properly characterized as prospective with respect to them specifically.[2]

Indeed, that the plaintiffs "rather easily" stated a claim under *Ex Parte Young* is confirmed by the Court's subsequent grant of prospective, injunctive relief. The Court has no idea why the defendants even attempted to raise this issue as a defense. It is, as the plaintiffs argue, the height of frivolousness.

To be clear, the Court is absolutely convinced that the defendants' attempt to appeal this issue is a frivolous effort to deprive the Court of its jurisdiction to enter an injunction. To recap prior proceedings, the Court allowed the parties to brief certain prefatory issues in advance of a ruling on the plaintiffs' motion for injunctive relief. The defendants raised a variety of issues in their motions to dismiss, including, for example, that the Court lacks jurisdiction under various abstention doctrines. *See generally*, April 8 Decision and Order. The Court rejected all of those arguments, and the defendants are entitled to pursue those arguments on appeal. The Court's forbearance in allowing the defendants to raise these issues cannot and should not deprive the Court of jurisdiction to enter an injunction in this case.

Nothing required the Court to even consider a motion to dismiss arguing that the plaintiffs failed to state an *Ex Parte Young* claim prior to issuing an injunction. Indeed, the Court could have deferred ruling on the defendants' argument until after the Court actually issued an injunction. More precisely, the Court could have ruled on

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[2] The Court also notes that the plaintiffs have a colorable waiver argument with respect to the Milwaukee Defendants on this issue. ECF No. 156, footnote 4. Dean Nickel did not raise the issue at all.

the issues simultaneously, which is what the Court actually did when it granted the plaintiffs' motion for a preliminary injunction. Such an arrangement obviously would not have deprived the Court of jurisdiction in the event of a subsequent appeal.

If anything, the emergency nature of the plaintiffs' request for injunctive relief demanded that the Court should have immediately proceeded to the merits of the plaintiffs' injunction motion. Instead, the Court accommodated the defendants' request for extensive briefing on other issues before considering the injunction motion. In that respect, the Court's self-imposed, April 11 deadline to issue a ruling[3] was meant to trigger further briefing on the injunction motion in the event the motions to dismiss were denied. It was not meant as an opportunity to dodge the Court's jurisdiction.[4]

Regarding qualified and absolute immunity, the Court's view and understanding is that the appeals on these issues do not divest the Court of jurisdiction over the *Ex Parte Young* claim. Also, the Seventh Circuit's order does not direct the Court to consider this aspect of the plaintiffs' motion.[5] However, for the sake of completeness, and as requested by the plaintiffs, the Court finds that these appeals are also frivolous.

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[3] ECF Nos. 62 and 63 (March 13 Scheduling Order).

[4] Moreover, as previously stated, the Court does not believe that the defendants' appeals on this issue deprived the Court of jurisdiction, even in the absence of the requested certification.

[5] The Court also notes that it does not intend to proceed on the plaintiffs' damages claims while this case is pending on appeal. *May v. Sheahan*, 226 F.3d 876, 880 n.2 (7th Cir. 2000).

As to qualified immunity, the Court held the plaintiffs stated plausible claims for relief against each of the defendants, and that "the defendants cannot seriously argue that the right to express political opinions without fear of government retaliation is not clearly established." April 8 Decision and Order at 17. The defendants do not dispute that this right is clearly established. Instead, the defendants attempt to re-frame the issue by arguing that the right to coordinate issue advocacy speech is not clearly established. But even if that assertion is true, the defendants would still have to defend against the general thrust of the plaintiffs' claim that they were targeted by the defendants because of their conservative viewpoints. This issue, and many others, would be left for consideration after remand. Thus, the issue appealed by the defendants would not "conclusively determine[]" their "claim of right not to stand trial on the plaintiff's allegations." *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985).

As to absolute immunity, the Court held that the prosecutor-defendants are not entitled to this defense because of their admission that the John Doe proceeding seeks "information necessary to determine whether probable cause exists that Wisconsin's campaign finance laws have been violated." April 8 Decision and Order at 15. A prosecutor "does not enjoy absolute immunity before he has probable cause." *Whitlock v. Brueggemann*, 682 F.3d 567, 579 (7th Cir. 2012). The defendants are not entitled to a "status" immunity simply because they are prosecutors. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993) (courts look to the "nature of the function performed, not the identity of the actor who performed it . . .").

Therefore, the plaintiffs' motion to certify the defendants' appeals as frivolous [ECF No. 155] is **GRANTED**. The Clerk of Court is directed to send a copy of this Order to the Seventh Circuit Court of Appeals.

Once again, the plaintiffs' motion for a preliminary injunction [ECF No. 4] is **GRANTED**. The reasoning in the Court's May 6 Decision and Order [ECF No. 181] is incorporated by reference.[6]

Dated at Milwaukee, Wisconsin, this 8th day of May, 2014.

SO ORDERED:

HON. RUDOLPH T. RANDA
U.S. District Judge

[6] Obviously, the defendants are not required to comply with the "return-and-destroy" aspect of the Court's injunction, as explained in the Seventh Circuit's order.

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

ERIC O'KEEFE, and WISCONSIN CLUB FOR GROWTH, INC., **Plaintiffs,** **v.** **FRANCIS SCHMITZ, in his official and personal capacities,** **JOHN CHISHOLM, in his official and personal capacities,** **BRUCE LANDGRAF, in his official and personal capacities,** **DAVID ROBLES, in his official and personal capacities,** **DEAN NICKEL, in his official and personal capacities, and** **GREGORY PETERSON, in his official capacity,** **Defendants.**	Civil Case No. ______________

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs Eric O'Keefe and Wisconsin Club for Growth ("Plaintiffs"), through their counsel, respectfully move this Court pursuant to Fed. R. Civ. P. 65(a) to enter an order enjoining Defendants Chisholm, Landgraf, Robles, and Nickel ("Defendants") from continuing to conduct a wide-ranging "John Doe" investigation on that grounds that it has the purpose and effect of retaliating against and otherwise preventing and discouraging Plaintiffs' exercise of free speech and association in violation of the First and Fourteenth Amendments, which are enforceable against Defendants through 42 U.S.C. § 1983.

In support of this Motion, Plaintiffs submit a Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction and Declarations and Exhibits thereto, which are hereby incorporated within this Motion by reference.

Dated: February 10, 2014

Respectfully submitted,

/s/ David B. Rivkin

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* Admission to the Eastern District of Wisconsin pending

CERTIFICATE OF SERVICE

I, Edward H. Williams, an attorney, certify that a true copy of the foregoing PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION was served on February 10, 2014, upon the following by U.S. Mail and hand delivery:

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Counsel will further arrange for hand delivery as quickly as practicable and supplement this certificate of service accordingly.

/s/ Edward H. Williams

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

ERIC O'KEEFE, and **WISCONSIN CLUB FOR GROWTH, INC.,** **Plaintiffs,** **v.** **FRANCIS SCHMITZ, in his official and personal capacities,** **JOHN CHISHOLM, in his official and personal capacities,** **BRUCE LANDGRAF, in his official and personal capacities,** **DAVID ROBLES, in his official and personal capacities,** **DEAN NICKEL, in his official and personal capacities, and** **GREGORY PETERSON, in his official capacity,** **Defendants.**	Civil Case No. _______________

PROPOSED FINDINGS AND ORDER GRANTING PRELIMINARY INJUNCTION

1. Plaintiffs have demonstrated that they are likely to succeed on the merits. Specifically Plaintiffs are likely to demonstrate the following at trial:

(A) Defendants' investigation has no likelihood of obtaining a valid conviction. The theory of "coordination" forming the basis of the investigation, including the basis of probable cause for home raids, is not supported under Wisconsin law and, if it were, would violate the United States Constitution. Binding Supreme Court precedent restricts the reach of the Wisconsin statutes to "express advocacy." Plaintiffs did not engage in express advocacy and therefore cannot be convicted under the theory proposed by Defendants.

(B) Defendants' investigation constitutes retaliation motivated by Plaintiffs' exercise of their constitutional rights. Plaintiffs' speech is constitutionally protected issue advocacy and is "core political speech" fully protected by the First Amendment. Defendants' retaliatory motive is evidenced through their choice to target nearly the entire right-of-center wing of political advocates in Wisconsin, by their choice to ignore materially identical conduct among left-of-center organizations, by the impossibility of obtaining a valid conviction under their legal theory, and by the timing of the investigation corresponding to critical political events in Wisconsin.

(C) Defendants' retaliation deprives Plaintiffs' of their First Amendment rights. Settled precedent prohibits government officials from retaliating against individuals and organizations, including through criminal investigation and prosecution, for speaking out in exercise of their First Amendment freedoms. Plaintiffs' conduct constitutes "core" First Amendment activity. Defendants' investigation—including subpoenas, raids, and threats of criminal prosecution—are likely to deter the First Amendment activity of Plaintiffs and others. Plaintiffs' First Amendment activities have in fact been deterred.

(D) Defendants' investigation deprives Plaintiffs of their Equal Protection rights under the Fourteenth Amendment. Defendants have targeted Plaintiffs and others based on an arbitrary classification, *i.e.*, the exercise of a constitutional right. Defendants have not targeted similarly situated individuals and organizations. The only difference between the groups and individuals targeted and those not targeted is the content and viewpoint of their speech.

(E) Defendants' investigation deprives Plaintiff Wisconsin Club for Growth of its First Amendment privilege. Defendants' demands for and seizure of Wisconsin Club for Growth's documents and records, including donor records, constitute a forced disclosure that has at least a reasonable probability of subjecting it to threats, harassment, or reprisals, including by

opponents of the Budget Repair Bill who have subjected supporters of the Bill with boycotts, vandalism, and death threats. Donors to Wisconsin Club for Growth have asked for assurance that their identities would remain undisclosed, and Defendants' seizure of documents and records, including donor records, has chilled speech and associational rights and is likely to continue to do so.

2. Plaintiffs will suffer *per se* irreparable harm in the form of deprivation of their First Amendment rights of free speech and association. Money damages are not an adequate remedy to address these harms, and only an injunction can vindicate these rights.

3. The balance of equities weighs heavily in Plaintiffs favor as Defendants do not have any legitimate government interest in maintaining a retaliatory and discriminatory investigation. Moreover, Plaintiffs may choose to continue the investigation in the unlikely case that they ultimately prevail. Plaintiffs' First Amendment rights outweigh this minimal interest.

4. Plaintiffs' resumption of their speech is in the public interest as, according to Seventh Circuit precedent, "injunctions protecting First Amendment freedoms are always in the public interest." *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012) (quoting *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006)). That interest is even more pronounced here where political speech is at issue.

WHEREFORE, IT IS HEREBY ORDERED THAT:

Plaintiffs Motion for a Preliminary Injunction is GRANTED as to their request that this Court enjoin Defendants' investigation. Defendants must cease all activities related to the investigation, return all property seized in the investigation from any individual or organization, and permanently destroy all copies of information and other materials obtained through the investigation. Plaintiffs and others are hereby relieved of any and every duty under Wisconsin

law to cooperate further with Defendants' investigation. Any attempt to obtain compliance by any Defendant or John Doe Judge Gregory Peterson is grounds for a contempt finding by this Court.

IT IS SO ORDERED.

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

ERIC O'KEEFE, and
WISCONSIN CLUB FOR GROWTH, INC.,

Plaintiffs,

v.

FRANCIS SCHMITZ, in his official and personal capacities,
JOHN CHISHOLM, in his official and personal capacities,
BRUCE LANDGRAF, in his official and personal capacities,
DAVID ROBLES, in his official and personal capacities,
DEAN NICKEL, in his official and personal capacities, and
GREGORY PETERSON, in his official capacity,

Defendants.

Civil Case No. ________________

COMPLAINT

JURY TRIAL DEMANDED

Now Come the above-named plaintiffs, Eric O'Keefe ("O'Keefe") and Wisconsin Club for Growth, Inc., ("WCFG") (collectively, "Plaintiffs"), by and through their attorneys, and make their Complaint against Defendants Francis Schmitz ("Schmitz"), John Chisholm ("Chisholm"), Bruce Landgraf ("Landgraf"), David Robles ("Robles"), and Dean Nickel ("Nickel"), in their respective official and personal capacities (collectively, "Defendants"), and against Gregory

Peterson ("Peterson"), in his official capacity only.[1] This action arises under the First and Fourteenth Amendments to the United States Constitution, the Civil Rights Act of 1871 (42 U.S.C. § 1983), and the doctrine recognized in *Ex Parte Young*, 209 U.S. 123 (1908). Plaintiffs allege and state as follows:

NATURE OF THE ACTION

1. Since May 2010, the Milwaukee County District Attorney's Office, led by Defendant Chisholm, has been using the unique power granted to prosecutors under Wisconsin's "John Doe" statute to engage in a continuous campaign of harassment and intimidation of conservative individuals and organizations. This campaign was politically motivated from the beginning, has involved at least six separate John Doe proceedings, and has most recently expanded into a consolidated five-county proceeding under Defendant Schmitz as special prosecutor, with the continued aid of the other Defendants. The current targets include virtually every conservative social welfare organization in Wisconsin and persons affiliated with them. The goals are to sideline these groups and individuals and prevent them from publishing political speech during the 2014 legislative session and campaign period, during which Scott Walker will run for re-election as Wisconsin's governor and to discredit conservative politicians and candidates in the State of Wisconsin by virtue of the unlawful investigation. These targets include Plaintiffs Eric O'Keefe and WCFG, individuals affiliated with them, and other conservative affiliated individuals and organizations.

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[1] The defined term "Defendants," as used in this Complaint, does not include Gregory Peterson, who is named only in the official capacity of his office and is referred to separately in allegations involving the official capacity of his office.

2. The result of Defendants' actions is a substantial chilling effect on political speech and association in Wisconsin, including Plaintiffs'. Groups that have spoken politically in the past are now unable to speak effectively or at all. Their fundraising efforts are hobbled, their resources are wasted on legal defense, and they do not exercise their First Amendment rights of speech and association for fear of being swept into the investigation and for fear of prosecution under unconstitutionally overbroad and vague legal theories.

3. These extraordinary circumstances call for extraordinary action from the federal judiciary. Federal courts, including the United States Supreme Court, have affirmed the principle that "investigations, whether on a federal or state level, are capable of encroaching upon the constitutional liberties of individuals" and that "[i]t is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas . . . ." *Sweezy v. New Hampshire by Wyman*, 354 U.S. 234, 245 (1957). The Court should reaffirm these principles and issue preliminary and permanent injunctions ending the investigation and award damages to O'Keefe and WCFG in an amount to be determined at trial.

JURISDICTION AND VENUE

4. This action arises under the First and Fourteenth Amendments to the United States Constitution; the Civil Rights Act of 1871, 42 U.S.C. § 1983; and the doctrine recognized in *Ex Parte Young*, 209 U.S. 123 (1908). Jurisdiction of the Court is conferred by 28 U.S.C. §§ 1331, 1343(a)(3) and (4).

5. The United States District Court for the Eastern District of Wisconsin is a proper federal venue for this action because all the defendants are residents of Wisconsin pursuant to 28

U.S.C. § 1391(b)(1). In addition, pursuant to Section 1391(b)(2), a substantial part of the events or omissions giving rise to the claim occurred in Milwaukee County. Venue in the Milwaukee Division is appropriate because the events in question have their "greatest nexus" to the counties in that division. *See In re General Order Regarding Assignment of Cases to the United States District Judge Designated to Hold Court in Green Bay, Wisconsin* (E.D. Wis. Jan. 1, 2005).

PARTIES

6. Plaintiff Eric O'Keefe is an individual who resides at his permanent address in Iowa County, Wisconsin. O'Keefe is a veteran volunteer political activist with local and national activities, and he engages in First Amendment-protected political speech and associational activities in Wisconsin and nationwide, including through several independent organizations. O'Keefe is a director of WCFG, which is among the many targets of the investigation.

7. Plaintiff WCFG is a 501(c)(4) social welfare organization that promotes free-market ideas and policies. It does this through public communications and its expressive associations with other groups promoting conservative policies. All of its public communications constitute "issue" advocacy—that is, none expressly urge the election or defeat of any candidate for office—and WCFG only associates and donates money to other groups that similarly engage in issue advocacy.

8. Defendants have coordinated with local authorities to open a John Doe proceeding in Iowa County targeting O'Keefe and have joined it with parallel John Doe proceedings in counties across Wisconsin. The initial judicial appointment documents for the John Doe investigation in Iowa County, where O'Keefe resides, state that the target is "ESO," apparently referencing O'Keefe. Defendants have also coordinated with local authorities to open a John Doe proceeding targeting WCFG. Defendants' investigation, carried out in part through

these proceedings, violates Plaintiffs' rights under the First and Fourteenth Amendments to the U.S. Constitution.

9. On information and belief, Defendant Francis Schmitz is an individual who resides at his permanent address in Waukesha County, Wisconsin. Schmitz has been appointed special prosecutor in the current phase of the investigation and in each of the current John Doe proceedings. Schmitz was appointed on petition of Defendant Chisholm and others, and he acts in concert with the other Defendants in perpetrating the unlawful investigation at issue in this case. At all times material to this Complaint, Schmitz was and is acting under color of law.

10. On information and belief, Defendant John Chisholm is an individual who resides at his permanent address in Milwaukee County, Wisconsin, and is the District Attorney of that county. In Wisconsin, District Attorney is a partisan position, and Chisholm ran for his post as a Democratic Party candidate and has strong ties with members of that Party in Milwaukee, including with Mayor Tom Barrett, who ran for governor twice against Scott Walker. At all times material to this Complaint, Chisholm was and is acting under color of law.

11. On information and belief, Defendant Bruce Landgraf is an individual who resides at his permanent address in Milwaukee County, Wisconsin, and is employed as an Assistant District Attorney in the Milwaukee County Attorney's Office. On information and belief, Landgraf prosecutes cases for that Office's Public Integrity Unit and has been the principal member of that Office in charge of the investigation. Most recently, Landgraf has been involved in communications alongside Defendant Schmitz with others involved in the proceedings and has been held out has being part of the investigative and prosecutorial team. At all times material to this Complaint, Landgraf was and is acting under color of law.

12. On information and belief, David Robles is an individual who resides at his permanent address in Milwaukee County and is employed as an Assistant District Attorney in the Milwaukee County Attorney's Office. As a member of that Office's Public Integrity Unit, Robles has been heavily involved in the investigation, attending in-person meetings between the Special Prosecutor and other parties. He has been held out as part of the investigative and prosecutorial team. At all times material to this Complaint, Robles was and is acting under color of law.

13. On information and belief, Dean Nickel is an individual who resides at his permanent address in Dane County, Wisconsin. On information and belief, Nickel is a contract investigator with GAB and was appointed or selected as an investigator by Defendant Chisholm and has been acting in concert with the Defendants or as an agent of the Milwaukee County Attorney's Office in perpetrating the investigation. Defendant Dean Nickel worked under Peggy Lautenschlager, the former Attorney General of Wisconsin from 2003 to 2007 and member of the Democratic Party, as head of the Wisconsin Department of Justice Public Integrity Unit and did not remain in that high-level position after her tenure ended. At all times material to this Complaint, Nickel was and is acting under color of law.

14. On information and belief, Gregory Peterson is an individual who resides at his permanent address in Eau Claire County, Wisconsin, and is a retired Appeals Court Judge. Peterson has been appointed as John Doe "Judge" and is responsible for administering the most recent John Doe proceeding in this investigation. In this role, Peterson is not, in fact, acting in a judicial capacity. Peterson is a Defendant in this matter in his official capacity only, and Plaintiffs are not seeking money damages from him. An injunction against Peterson is necessary

to provide Plaintiffs adequate relief in this lawsuit, including relief from the Secrecy Order. At all times material to this Complaint, Peterson was and is acting under color of law.

FACTS

I. Background

15. The investigation at issue in this Complaint is taking place against the backdrop of the most tumultuous political events in Wisconsin in generations—perhaps in history.

16. On November 2, 2010, candidates of the Republican Party won control of all branches of the Wisconsin government for the first time since 1998.

17. Contributing to this success was the growing influence of conservative independent social welfare organizations, including the organizations that have been targeted in the John Doe investigations. These social welfare organizations published political speech, in media, including television and radio, on issues related to their organizational purposes. Around the time of the 2010 Wisconsin gubernatorial race, independent interest groups spent, according to the best estimates, a combined $37.4 million, largely for communications criticizing positions taken by the candidates.

18. Many with left-leaning views have opposed the involvement of independent interest groups like WCFG in election speech. This opposition escalated considerably after the Supreme Court decided *Citizens United v. Federal Election Commission*, 558 U.S. 310, in January 2010, which struck down regulations barring corporations from making independent express advocacy expenditures in elections as violative of the First Amendment. The Court explained that the "right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it," and that the "First Amendment has its fullest and most urgent application to speech uttered

during a campaign for political office." 558 U.S. at 339 (internal quotation marks omitted). Demonstrating the consternation surrounding that decision among many affiliated with the Democratic Party, the President of the United States chastised members of the Supreme Court in attendance at that year's State of the Union Address over the decision. This tactic was unprecedented, as observers noted at the time.

19. Around this time, left-leaning advocates began to theorize and propose that campaign finance theories such as "coordination" could be redefined and diverted from their traditional scope to undermine *Citizens United* and offer an alternative route to preventing independent organizations from participating in elections. Another campaign finance concept recommended for redefinition was the distinction between "issue" advocacy and "express" advocacy. Left-leaning advocates have also spent considerable time and efforts theorizing of ways to expose the names of donors to social welfare organizations in order to allow them to become the targets of reprisals. This has led to scandals including those in the federal government, as IRS agents have been accused of illegally leaking the names of Republican and conservative donors around the 2012 presidential election.

20. In March 2010, in the wake of *Citizens United*, GAB adopted new rules expanding the meaning of "express" advocacy to include forms of political speech that had long been considered "issue" advocacy. Plaintiff O'Keefe, WCFG, and a liberal organization called One Wisconsin Now sued in the United States District Court for the Western District of Wisconsin to block these rules, and several other lawsuits were filed, including in state court. Within days, upon the advice of the Wisconsin Department of Justice, GAB agreed to a settlement, recognizing that it had overstepped its legitimate authority and violated the First Amendment. The settlement process became complicated when the court determined that

prudential doctrines, such as *Pullman* abstention, should prevent the settlement from being finalized, but GAB adopted an emergency rule and has stated that it will not enforce the March 2010 rules. The John Doe Judge recognized that concession in his ruling quashing Defendants' subpoenas.

21. At the same time, the left wing of the political spectrum has continued to build up a substantial independent expenditure machinery in Wisconsin and nationwide, which rivals and, in fact, surpasses the competing conservative groups like WCFG. By the 2011 and 2012 recall races at issue in this case, these left-leaning organizations were able to outraise and outspend conservative groups in most of the relevant campaigns, and this system has allowed union money to flow freely to support Democratic Party candidates and causes in these recall elections.

22. Until his election as Governor in 2010, Scott Walker was the County Executive of Milwaukee County. On April 24, 2009, Walker declared his candidacy for Governor of Wisconsin.

A. Walker Proposes, and the Legislature Passes, the Budget Repair Bill Against Unusually Heated Opposition

23. During his 2010 campaign, Walker emphasized the need to reduce taxes and the size of the Wisconsin government to stimulate a dismal state economy. He criticized the 2009-2011 state budget as being too large given the economic situation and pledged to diminish it if elected. On September 14, 2010, Walker won the Republican primary, and he was elected Governor on November 2, 2010. He took the oath of office on January 3, 2011.

24. By early February, Walker's new administration had projected a budget shortfall in 2013 of $3.6 billion and also determined that a budget repair bill to resolve a $137 million shortfall for the year ending June 30, 2011, was necessary. Among the critical problems

identified in the state budget were costs related to public employees' pensions and health care plans. Much of the cost was the result of contracts with public sector unions.

25. The Walker administration proposed a bill ("Budget Repair Bill") to remove the ability of public sector unions to bargain collectively over pensions and health care. The bill also proposed to limit pay raises to the rate of inflation.

26. The response to this proposal was immediate and aggressive. Thousands of protestors demonstrated in and around the capitol building in Madison.

27. The events gained extensive press coverage, and images of the demonstrations were broadcast in homes nationwide. Advocacy groups across the political spectrum recognized this controversy as an opportunity to participate in a public debate about the proper role of unions generally, the proper role of public sector unions in particular, and the proper role of government. The airwaves in Wisconsin became flooded with advertisements for and against Walker's budget plan, and money came from across Wisconsin and the nation. For the budget battle alone—which involved no elections—opponents of the Walker budget spent an estimated $1.8 million and supporters spent $1.7 million. The organizations that are now being targeted in the John Doe investigation published many issue advertisements during this time about the need for public sector labor law reform.

28. For many opponents, Walker's plan was more than a political debate and quickly became personal and vindictive. For example, the website DemocraticUnderground.com maintained a list of contributors to Scott Walker for the purpose of boycotting their businesses and otherwise harming them economically. On March 3, police discovered 41 rounds of 22-caliber rifle ammunition outside the Wisconsin state capitol, and ammunition was also discovered inside a city and county government building in downtown Madison. Protestors

convened at Scott Walker's private residence in eastern Wisconsin, where his family was residing, and also targeted private residences of legislators at various times.

29. Around this time, a liberal blogger posing as David Koch called Scott Walker to entice him into making statements suggesting coordination of publicity efforts. On March 7, the Democratic Party of Wisconsin seized on this opportunity to file a complaint with GAB, alleging campaign coordination despite there being no legal basis for the complaint.

30. Around February 17, Senate Minority Leader Mark Miller led fourteen Senate Democrats—in fact, every Democratic Party-affiliated member in that body—in absconding from Wisconsin. Their whereabouts were unknown for days before they were discovered to be hiding in Illinois. The purpose of their effort was to prevent the twenty-member quorum necessary under Wisconsin law to pass spending measures and thereby stall Walker's budget plan.

31. On February 25, following sixty hours of debate, the Wisconsin Assembly, which had the requisite quorum, passed Walker's Budget Repair Bill.

32. The Bill was sent to the Senate, which still lacked the quorum necessary to pass a spending bill. The Republicans thus stripped the spending provisions from the Bill and passed the remaining measures, which included the measures related to collective bargaining. Protests engulfed the capitol once again.

33. On March 10, the Assembly passed the Senate version.

34. On March 11, Scott Walker signed the Bill, which became 2011 Wisconsin Act 10.

B. Political Hostilities Escalate Further After the Budget Repair Bill's Passage

35. The passage of the Budget Repair Bill turned out to be only the beginning of a political war in Wisconsin, as opponents continued to stretch the bounds of legality and civility in their campaign to defeat the Act and, later, Scott Walker.

36. Legal challenges to the Bill came early and often. On March 11, the day it was signed, Dane County Executive Kathleen Falk filed a lawsuit against the state, arguing that it was unconstitutionally passed. Dane County District Attorney Ismael Ozanne filed a similar lawsuit on March 16.

37. Wisconsin's Secretary of State, Doug La Follette of the Democratic Party, refused to publish the Budget Repair Bill, to try to thwart its becoming law. The Legislative Reference Bureau was thus forced to bypass the Secretary of State's office and officially published the law on March 25.

38. On March 25, AFL-CIO Laborers Local 236 and Firefighters Local 311 filed a lawsuit, and on June 15, 2011, all public unions in Wisconsin joined to file a lawsuit in federal court alleging violations of Equal Protection and the First Amendment.

39. On March 18, 2011, Dane County Judge Maryann Sumi granted a temporary restraining order against the Budget Repair Bill. Subsequently, the Wisconsin Supreme Court reversed this decision, finding that it violated separation of powers and Wisconsin precedent.

40. Lawsuits, however, were not the only tactic tried. Wisconsin State Employees Union, AFSCME Council 24, began circulating letters to businesses in southeast Wisconsin, demanding that they support "workers' rights" by placing a sign in their windows: "Failure to do so will leave us no choice but [to] do a public boycott of your business. And sorry, neutral means 'no' to those who would work for the largest employer in the area and are union members."

Similar threats occurred across the state. Among the many businesses targeted for boycotts were some that took no position on the Walker budget.

41. On April 1, 2011, a woman from Cross Plains was charged with two felonies for threatening to kill fifteen Republican state senators who voted for the Budget Repair Bill. She emailed them that opponents of the legislation were planning "to assault you by arriving at your house and putting a nice little bullet in your head." By this time, the Republican caucus in the legislature had received at least a dozen credible specific death threats.

42. Demonstrations continued as before the Budget Repair Bill's passage. We Are Wisconsin ("WAA") a prominent left-wing social welfare organization that rivaled or surpassed WCFG in spending at all relevant times, sponsored demonstrations in home communities of Republican senators. Protestors began living in tents around the capitol in a complex they called "Walkerville." When the Wisconsin State Assembly met to pass the 2012 fiscal year budget, an onlooker screaming "you're F-A-S-C-I-S-T!" had to be physically apprehended. Other onlookers chained themselves to the railing.

43. Political tensions reached the highest offices in Wisconsin, demonstrating that no institution was immune from partisan feeling. On June 27, Supreme Court Justice Ann Walsh Bradley filed a complaint claiming that fellow Justice David Prosser had placed her in a chokehold several weeks before. Other justices claimed that Bradley was the aggressor. These events occurred as the Court was ruling on the legality of the Budget Repair Bill. The event spawned two investigations, neither of which resulted in charges.

C. The Result of Political Hostilities Is Unprecedented Recall Elections

44. Legislative recall campaigns were commenced for every member of the Wisconsin Senate who was legally eligible for a recall at the time, some being commenced even

before the Budget Repair Bill's passage. Republican Senators were targeted for their support of the Budget Repair Bill. Democratic Senators were targeted for their opposition of the Budget Repair Bill, including their departure from the state to thwart legitimate democratic process. These efforts resulted in actual recall elections for nine Senators. The scope of this recall effort exceeded any precedent in United States history. The elections were held on July 19, August 9, and August 16.

45. Advertisements engulfed the Wisconsin airwaves around the time of the recall elections and the Supreme Court race. Total independent spending around the time of the state Supreme Court race was estimated to exceed $4.5 million, with WCFG being a top spending organization around the time of the primary in that race. Around the time of the 2011 Senate recall elections, the best estimates show that total spending reached a record $44 million, with $34.6 million being spent by independent advocacy groups. According to Wisconsin Democracy Campaign, Left-leaning WAW led independent groups in spending, followed by WCFG, left-leaning Greater Wisconsin Committee and Citizens for a Strong America.

46. Democrats held all their seats in the recall races, and Republicans lost two of six seats but retained control of the Senate.

47. On November 15, 2011, the Walker recall effort commenced. On November 19, the Committee to Recall Scott Walker organized an event that was advertised as being "in coordination with We Are Wisconsin, United Wisconsin, and the [Democratic Party of Wisconsin]." Organizers hoped to obtain 600,000 to 700,000 signatures on the recall petition, which would, under Wisconsin law, trigger a recall election.

48. Once again, the turn of events resulted in a deluge of political advertisements from groups and official campaigns trying to influence the public narrative. Both liberal and

conservative organizations participated, raising money from individuals, corporations, and unions. Unions were especially important contributors, contributing millions through activist groups such as WAW. It was typical on both sides for groups to donate to like-minded groups. It was also typical for personnel to be shared between groups and donors, especially unions. For example, Marty Beil, a board member of WAW was also the Executive Director of the Wisconsin State Employees Union, the Wisconsin Chapter of AFSCME. Kristen Krowell, the Executive Director of WAW was also a founding director of Wisconsin Progress, which has ties to Planned Parenthood, Fair Wisconsin, and Wisconsin Progress PAC. Phil Neuenfedlt, treasurer of WAW, was also President of Wisconsin State AFL-CIO. Under Wisconsin law, contribution limitations do not apply during the signature-gathering phase of a recall election, and GAB issued a ruling confirming this principle also applied to the Walker recall effort.

49. In March 2012, GAB announced that more than 900,000 valid signatures had been collected to recall Governor Walker. On March 30, GAB voted in favor of a recall election over Walker campaign objections that possibly hundreds of the signatures were invalid.

50. Also on March 30, Milwaukee Mayor Tom Bárrett announced that he would again run against Scott Walker in the governor's race. This began a primary election cycle that Barrett won on May 8, and in connection with which unions made record expenditures.

51. The recall election between Walker and Barrett occurred on June 5, 2012, and Walker won by a greater margin than he defeated Barrett in 2010. Also on June 5, lieutenant governor Keefisch won her recall election, as did two incumbent Senators. One Republican won an open seat race on this day as well. One Republican Senator was narrowly recalled, resulting in a temporary swing of power in that body in favor of the Democratic Party. But in the November

2012 general election, Republicans gained two Senate seats, reclaiming control. And Republicans retained the 60-39 edge in the Assembly earned in the 2010 Republican sweep.

52. According to Wisconsin Democracy Campaign of independent spending surrounding the 2012 recall election shows that a record $81 million was spent around the time of these elections. Independent groups spent $36.5 million.

53. Walker and Republican lawmakers had thus been victorious, not only the in budget battle, but also in the recall race. However, efforts to attack them politically continued.

II. The "John Doe" Investigation

54. Of the many efforts to attack Governor Walker tried by his opponents, none proved so persistent as the investigation conducted continuously for nearly four years by the Milwaukee County District Attorney's office under the guidance of John Chisholm, Bruce Landgraf, and David Robles. Begun on pretextual grounds in 2010, the investigation grew into an ongoing audit of the Walker campaigns, allowing prosecutors an inside track to scrutinize actions of Walker staffers as they were taken, despite that they were unrelated to the original purported purpose of the investigation. It also allowed the Milwaukee District Attorney's office to influence public opinion through leaks of selective information meant to embarrass Walker and his campaign. The investigation became a rallying cry for Democratic Party members and candidates and a central issue in the Walker recall right up until the election.

55. After Walker's 2012 recall victory, the investigation was expanded again as more John Doe proceedings were begun and then consolidated into another phase of the investigation with an even broader scope: all independent advocacy by conservative groups in Wisconsin and even outside Wisconsin.

A. The Milwaukee County Attorney's Office, Which Has Initiated and Conducted the Investigation, Is Biased Against Walker and the Budget Repair Bill

56. The investigation originated in the Milwaukee County Attorney's Office (sometimes, "the Office" or the "DA's Office") and was conducted almost entirely by investigators and attorneys in that Office.

57. The leader of the Office was at all relevant times and is District Attorney John Chisholm, who won that seat as a Democratic Party candidate and has been supported by unions in previous campaigns, including in the most recent race to hold his DA position, during which he received support from, among others, the AFL-CIO. Chisholm also is a donor to Democratic Party candidates and, as of April 2012, had given $2,200 exclusively to Democratic and liberal candidates, making him one of the top donors in the Milwaukee County Attorney's Office.

58. Altogether, as of April 2012, employees in Chisholm's office had donated to Democratic over Republican candidates by roughly a 4 to 1 ratio.

59. During the 2011-2012 campaign to recall Scott Walker, at least 43 (and possibly as many as 70) employees within Chisholm's office signed the recall petition, including at least one Deputy District Attorney, 19 Assistant District Attorneys, and members of the District Attorney's Public Integrity Unit.

60. Chisholm has close ties with Democratic Party members around Wisconsin and in Milwaukee, including Mayor Tom Barrett. In 2008, just days before Democrat Tom Barrett ran for reelection as Mayor of Milwaukee, Chisholm appeared in a two-and-a-half minute clip that began and ended with the official Barrett-for-Mayor reelection screen. In the clip, Chisholm praised Barrett's record on crime, education, and city development. Upon information and belief, Chisholm provided other forms of support for Barrett and received similar support both publicly and privately in their respective campaigns.

61. Like many public sector employment divisions, assistant district attorneys in Wisconsin are represented by a union, which was affected by the passage of the Budget Repair Bill in much the same way as the other public sector unions. Thus, assistant district attorneys, like many other public sector employees had a direct, personal stake in the debates over the Budget Repair Bill. Among other things, the Budget Repair Bill resulted in their having to contribute more to their health care and pension plans, resulting in a direct financial loss to them from the Bill. Unlike many public sector unions, which have had a difficult time recertifying after the Budget Repair Bill went into effect, the assistant district attorneys union recertified again in November 2013.

B. The Investigation Began on Pretextual Grounds and Had a Political Motive From the Beginning

62. Under Wis. Stat. § 968.26, a prosecutor may commence a special investigation, commonly known as a "John Doe" investigation, by filing a complaint with a judge and alleging that there is reason to believe that a crime has been committed. The judge in this matter, often called a "John Doe judge," does not act on behalf of the court but serves essentially as a grand jury of one. Once a district attorney requests a judge to convene a John Doe proceeding, the judge *must* convene the proceeding and *must* issue subpoenas and *must* examine *any* witnesses the district attorney identifies. This gives a district attorney extraordinary ability to obtain subpoena power over private parties as part of an investigation.

63. Wisconsin law also allows a judge to impose a secrecy order over witnesses in a John Doe proceeding. In this respect, a John Doe proceeding differs from normal practice before a federal grand jury, where a secrecy order binds jurors and prosecutors but typically not witnesses. According to common practice in John Doe proceedings, prosecutors who ask for

secrecy orders almost inevitably receive them. Secrecy orders were imposed in all John Doe proceedings commenced in this investigation.

64. The investigation has lasted nearly four years, with the first phase beginning on May 5, 2010, and ending on February 21, 2013. It was conducted by attorneys at the Milwaukee County Attorney's Office under the supervision of Defendant Chisholm. For purposes of opening the proceeding, the crime that the Milwaukee District Attorney's office purportedly had reason to believe was committed related to missing money from veteran's fund called Operation Freedom, which was founded by Scott Walker. But Operation Freedom was never a priority of the District Attorney's Office, which had grander plans in mind from the outset.

65. After 2006, the Operation Freedom funds were managed by the Michelle Witmer Chapter of the Military Order of the Purple Heart ("MOPH"). In 2008, Darlene Wink, an employee in the Milwaukee County Executive's Office identified an apparent shortfall of roughly $11,000 from funds received by MOPH from the Executive's Office. The Executive's Office subsequently informed the Milwaukee County Attorney's Office.

66. On April 23, 2009, Chief Investigator David Budde interviewed Thomas Nardelli, Chief of Staff to Milwaukee County Executive Scott Walker, regarding the missing funds. Nardelli told Budde that he believed that Kevin Kavanaugh, the MOPH chapter treasurer, was responsible for the discrepancy and likely had stolen over $11,000 from the funds.

67. This interview occurred over one year before the Milwaukee County Attorney's Office opened a John Doe proceeding for the purported purpose of investigating the discrepancy.

68. Upon information and belief, the Milwaukee County Attorney's Office decided to use a John Doe proceeding to investigate the Milwaukee County Executive's Office as a means of influencing the 2010 election in which Scott Walker was a candidate for Governor. Attorneys

within the Office determined that, by opening an investigation into the missing Operation Freedom funds, they could investigate Darlene Wink's activities on her county computer and possibly expand an investigation into Walker's employees more generally to identify possible violations of law that could be linked directly to Scott Walker.

69. In the petition requesting the commencement of a John Doe proceeding, Defendant Landgraf represented that a John Doe proceeding was necessary because the Executive's Office had not provided documentation that would allow investigators to trace the funds from Milwaukee County to MOPH and because interviewing witnesses outside a John Doe proceeding had "not yielded satisfactory results." *See* Ex. A, Petition for Commencement of a John Doe Proceeding, *In re John Doe Proceeding* (Wis. Cir. Ct. Filed May 5, 2010). In fact, the County Executive's Office, after this representation became public, denied this allegation and stated in no uncertain terms that it had made "multiple follow-ups" to the DA's Office, since it had originally requested the investigation. Moreover, with one exception, every interview cited in the subsequent criminal complaint against Kavanaugh was with a willing witness outside the John Doe process.

70. The purported line of inquiry cited by Defendant Landgraf was narrow: "to identify the origin of the funds transferred to the Order." *Id.* Yet, within half the time between the Nardelli interview in 2009 and the commencement of the John Doe proceeding in May 2010, the investigation had turned to other issues involving Walker, his campaign, and his staff. And within two years, the investigation had turned to Walker's gubernatorial administration in Madison and, within three years, it had become the basis for a state-wide probe into virtually every conservative independent organization involved in Wisconsin politics.

71. Upon information and belief, even the purported line of inquiry had little if any importance to the Operation Freedom investigation. The concerns from the Executive's Office related to what happened to the funds *after* they had been transferred to MOPH and had little if any relevance to the "origin" of the funds, *id.*, which, upon information and belief, was never in doubt. Yet Landgraf used this pretext as an excuse for "subpoenaing county officials" and for "examination of business records maintained by the County Executive's office and other County Departments," despite that relatively few records would be relevant to and relatively few officials would have knowledge of this narrow topic. The actual purpose of the petition was to obtain access to county officials and documents for an open-ended fishing expedition into Walker's office.

72. The political potential of the investigation was apparent to Landgraf from the beginning. In the petition, Landgraf argued that the investigation should be conducted under a secrecy order because "publicity of allegations and inferences would be particularly unfair to the County Executive, a man who is seeking the nomination of the Republican Party for the Office of Governor of the State of Wisconsin in this Election Year." *Id.* Under the purported basis for the John Doe proceeding, this would be unnecessary: an investigation that Walker's Chief of Staff invited would hardly embarrass Walker, so long as it was limited to its original purpose, and imposing a secrecy order could prevent Walker from demonstrating to the public that he was not the target and that his office had requested it—two arguments Walker had a difficult time making subsequently precisely because of the secrecy order. In fact, it was the secrecy order and the concomitant lack of public scrutiny that allowed Landgraf and others to turn the investigation against Walker, to permit selective leaks to embarrass Walker, and to prevent any substantive defense by Walker or others as the investigation became a media sensation during his recall.

Thus, upon information and belief, while requesting secrecy with the purported purpose of helping Walker avoid embarrassment, Defendant Landgraf made it all the more possible to embarrass him.

73. The first priority of the investigation was the county employees, and Darlene Wink in particular, and its aims were far broader than tracing a few thousand dollars to a source that was uncontested. Nine days after the commencement of the proceeding, the John Doe judge signed a search warrant allowing investigators to search the Milwaukee County computer that Wink used, and the warrant was executed immediately. Without delay, investigators examined her computer and had already discovered Wink's personal email accounts in time to issue a Preservation Letter Request the next day, May 15. Wink's personal email accounts bore no relation to the purpose of tracing funds from the County to MOPH. Nevertheless, the John Doe judge subsequently issued a search warrant for them. Wink, like so many witnesses with information about Operation Freedom, would later testify willingly about the Operation Freedom funds, demonstrating that, had their purpose been to ascertain what she knew of the funds, investigators could simply have asked. In contrast to the one-year delay to launch an investigation into the missing funds, the few days needed to target Wink shows that Walker's employees were of interest from the very beginning.

74. The same day as the search, the Milwaukee County Supervisor John F. Weishan, Jr., sent a criminal complaint to Defendant Chisholm, carbon copying Defendant Landgraf. The complaint alleged that Darlene Wink was "illegally using state resources for political purposes" by posting articles favorable to Scott Walker. This amounted to "donat[ing] resources, email services, computer services, staff salary, etc., which did not belong to her for the political benefit of Scott Walker's campaign." In addition, the complaint alleged that Scott Walker's campaign

failed to report these illegal contributions and, in so failing, violated Wisconsin law. The complaint concluded that the Milwaukee County Attorney's Office should investigate, not only Darlene Wink, but also Scott Walker and his campaign. Thus, within nine days of the commencement the investigation, Chisholm and Landgraf had succeeded in their true goal: finding an excuse to conduct an open-ended investigation of Walker's staff for the remainder of his campaign and beyond.

C. The Scope of the Investigation Immediately Broadened and Has Broadened Exponentially Ever Since

75. Chisholm, Landgraf, and their subordinates, including Defendant Nickel, followed through on that purpose. The investigation has been breathtakingly broad. It has swallowed up everything in its path that could remotely be used as political fodder against Scott Walker and any groups or individuals that support initiatives or changes proposed by Walker. Credible reports state that over 100 witnesses were interviewed and hundreds of thousands of documents were seized and reviewed, which unquestionably cost far more than the missing $11,000 supposedly under investigation.

76. On May 10, 2010, GAB formally initiated an investigation into William Gardner, a railroad owner, based on a complaint by his former girlfriend that he had asked her to make a campaign contribution to Scott Walker on his behalf and with his reimbursement. Under Wisconsin law, the venue for an eventual prosecution would have to be (and eventually was) Washington County because of Gardner's residency in Hartford. Nevertheless, that very month, GAB consulted with Landgraf and they agreed that this investigation should continue in Milwaukee County under the auspices of the John Doe investigation. The Gardner allegations were unrelated to the Operation Freedom funds, and there would be no basis for drawing a connection between the issues under investigation—unless it was already established that the

investigation was aimed at individuals or groups that support Walker, who was the sole common denominator. On information and belief, the purpose was to lend credibility to requests before the John Doe judge to expand the investigation further into Walker, his associates, his campaign, and his supporters.

77. On May 28, 2010, Gardner contacted GAB, agreed to cooperate, and eventually turned over the information that would be used in the criminal complaint against him. A John Doe proceeding was unnecessary to obtain his conviction, but served as a pretext to allow Chisholm and Landgraf's continue their unlawful fishing expedition into Walker's affairs.

78. The investigation quickly turned to other employees within Walker's office, including through computer seizures at county offices, and by November 1, 2010, investigators succeeded in obtaining a search warrant of another employee in the County Executive's Office: Kelly Rindfleisch.

79. Continuing their pattern of using the John Doe investigation for political means, investigators executed a broad search warrant allowing them to comb through the Office of the County Executive the day before the November 2 gubernatorial election. That same day, investigators executed a search warrant at the home where Rindfleisch was residing on a temporary basis. Execution of this warrant was not necessary for the investigation, as Rindfleisch did not keep any possessions there except clothes and other personal items.

80. By the end of November, prosecutors turned their investigation on Timothy Russell, another county employee, whose computer was seized in August. The John Doe Judge authorized expansion of the John Doe proceeding on November 30, and Milwaukee authorities promptly executed a search warrant on his home on December 7. Although this raid produced nothing of value for the John Doe investigation, it uncovered wholly unrelated conduct on behalf

of Russell's domestic partner that Chisholm and Landgraf used to further justify continued expansion of the investigation.

81. Over the following year, as political tensions in Wisconsin blazed, investigators continued to dig deeper into the Walker affairs in an effort to find some evidence of criminal conduct that could influence the recall election. By December 2011, the investigation had expanded into alleged bid-rigging in connection with a competitive bidding process for office space for the Milwaukee County's Department of Aging. The bidding process occurred in the fall of 2010, as did the events under investigation, and the tip leading to the investigation was received in the fall 2010. By December 2011, investigators were asking whether Walker's office had improperly provided inside information to some brokers ahead of others during the bidding process. No bid was ever awarded, making the theory unlikely to succeed.

82. As of May 2012, this line of inquiry was still ongoing, and, by this time, investigators were focused on whether a Walker aide had improperly received preferential treatment in the bidding process. This line of inquiry could not have been contemplated at the outset of the investigation because the events had not yet occurred. The events at issue were entirely unrelated to the Operation Freedom funds, and the sole common denominator with the other subject matters of the investigation was Scott Walker and his supporters.

83. Upon information and belief, numerous other legal and factual avenues were also being explored and had been explored at this time, none leading to a viable prosecution against Walker or those close to him.

84. By June 2012, finding no basis for prosecution related to the 2010 Department of Aging office bids after months of resources had been poured into the inquiry, the County Attorney's Office, rather than move on, continued to search for anything that could be used for

political purposes without any regard for probable cause or even reasonable suspicion. On June 18, 2012, Defendant Robles filed an open records request with the state Department of Administration seeking communications between the agency and staffers in Governor Walker's office at the state capitol. The request sought all communications "related to the designation and determination of individuals as 'key professional staff' of the Office of Governor" since the time Walker took office on January 3, 2011. Robles tried to disguise the purpose of the request. It was not submitted on Milwaukee County DA letterhead and did not provide Robles's job title. Robles provided a personal e-mail address for the request, raising issues under Wisconsin's public records laws, but the possible impropriety was never investigated. Legal counsel for the Department of Administration recognized that the request related to the official business of the County Attorney and emailed a response to Robles's government email account on June 27 with a carbon copy to Kent Lovern and Hanna Kolberg of the DA's Office.

85. On information and belief, the Robles request signaled yet another shift in the John Doe investigation, as the DA's Office began to evaluate whether it could plausibly continue its ongoing efforts and refocus them from Walker's time as County executive to Walker's tenure as Governor, despite that Walker's administration did not fall within Office's jurisdiction of Milwaukee County. For that, Chisholm and Landgraf would need the ability to oversee Walker's activities 80 miles away in Madison, which would require a new John Doe proceeding with statewide reach and even a broader scope.

86. In August 2012, Landgraf filed a petition for another John Doe proceeding, which was officially opened in September. Upon information and belief, it was initiated for the purpose of continuing the political vendetta in the days after Walker's victory in a renewed attempt to defeat him and/or his Budget Repair Bill.

87. From Defendants' perspective, the expanded investigation would allow them to continue their campaign of harassment and intimidation from persons affiliated with Scott Walker at the County Executive's office to the entire conservative social welfare organization community in Wisconsin, and beyond. It would also put them before a new John Doe judge, one who was not wary of the growing scope of their investigation. The timing would conveniently coincide with the 2014 campaign season, which was set to heat up late in 2013, and that year's legislative session. That target timeline allowed prosecutors time to solve several practical problems with their scheme.

88. First, upon information and belief, the evidence on hand was not sufficient to justify an investigation of the scope contemplated. This problem was addressed in part by combing through the mountains of evidence obtained from the first John Doe proceeding and was addressed in part through the Robles public records request and similar investigations into publicly available information.

89. Second, upon information and belief, Landgraf and Chisholm needed the ability to conduct the investigation on a state-wide basis. This problem was resolved by opening other John Doe investigations. Defendants persuaded other district attorneys to petition for John Doe proceedings. A proceeding was opened in Dane County, where Walker's administration was and is headquartered. A proceeding was opened in Dodge County, where, on information and belief, prosecutors continued to investigate Kelly Rindfleisch and others. A proceeding was opened in Columbia County. And a proceeding was opened in Iowa County, allowing prosecutors to target Plaintiff O'Keefe. A single judge, Barbara Kluka, was appointed to oversee each of these proceedings.

90. Defendants did not want the investigation to be run by the respective district attorneys, which could significantly detract from their political ends and risk their motives being exposed. So, after having engineered the opening all these proceedings, Defendant Chisholm complained to the John Doe judge that having multiple proceedings was inefficient and cumbersome and requested that they be run along with the Milwaukee County proceeding in one effectively consolidated proceeding. Chisholm's request was granted.

91. Third, upon information and belief, Landgraf and Chisholm were aware of the criticism they would face once this phase of the investigation became public and so needed a way of minimizing the appearance of impropriety. This problem was resolved by having Defendant Francis Schmitz, who lacked the publicly known ties to liberal politics plaguing Defendants, appointed as special prosecutor. Schmitz is a former federal terrorism prosecutor with no experience in campaign finance or First Amendment law. He admitted to O'Keefe's lawyers that he is "a neophyte" with respect to these areas of law. Schmitz has further admitted in court papers that he has not applied for any of the subpoenas, subpoenas duces tecum, or search warrants in this matter, and that he has not appeared before the John Doe judge to take oral testimony. Schmitz's phone number is a Milwaukee County District Attorney's Office phone number, indicating that this Office remains the headquarters of the investigation. In fact, the orders appointing Schmitz specifically authorize the same district attorneys and staff members who wanted to avoid the appearance of impropriety (including Defendants) to carry out the day-to-day work of the investigation, and, on information and belief, they still maintain effective control over the investigation.

92. Upon information and belief, Landgraf, Chisholm, Robles, and Nickel continue to play an active and supervisory role in the investigation. Landgraf and Robles have been involved

with phone conferences with counsel in the various proceedings. Nickel swore out the affidavits for some or all of the home raid warrants.

93. Early in 2013, Chisholm solicited Attorney General J.B. Van Hollen's assistance in taking the investigation statewide. Van Hollen recommended that, if Chisholm was concerned about access to statewide jurisdiction, he refer the matter to the GAB to serve "as a lead investigator and first decisionmaker," which it had done in prior cases. Ex. B, Van Hollen Letter to Chisholm (May 31, 2013).

94. Chisholm rejected this advice. The investigation was not directed under the auspices of GAB but was turned into an unprecedented five-county John Doe proceeding. In Chisholm's petition to the John Doe Judge to appoint a special prosecutor, he explained that GAB was not the correct party to conduct the investigation because the investigation was criminal, completely ignoring Van Hollen's caution that one purpose of the investigation should be to *determine whether the charges should be civil and criminal*. As Van Hollen noted, if GAB determined that enforcement should be through criminal sanctions, it could have referred the case to the appropriate district attorney, which would have served the ends of justice, but would not have given Chisholm the opportunity to continue the witch hunt. The petition demonstrates that Chisholm decided that the prosecutions would be criminal before obtaining much of the relevant evidence.

D. The Current Inquiries Are Based on an Invalid Legal Theory

95. Defendants are basing their current phase of the investigation on a theory of campaign coordination that would make nearly all political advocacy in Wisconsin subject to government scrutiny and regulation. In particular, their theory is that Wis. Stat. § 11.01(16), which defines "political purposes" for purpose of Wisconsin campaign-finance law, reaches

communications other than those that are express advocacy or its functional equivalent. On that basis, Defendants assert that speech and speech expenditures coordinated with a campaign or campaign committee are subject to Wisconsin laws limiting contributions to campaigns and mandating disclosure.

96. Defendants assert that potentially every activity in which Plaintiff WCFG and 28 other social welfare organizations engaged during the 2011 and 2012 recall elections constitutes a contribution to, or may be attributable to, Friends of Scott Walker ("FOSW"), Governor Walker's official campaign committee, by virtue of the fact that FOSW allegedly employed Mr. Richard "R.J." Johnson, a veteran political operative in Wisconsin who has ties to certain of the groups.

97. Defendants argue that R.J. Johnson's ties with FOSW and with other social welfare organizations during the recall campaign, including WCFG, were sufficient to render the activities of these organizations "coordinated" with FOSW. Under Defendants' theory, by operation of law, these organizations either (1) became subcommittees of FOSW, and so were subject to the same limitations applicable to FOSW, or (2) their expenditures became "contributions" to FOSW. *See* Ex. C, State's Consolidated Response to Motions to Quash Subpoenas Duces Tecum, *In re John Doe Proceedings* (Wis. Cir. Ct. Filed December 9, 2013).

98. A key problem, according to Defendants' theory, with the alleged coordination scheme, is that these "contributions" should have been *reported* as contributions in kind to FOSW to fulfill the legislative purpose in Wisconsin of transparency in elections.

99. The legal theory is flawed in several respects. Because WCFG engaged only in issue advocacy and not express advocacy at all times relevant to the investigation, the

coordination theory proposed cannot extend to its activities. Both Wisconsin law and the First Amendment preclude this application.

100. Under Wisconsin law, campaign finance regulation is predicated on communication being for a "political purpose." This term of art is, in turn, predicated on the communication expressly advocating the election or defeat of a clearly identified candidate. Thus, Wisconsin campaign finance law does not extend to issue advocacy, including the communications made by Plaintiffs. Without express advocacy, Plaintiffs' and other targets' communications are not properly subject to the limitations and disclosure requirements of Wisconsin law.

101. Under the First Amendment, regulation of campaign speech is subject to strict scrutiny and is only legitimate to the extent that they are narrowly tailored to the government's interest in preventing quid pro quo corruption. In addition, statutes and regulations cannot be overbroad or vague. These principles take on even more importance when the statutes or regulations are being applied to support criminal liability, and, under ordinary principles of statutory interpretation, all benefit of the doubt as to a vague statute goes to the defendant. The Supreme Court applied these principles to federal provision substantially identical to the Wisconsin statute and held that the provision would be unconstitutional unless restricted in its scope to express advocacy. *See Buckley v. Valeo*, 424 U.S. 1, 77-80 (1976). That decision was made over 40 years ago, and the law is thus well settled and should be known to a reasonable prosecutor. A reasonable prosecutor would also know that the Supreme Court's decision in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), similarly prohibits the intent-based standard for "political purpose" that Defendants assert reaches Plaintiffs' issue-advocacy communications.

102. In addition, Plaintiffs' advocacy did not promote Scott Walker at any time relevant to this investigation. Plaintiffs spoke out on the Budget Repair Bill and other issues, but did not promote Walker during the recall petition or during the recall election. Plaintiffs did not donate money to any organizations for the purpose of making communications regarding Scott Walker, and, to their knowledge, recipients never made communications regarding Scott Walker, with one exception that cannot be attributable to their donation. These facts are easily ascertainable, as virtually all of Plaintiffs' advocacy is available online, including on YouTube. As GAB has recognized in an official opinion issued over a decade ago and reaffirmed since, and which thus reflects settled law, any statutory language that could be read to prohibit all contact between independent organizations and candidates is unenforceable. Yet the purpose and effect of Defendants' actions is to render Plaintiffs' protected association and speech a criminal offense, demonstrating blatant disregarding for Plaintiffs' well-established constitutional rights.

103. Further, under the First Amendment, Defendants' "subcommittee" legal claim—which would cause issue advocacy groups to be deemed to be subcommittees of a campaign based on a purported "hub" connecting them—is legally flawed for the same reasons. It is also unlawfully overbroad because it amounts to a prohibition on association between these groups. The theory is also flawed because Plaintiffs' activities did not relate to the campaign of which they are alleged to be a subcommittee, and Supreme Court precedent is clear that Defendants may not redefine terms to circumvent First Amendment rights. *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996).

104. In addition, the factual theory that R.J. Johnson was the hub of a coordination scheme with FOSW is entirely unrelated to the numerous legislative campaigns that are included

in the subpoenas, demonstrating that the purpose of the subpoenas is to harass, not to gather information for a legitimate prosecution.

105. The Defendants have also alleged that the monetary transfers among the conservative social welfare organizations that are subject to the John Doe investigation are somehow illegal. In fact, there is absolutely no prohibition against independent groups donating money or otherwise communicating or coordinating with *one another*. For that reason, vast amounts of information related to communications between and among the independent organizations is irrelevant to the purported purpose of the investigation. Liberal groups engaged in precisely the same cash flow operations and have not been scrutinized by a John Doe investigation or otherwise.

106. Liberal groups involved in the Wisconsin recall campaigns conducted precisely the same activities that Schmitz and the other Defendants have identified as justifying an investigation into conservative groups, but there is no John Doe investigation into these groups. This selective use of prosecutorial discretion and retaliation itself violates the First and Fourteenth Amendments, irrespective of the legal validity of the prosecution. It is settled law that prosecutors may not make investigative and prosecutorial decisions as retribution for First Amendment activities or based on the political views of the respective targets, and a reasonable prosecutor would know that such bases for decision-making is unlawful.

107. The investigation is conducted primarily with the purpose of intimidating conservative groups, hobbling their operations, impairing their fundraising efforts, and otherwise preventing their participation in the upcoming election cycle. It has no legitimate legal basis.

E. The John Doe Judge Found that No Probable Cause Exists To Maintain the Investigation, But Defendants Have Announced Intent To Continue It Anyway

108. On January 10, 2014, John Doe Judge Peterson quashed the subpoenas issued in the investigation and found that the search warrants (long since executed) lacked probable cause. Peterson ordered the return of property seized from the raids as well as any property provided pursuant the subpoena demands.

109. In making this ruling, Peterson found that Defendants' campaign finance theories are invalid as a matter of statutory interpretation and that they violate the constitution. His ruling held unequivocally that "the statutes only prohibit coordination by candidates and independent organizations for a political purpose, and political purpose . . . requires express advocacy. There is no evidence of express advocacy." Ex. D Decision and Order Granting Motions to Quash Subpoenas and Return of Property (Jan. 15, 2014).

110. The ruling found that, without this limitation, "the definition of political purpose [in the Wisconsin statute] might well be unconstitutionally vague." *Id.* (citing *Buckley v. Valeo*, 424 U.S. 1, 77 (1976)). The ruling found that any "broad language" in Wisconsin law that might arguably extend to "all coordination" between a candidate and independent organizations "is constitutionally suspect," and that GAB "has recognized" this flaw in an opinion over a decade old. *See Id.* (Citing El. Bd. 00-2 (reaffirmed by GAB in 2008)). The ruling therefore makes clear that this law was well settled by 2013 and that a reasonable prosecutor would know of it.

111. The ruling further found that "statutes do not regulate coordinated fundraising. Only coordinated expenditures may be regulated and the State does not argue coordination of expenditures occurred." *Id.* (citation omitted).

112. In holding that the legal theory underpinning the investigation was invalid, the decision necessarily demonstrates that there is no legitimate government interest in continuing the investigation.

113. Defendants have not responded to Plaintiffs' requests that they cease and desist their conduct.

F. The Investigation Has Been Characterized by Prosecutorial Misconduct

114. Along with allowing prosecutors' ongoing access to Walker-related files, the investigation provided an avenue for them to engage in intimidating behavior and harassment to achieve the goals of their politically motivated quest.

115. One such incident began in September 2010, when Christopher Brekken, owner of Rice Lake Harley Davidson in Barron County, received a subpoena seeking the credit card number used for certain purchases from his dealership on a specific date. Brekken's dealership does not and did not maintain records of the credit card numbers of specific customers and had no way of obtaining the information. In fact, such information is protected by Wisconsin and federal law, and it would be illegal for Brekken's dealership to maintain records of credit card numbers or obtain them from other sources. Brekken timely informed Landgraf that he had no information in response to this request and could not obtain it. This answer did not satisfy Landgraf, and he obtained a bench warrant for Brekken's arrest. Brekken was arrested on October 19, 2010 and remained in jail even after producing the basic information about the purchases that he was legally allowed to maintain. Landgraf informed Brekken's attorney that he should pressure Brekken's bank or credit card company to turn over the information, despite that it would be illegal to do so. Brekken was finally released after he agreed to drive five hours to

Milwaukee to testify before the John Doe Judge, which resulted in his providing to Landgraf the same information that he had initially provided.

116. Brekken has subsequently sued Landgraf on several civil counts, including false imprisonment and abuse of process. In a hearing in that case in March 2013, Barron County Judge Timothy Doyle expressed his amazement at Landgraf's behavior: "Obviously a lot of what happened here was politically motivated and not—the conduct described is nothing that we as Wisconsinites should be proud of, bottom line . . . . Mr. Landgraf was behaving badly, probably for political reasons."

117. Landgraf expressed his own view of the affair in November 2013 to the Wisconsin Reporter: "What difference does it make? . . . We ultimately got the information and details we needed." Though clearly inconsistent with prosecutorial ethics, the statement accurately describes the philosophy and *modus operandi* of the investigation.

118. Another incident occurred in December 2011, when Landgraf ordered that Andrew Jenson, a commercial real estate broker, be arrested, and he was be jailed overnight. Jensen and his real estate firm were both donors to Walker's 2010 campaign. Defendant Robles personally undertook the task of arresting him. The incident caused a sensation in the Milwaukee papers, where Jensen's mug shot was prominently published, and it was broadcast that criminal charges were pending.. The papers also stated that Jensen was jailed for "refusing to cooperate" with the investigation. None of this was true. Over a year later, Jensen's attorney, with the consent and approval of the John Doe Judge, issued a short statement that his client was not a target of the investigation, that he would not be charged, and that he had "fully cooperated, and ha[d] truthfully answered all of the investigators' questions." Landgraf and Robles never explained their actions in light of the basis for jailing Jensen being proven false.

119. The investigation also involved home raids against unsuspecting individuals that resulted in the discovery of no criminal conduct whatsoever. In all cases, these raids were unrelated to legitimate law enforcement purposes but were intended to intimidate and harass persons affiliated with the County Executive's office.

120. At dawn on September 14, 2011, around a dozen law enforcement officers, including FBI agents, raided the home of former Walker aide Cynthia Archer in Madison. Dane County Sheriff Dave Mahoney told reporters that one of his deputies had been placed at the house during the search at the request of investigators from Chisholm's office and that his office was otherwise not involved. To this day, it is unknown what prosecutors were looking for or what they *thought* they were looking for, but the evidence seized has apparently not proven relevant to any of the crimes eventually charged. This, of course, did not prevent Archer's reputation from being harmed in the process as collateral damage of Defendants' search for materials to use against Walker.

121. As the investigation broadened into a state-wide effort, the intimidation tactics spread as well. Plaintiff O'Keefe first learned of the investigation on October 3, 2013, when he was served a subpoena asking for an astonishing range of documents, not only related to the Walker recall election, but going back as far as 2009 and implicating numerous election campaigns.

122. That same day, investigators coordinated at least three raids on private residences in residential neighborhoods. All began between 6:00am and 6:30am, dawn that day being just before 7:00am. School age children were home in at least two residences and school buses passed their houses during the course of the raids, which lasted over two and a half hours. The searches were conducted by six armed sheriff's deputies with flak vests, bright lights were aimed

at the houses, and multiple vehicles were parked on the lots, police lights ablaze. At least one official from the Milwaukee County District Attorney's Office was present at the sites.

123. Targets were not allowed to call attorneys. Investigators seized computers and phones of all family members, whether or not they were targeted in the investigations. All paper files that appeared political were seized. In at least one case, no inventory of items seized was provided, and inventories that were provided were at least partially erroneous. Affidavits purportedly showing probable cause have never been disclosed. The warrants show that Defendant Dean Nickel signed the affidavits.

124. Among the documents and records seized in the raids are some that are vital to targeted organizations' activities, including political speech and association.

125. There was no reason for prosecutors to believe that relevant information would have been destroyed or that raids were otherwise necessary.

126. Upon information and belief, these raids were calculated to threaten and intimidate and could easily have been conducted in a proper manner with the same investigative effectiveness.

127. The commencement of this new wave of activity was timed amidst key political events, including Walker's recall victory and the 2014 legislative session and campaign season.

128. These activities occurred with remarkably little judicial supervision. Judge Barbara Kluka approved as many as 100 subpoenas of breathtaking scope and home raids related to at least 29 organizations based on meritless legal theories of campaign finance going to the heart of protected First Amendment activity and implicating documents covered by, among others, First Amendment privilege. Yet billing records show that she only completed one day of work. The extraordinary speed by which she approved these complex demands demonstrates

how easy it has been for Defendants Schmitz, Chishom, Landgraf, and Robles to push their agenda by the John Doe judges, at least until Judge Peterson was appointed.

129. In this one day's worth of work, Judge Kluka also approved the substantially identical secrecy orders in force in the John Doe proceedings (collectively, "Secrecy Order"). *See* Ex. E, Secrecy Order. The Secrecy Order provides no information as to why the context of the investigation requires secrecy, other than boilerplate statements about preventing "tampering with prospective testimony or secreting evidence," and "render[ing] witnesses more free in their disclosures." The Order was not carefully reviewed: one version stated the purpose "to render witnesses more free in their disclosures" twice. The Secrecy Order provides that employees of the Milwaukee County District Attorney's Office, including support staff, will have access to the secret materials. Kluka also made the findings allowing for the appointment of Defendants Schmitz as Special Prosecutor.

130. Judge Kluka's involvement with the case was improper, and she recused herself because of an undisclosed "[c]onflict" after rubberstamping dozens of subpoenas, warrants, and secrecy orders on one day's work. This decision has never been explained. Judge Peterson was appointed as the new John Doe Judge.

131. The subpoenas are overly broad and request an extraordinary amount of information. Ex. F, O'Keefe Subpoena. Upon information belief, for each target, the subpoena demands all information related to several individuals and groups, including R.J. Johnson, Deborah Jordahl, and Kate Doner, each of whom has been vital to WCFG. The subpoena demands *all* information related to *all* 2011 and 2012 recall elections. It also demands *all* communications with *every other* subpoena recipient and potentially other individuals entities. Further, it seeks documents going back even before the relevant time periods, in some cases to

2009. And many of the demands are not limited to the recalls, to Wisconsin, or to political matters.

132. The subpoenas also demand, for each recipient, *all* fundraising information, including identities of donors. While this information would be quite helpful in intimidating organizations and their donors, it has no rational relationship to the theories of coordination law advanced by Defendants as the basis for the investigation, as coordination is a theory that implicates the relationship between an independent organization and an official campaign committee, not the relationship between an organization and its donors.

133. The subpoenas also request, for each recipient, *all* records of "money spent." While this information would be quite helpful in intimidating organizations and their donors, it has no rational relationship to the theories of coordination law advanced by Defendants as the basis for the investigation, as coordination implicates communications between an independent organization and an official campaign committee, not money spent in an election, even money given from one independent organization to another.

134. The subpoenas demand other information in broadly worded requests that have no plausible relationship to any legitimate investigative interest.

135. The information demanded includes significant materials protected by the First Amendment, including under the doctrine of First Amendment privilege. When asked—after the raids had occurred—what Schmitz's approach would be to ensuring that the First Amendment privilege (among others) was protected, he indicated to Mr. O'Keefe's counsel that he had never heard of the concept, demonstrating further disregard for the constitutional rights of their targets and their purpose of intimidation. Schmitz has subsequently indicated that his attorneys will not recognize First Amendment privilege protection as part of their ethical restraint. First

Amendment privilege, nevertheless, is clearly established law and a reasonable prosecutor in Schmitz's position would know that inspection of political materials in violation of the privilege is unlawful.

136. The information demanded in the subpoenas extends far beyond the mistaken legal theories cited as justifying the investigation. The coordination scheme posited by Defendants could not be remotely related to the donors of these groups or communications between and among them, none of which are Wisconsin political committees. In other words, *most* of the information sought in the subpoenas could not be relevant to Defendants' legal theory, even if taken as valid on its face. In response to a motion to quash certain of these subpoenas, Defendant Schmitz entirely ignored this fatal flaw and offered no justification for these far-reaching demands.

137. The demands for documents in these subpoenas impose a tremendous burden on these organizations, as they incur large legal fees and review thousands of documents. And, in many cases, the information demanded is already in the possession of Defendants through the home raids.

138. The purpose of the subpoena requests and the broad scope of the investigation is to intimidate, harass and otherwise discourage these conservative groups from engaging in First Amendment protected speech.

139. The John Doe judge eventually quashed these subpoenas with respect to certain parties who filed motions, but Defendants have announced their intention to continue the investigation.

E. The Targets of the Investigation Were Selected Based on Political Views and Associations

140. All the while, as Defendants Chisholm and Landgraf were continually engaging in an ever-broadening investigation in an attempt to discredit Scott Walker and to harass and intimidate his supporters, the Milwaukee County District Attorney's Office continually refused to investigate credible allegations of misconduct involving Democrats.

141. In January of 2010, the City of Milwaukee awarded Jeff Fleming a no-bid contract paying $75 an hour for up to 15 hours a week with benefits. Through December 2009, Fleming had been a campaign spokesman for Mayor Tom Barrett, who was then a candidate against Walker for the 2010 governorship. His contract was to perform public relations services for a division of the Mayor's office. During his time in this role, Fleming went back and forth between county duties, private business work, and campaign work for Barrett. Among other things, Fleming worked on speeches for Barrett, and correspondence regarding this and other campaign activities was sent both to Fleming's city account and his personal account. Fleming was hired again in August 22 to be a part-time spokesman for the Department of City Development. Barrett's Chief of Staff explained that "We knew Jeff, and were comfortable with him," and news stories raised the concern that Fleming was working for the campaign on city time. The District Attorney's Office did not investigate this appearance of impropriety, much less commence an open-ended investigation into Barrett's campaign.

142. In spring 2010, the Milwaukee County District Attorney's Office declined to prosecute a county employee named Christopher Liebenthal, who was caught engaging in "excessive political blogging" for liberals from his taxpayer-funded computer. The District Attorney's Office recognized that "Mr. Liebenthal's actions constitute an extreme example," but stated that it would prefer to see the situation handled as a personnel matter rather than a criminal

matter. The decision by Defendants Chisholm and Landgraf to treat this conduct as a personnel matter is completely different from how they treated indistinguishable conduct by Wink and Rindfleisch. Each was charged criminally on multiple counts, and Rindfleisch was sentenced to jail time for similar conduct treated as a "personnel" matter in Liebenthal's case.

143. In September 2010, the *Milwaukee Journal-Sentinel* reported that unions and Democratic candidates were coordinating a plan to attack Scott Walker for neglecting county facilities in connection with a parking garage incident. Unions would sponsor television ads, officials would continue to call for an independent investigation, and the Democratic governor's administration would allow state engineers to inspect the county facility. Defendants did not investigate this appearance of impropriety or coordination , much less commence an open-ended investigation into the entire left-wing movement in Wisconsin.

144. On September 22, 2010, the Wisconsin Republican Party filed a formal complaint with GAB alleging illegal coordination based on comments by John-David Morgan, an SEIU Local # 1 employee who actively supported Barrett's campaign, to a Walker campaign member. Morgan boasted that unions were commanding local media coverage of the campaigns and that county supervisors—he mentioned at least one specific name—were involved as well. Both the Morgan incident and the ensuing Republican GAB complaint received coverage in the *Milwaukee Journal-Sentinel* and other news sources. Defendants did not investigate this coordination, much less commence an open-ended investigation into the entire left-wing movement in Wisconsin.

145. In 2011, the Wisconsin Republican Party filed a complaint with GAB regarding Shelly Moore, a Democratic candidate for government and a public school teacher. The complaint alleged that she used school equipment, including her computer, for her recall

campaign. In a work email, published in news stories about the complaint, Moore acknowledged that she was prohibited from using public property for this purpose, but stated "I don't frankly care." This was reported widely in Wisconsin and around the nation. Defendants did not investigate this Moore's conduct, much less commence an open-ended investigation into the entire left-wing movement in Wisconsin.

146. In July 2011, weeks before the recall election between Democratic Party challenger Shelly Moore and Republican incumbent Sheila Harsdorf, reports surfaced that We Are Wisconsin offices were identified to be operating out of the same building offices as official Shelly Moore campaign offices in multiple sites. Defendants did not investigate this appearance of coordination, much less commence an open-ended investigation into the entire left-wing movement in Wisconsin.

147. Also in summer of 2011, a complaint was filed with GAB against Friends of Senator Hansen, a Democratic incumbent, alleging coordination with liberal groups. The complaint states "Any person with eyes can see after reviewing the material sent to homes, or from watching TV advertisements sponsored by these various groups, that a direct violation of campaign law has occurred." The District Attorney's Office did not investigate this appearance of coordination, much less commence an open-ended investigation into the entire left-wing movement in Wisconsin.

148. On August 2, 2011, the Republican Party of Wisconsin filed a complaint with GAB asking for an investigation of "possible coordination" between representative Sandy Pasch and Citizen Action of Wisconsin, where Pasch serves on the board of directors. Defendants did not investigate this appearance of coordination, much less commence an open-ended investigation into the entire left-wing movement in Wisconsin.

149. On November 19, 2011, the Committee to Recall Scott Walker, a left-leaning political committee subject to the same requirements under Wisconsin law as Walker's official recall committee, including prohibitions on corporate contributions, announced a gathering to kick off the Walker recall effort. The event was widely announced as being "[i]n coordination with We Are Wisconsin, United Wisconsin, and the [Democratic Party of Wisconsin] . . . ." In fact, the Recall Committee was formed by leading Union and Democratic social welfare organization members, and the timing of the recall was carefully discussed between these members, political candidates, and nationwide Democratic Party leaders, including officials from the Barack Obama presidential campaign. In one prototypical meeting in October 2011, union leaders met with Obama's campaign manager and deputy campaign manager for several hours to discuss the timing of the recall. Social welfare organizations such as United Wisconsin had been collecting unofficial signatures since February 2011 in preparation for the recall. United Wisconsin registered a political action committee for the recall in March 2011. This activity was reported in November 2011 as raising questions about United Wisconsin's "independence." In fact, the word "coordination" or a derivation was used regularly in articles to describe United Wisconsin's role in the recall petition. Defendants did not investigate this coordination, much less commence an open-ended investigation into the entire left-wing movement in Wisconsin.

150. On March 25, 2012, Daniel Bice of the Milwaukee Journal Sentinel reported that Wisconsin for Falk had come "almost out of nowhere" and "blitzed" local airwaves with $1.6 million of television advertisements to favor Kathleen Falk. The name of this supposedly independent group was suspiciously similar, noted the article, to Falk's official committee, "Falk for Wisconsin," and the candidate appeared in the advertisements, directly staring at the camera, clearly demonstrating that Falk worked with this group to film the ads. Other advertisements

produced by this supposedly independent organization include Falk voice-overs, again indicating her involvement in creating the advertisements. Defendants did not investigate this appearance of coordination, much less commence an open-ended investigation into the entire left-wing movement in Wisconsin.

151. In May 2012, Michael Dean, on behalf of Anthony Ostry, filed a formal complaint with GAB and with John Chisholm, alleging campaign violations by Wisconsin AFL-CIO. The union sent advertisements constituting express advocacy by mail and was apparently designed to fall within the "members only" disclosure exemption of Wis. Stat. § 11.21. In fact, the mailing was clearly deficient by that statute's guidelines, most obviously in that Ostry, who was not an AFL-CIO member, received the document. The complaint alleges that AFL-CIO must have known of these blatant deficiencies, indicating willful violation of the statute. No one from GAB or the Milwaukee County District Attorney's Office ever followed up with Ostry or Dean and no investigation occurred, must less a state-wide John Doe investigation concerning nearly thirty social welfare organizations with regard to thirteen recall elections. Defendants did not investigate this appearance of impropriety, much less commence an open-ended investigation into the entire left-wing movement in Wisconsin.

152. AFL-CIO's annual report filed with the Department of Labor in September 2012 shows a $69,500 expenditure to the Center for Media and Democracy under Schedule 16 for "Political Activities and Lobbying," with the stated purpose of "Support of State Legislative Advocacy." But according to GAB's records, the Center for Media and Democracy, which is a 501(c)(3), was not a registered lobbyist at the relevant time period, and top staffers of the group were not registered as individual lobbyists. Lobbying without the proper registration violates

Wisconsin state law, but the Defendants did not investigate this appearance of impropriety, much less commence an open-ended investigation into the entire left-wing movement in Wisconsin.

153. In November 2012, the Federal Election Commission fined the Professional Firefighters of Wisconsin and eleven former board members $58,000 for knowingly and willfully violating campaign laws and regulations. This union is also a state committee in Wisconsin, has donated to Democratic candidates in Wisconsin (including Kathleen Falk), and has activities on the state level. Defendants did not investigate this appearance of impropriety, much less commence an open-ended investigation into the entire left-wing movement in Wisconsin.

154. In November 2013, the Center for Media and Democracy, a left-wing 501(c)(3) hosted a conference call between reporters and its director Lisa Graves, who is well connected with Democratic Party members in Madison, Milwaukee, and statewide. One reporter asked about the investigation and whether the same activity being investigated had occurred among liberal and Democratic groups. Graves's response indicated that such activity did occur, but was distinguishable, she said, because "they're advancing not just an ideological agenda but an agenda that helps advance the bottom line of their corporate interests. That's quite a distinct difference from some of the funders in the progressive universe." Defendants did not investigate this acknowledgement of coordination, much less commence an open-ended investigation into the entire left-wing movement in Wisconsin.

155. Upon information and belief, numerous other activities materially identical to the activities giving rise to the manifold branches of this massive investigation have occurred within Democratic campaigns and among left-wing issue advocacy and independent expenditure

groups. Defendants did not investigate any of this conduct, much less commence an open-ended investigation into the entire left-wing movement in Wisconsin.

156. All of this demonstrates that Defendants' investigation is motivated by an improper purpose: to retaliate against, or chill, conservative political speech and association. The investigation is not a legitimate investigatory process, but is instead a biased, politically motivated scheme primarily with the purpose of intimidating conservative groups, hobbling their operations, impairing their fundraising efforts, and otherwise preventing their participation in the upcoming election cycle.

F. The Investigation Has Had the Purpose and Effect of Influencing Wisconsin Politics

157. The Secrecy Order in the investigation has prevented the citizens of Wisconsin from fully discovering the prosecutorial abuses involved from witnesses and targets and prevented witnesses from defending themselves in the public arena. However, the Order was not very successful in preventing information from reaching the public. In fact, information from the investigation routinely reached the public at critical times during the 2010 gubernatorial election, the 2011 budget battle, and the 2011 and 2012 recall elections. Upon information and belief, some of this information reached the public through direct or indirect selective leaks from the DA's Office. Other information reached the public through other avenues that are not or cannot be controlled by secrecy orders. John Doe has repeatedly been a political rallying cry—and even a fundraising tool—for Democrats at each turn in influence important political events.

158. Upon information and belief, the first reports of the investigation were leaked to the press in the days following Scott Walker's victory in the Republican primary. Thirteen days after that election, Daniel Bice of the Milwaukee Journal Sentinel gave the first public report on the investigation. Citing unnamed sources, Bice informed the public that the John Doe

proceeding consisted of "two investigations," one into Gardner's campaign contributions and the other related to Milwaukee County employees and Darlene Wink's resignation. The article did not mention the Operation Freedom funds, but made sure to draw connections with the upcoming gubernatorial race. The source of this information was, by necessity, direct or indirect leaks from the Milwaukee County Attorney's Office, which operated under the control of Defendant Chisholm.

159. The day before the gubernatorial election, investigators chose to execute search warrants into Rindfleisch's residence and the Milwaukee County Offices, evidently with the hope of attracting some last minute John Doe attention before the election. Nothing would have prevented investigators from delaying the searches a few days until after the election.

160. In January 2012, Democratic Party Chairman Michael Tate sent out an email solicitation to supporters, asking them to give $10 "so we have the resources we need to expose Scott Walker's latest scandal involving more than $60,000 that was stolen from military veterans and their families." A spokesman for state Democrats explained that "Using these facts about Walker to motivate our base and muster resources to fight his vast sums of sleazy corporate cash is entirely appropriate."

161. In February and the following months of 2012, Scott Walker made several disclosures related to the investigation, first, that he had hired criminal defense attorneys to represent him in the matter, next, that he had established an official criminal defense fund, and later, that he had been reimbursed for legal expenses paid from his own pocket from his campaign. Numerous articles online and in print and advertisements followed each disclosure, ridiculing Walker and calling him a corrupt government official. The John Doe investigation,

thus, harmed Scott Walker politically, but the Secrecy Orders prevented him from defending himself adequately to the public.

162. On April 15, 2012, Daniel Bice reported that the John Doe investigation presented the "biggest question hanging over" the recall election. In particular, the article asked whether Chisholm would file additional criminal charges before the June 5 election. In fact, as of three months earlier, all complaints that would ever be filed to date from the investigation had already been filed. But the investigation continued as a means of attempting to influence the outcome of the recall election.

163. On May 28, 2012, the *Milwaukee Journal-Sentinel* reported that the John Doe investigation had zeroed in on key evidence related to the 2010 county bidding process that implicated Scott Walker and his longtime campaign advisor John Hiller. The report quotes some inside sources, upon information and belief directly or indirectly from the County Attorneys' Office, as calling this lead "a bombshell" and hinting that a criminal complaint might be in the works. The election was one week away.

164. On May 30, 2012, six days from the election, the Democratic Party of Wisconsin used the John Doe proceeding for further political advantage in a press release announcing that Walker had "mistakenly" admitted that he was under criminal investigation by referencing his criminal defense fund. The press release also played up the home raids on Rindfleisch and Archer as evidence of the severity of the matter. News coverage of this and similar advertising efforts was extensive, as reporters speculated about possible impending criminal charges against Walker at this critical time in Wisconsin politics.

165. In the final days before the 2012 gubernatorial recall, Tom Barrett made John Doe central to his campaign. Near the end of May 2012, his campaign issued advertisements

discussing the John Doe investigation and particular evidence it had uncovered and asserting that the evidence showed criminal misconduct by the governor and his employees. These assertions were false as there was no misconduct by the governor, but the continuing John Doe investigation by Chisholm—who had publicly supported Barrett in past elections—lent them improper credibility.

166. On May 31, the County Attorney's Office indicated that it granted immunity to Fran McLaughlin, former county spokeswoman, in the John Doe proceeding, and Tom Barrett's campaign issued a statement calling on Walker to "come clean with the people of Wisconsin" and asserting that "his credibility is stretched to the limit."

167. On June 1, in the final debate of the recall election, Barrett repeatedly used the John Doe investigation as a line of attack against Walker.

168. The more recent expansion of the investigation is similarly aimed at influencing the upcoming 2014 legislative session and campaign period, during which Walker will run for re-election as Governor, especially with the purpose of intimidating conservative groups, hobbling their operations, impairing their fundraising efforts, and otherwise preventing their participating in public debate during these times of intense public interest in matters of politics and policy.

169. The first public announcement of the new phase of the investigation was on October 21, 2013, in a Daniel Bice article in the *Milwaukee Journal-Sentinel.* Bice cited unnamed sources and provided the basic facts of the investigation, including that special prosecutor Schmitz had been appointed to run the investigation, that it had "spread to at least five counties," and that Defendant Landgraf had been investigating "'all over the place.'" Much of the activity was occurring in Madison and little information was known until rather recently, said

the article. The subject matter of the investigation was events occurring since 2010, it said. On information and belief, the information from the article was leaked directly or indirectly from the DA's Office with the purpose of influencing the 2014 campaign cycle and legislative session and chilling conservative activism.

170. Around November 19, 2013, Democratic Party-affiliated Senate Minority Leader Chris Larson and the State Senate Democratic Committee issued a fundraising appeal based on the investigation, asking donors to contribute $29 to fight against the 29 conservative groups that were under investigation.

171. When asked about the investigation, the Democratic Party Chairman was quoted as stating that "[y]ou can assume they're finding serious acts of wrongdoing."

172. Upon information and belief, the Defendants intend selectively to leak information from the investigation to the media during the 2014 legislative session and election cycle to chill conservative speech and influence legislative and electoral outcomes.

G. The Convictions Obtained from the Investigation Do Not Legitimize It

173. The investigation has, to date, been a complete failure. Although the Milwaukee County District Attorney's Office paraded six convictions around in support of its legitimacy, none of these convictions in any way implicated Walker's staff for campaign-finance violations, the county bidding process, or Walker's conduct of his gubernatorial administration, and, thus, the convictions can in no way legitimize these detours. Thus, the convictions are entirely unrelated to the politicized bent of the investigation—which turned up nothing—and are entirely unrelated to the ongoing inquiries, which has absolutely no chance of success.

174. In October 2012, Kevin Kavanaugh was convicted of embezzlement from the funds belonging to Operation Freedom. Kavanaugh's conviction simply represents what would

have been the result of a disciplined, ethical investigation undertaken without political motivation. Although issues related to Operation Freedom were the original purpose of the first John Doe petition, little evidence used in the criminal complaint against Kavanaugh resulted from the John Doe investigation, as all but one interview described therein was given by a willing witness without a secrecy order.

175. In November 2012, Timothy Russell pled guilty to one felony count of embezzlement for theft from the Operation Freedom funds. As with Kavanaugh's conviction, Russell's conduct would have been discovered simply by investigating the Operation Freedom funds and is unrelated to the political campaign waged by the investigation.

176. In April 2011, William Gardner pled guilty to campaign-finance related violations. Although Defendants Chisholm and Landgraf used the Gardner aspects of the investigation as a pretext to turn John Doe into a political investigation, all critical evidence was gathered outside the John Doe investigation. Gardner was sentenced to community service and probation.

177. In October 2012, Kelly Rindfleisch pled guilty to one count of misconduct for doing campaign work for lieutenant governor candidate Brett Davis while at work for Milwaukee County. She agreed to the plea because she lacked the funds to mount a legal defense and hoped to avoid jail time to care for her 88-year-old, ailing mother. At her sentencing hearing, Landgraf falsely alleged impropriety on behalf of Scott Walker. In doing so, Landgraf disclosed materials covered by the Secrecy Order that did not relate to the case against Rindfleisch. Rindfleisch's conviction is not remotely related to the initial justification for the John Doe investigation and is not related to ongoing inquiries.

178. In February 2012, Darlene Wink pled guilty to political fundraising in a courthouse. As with Rindfleisch, her conviction is the result of prosecutors turning peoples' lives upside down in a politically motivated fishing expedition. Defendants Chisholm and Landgraf chose not to apply the same scrutiny to liberal individuals. Both Fleming and Liebenthal provided similar opportunities to use the power of their office to scrutinize individuals for campaign-related technical impropriety, and they declined. Meanwhile, Wink was the first channel used to launch the investigation, and her conviction does not relate to the initial justification for the John Doe investigation and is not related to ongoing inquiries.

179. In January 2013, Russell's domestic partner pled guilty to a misdemeanor charge of contributing to the delinquency of a minor and was subsequently sentenced to 50 hours community service. There is no relationship whatsoever between this conviction and the goals or legal theories of the ongoing investigation.

III. The Investigation Is Calculated To Chill Protected Speech

180. The investigation retaliates against conservative individuals and groups on the basis of the content of their speech and their political associations, thereby chilling protected First Amendment speech and association.

181. An individual or organization considering conservative political advocacy in Wisconsin will know from the precedent of the investigation that he or she risks coming under official scrutiny and attack and suffer the consequences, including legal expenses. This may include being subpoenaed to turn over documents that are entirely unrelated to any legitimate scope of inquiry and threatened public disclosure of information that is protected from disclosure under federal law. It could very well involve a home raid that embarrasses family members, causes inconvenience, and raises questions with neighbors and the press.

182. Under Defendants' view of Wisconsin law an individual or organization interested in engaging in political speech cannot understand what is allowed and what is prohibited simply by reading the statute and may face investigation or prosecution for speech or association that is constitutionally protected. Such a person will understand in the future that the mere indicia of "coordination" or perceived intent to support a candidate or campaign may subject him or her to years' long investigations, home raids, subpoenas, and possible prosecution, and the odds of that harassment increase substantially if he or she is considering taking a conservative position. He or she thus is reasonable to curtail protected speech and association beyond what is legally required.

183. The natural and probable consequence of the investigation is therefore to chill speech and association.

IV. The Investigation Has Actually Chilled First Amendment Protected Speech and Associational Activities

184. Plaintiff Eric O'Keefe's nationwide political activities were debilitated from the time he received the subpoena, and he and the organizations with which he is affiliated will continue to remain on the sidelines in Wisconsin until the investigations end.

185. Plaintiff WCFG has been sidelined entirely and has ceased all First Amendment protected activity.

186. As the investigation is ongoing throughout the 2014 legislative session and campaign period, the investigation will have the intended effect of silencing Plaintiffs in Wisconsin during the 2014 legislative session and election cycle.

187. The subpoenas and home raids occurred on October 3, 2013. Even before coverage in the press, O'Keefe discovered immediate impediments to his political activism. Conference calls for the following week were cancelled. Phone calls went unanswered or were

kept unusually short. Several phones from his organization were seized in raids and were not in available for use. Vital documents and records were also seized.

188. O'Keefe lost significant fundraising potential instantly, as few if any donors will give to an organization under investigation for campaign finance violations. Moreover, O'Keefe is under a Secrecy Order prohibiting disclosure of information to prospective donors of the investigation, and yet it is unethical to raise money from donors without such disclosure.

189. WCFG's funds were soon near depletion, and it lost all capacity for political speech.

190. WCFG, concerned about the scope of inquiries and possible reprisals, aborted an advertising campaign that was then underway. The campaign highlighted improvements in the economy and attributed them in part to the Budget Repair Bill.

191. By this time, WCFG would have had at least three advertisement campaigns underway and/or in the works, and all of these efforts have ceased entirely.

192. Plaintiffs will continue to be silenced during the 2014 legislative session and election season.

193. Upon information and belief, all the targets of the investigation are experiencing the same debilitating effects on their ability to engage in political speech and association.

194. Upon information and belief, liberal and Democratic-supporting groups are not being debilitated in this way and thus will participate in the 2014 legislative session and campaign period.

195. Because the conservative groups and individuals that are targeted in the investigation represent nearly the whole of the conservative side of issue advocacy in Wisconsin, the investigation will result in a substantial competitive advantage for liberal advocacy and

Democratic candidates in the 2014 legislative session and campaign period. Upon information and belief, the investigation is calculated to achieve this precise result.

**COUNT I:
RETALIATION IN VIOLATION OF THE
FIRST AND FOURTEENTH AMENDMENTS**

196. Plaintiffs repeat and re-allege the averments of paragraphs 1-195 as if fully set forth herein.

197. Plaintiffs engaged in activity protected by the First Amendment, including, without limitation, sponsoring, creating, and publishing issue advocacy relative to the Budget Repair Bill and other issues during the 2011 and 2012 recall elections.

198. Defendants' conduct under color of state law would deter First Amendment activity of a person of reasonable firmness and that has, in fact, deterred the First Amendment activity of Plaintiffs and others. This deprivation of Plaintiffs' rights constitutes irreparable harm.

199. Plaintiffs' First Amendment activity, including the particular viewpoints they expressed, was the primary or at least a substantial motivating factor in the Defendants' decision to take their retaliatory actions.

200. As a direct result of Defendants' violation of his First and Fourteenth Amendment rights, Plaintiffs have sustained damages in an amount to be determined at trial. The right to be free from retaliation for exercise of constitutional rights, including the First Amendment, is well established and reasonable officers in the position of Defendants would know that retaliating against Plaintiffs and others based on the content and viewpoint of their speech is unlawful.

201. Unless Defendants are enjoined from committing the above-described constitutional violation, Plaintiffs will continue to suffer irreparable harm.

COUNT II:
SELECTIVE USE OF PROSECUTORIAL POWER IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS

202. Plaintiffs repeat and re-allege the averments of paragraphs 1-195 as if fully set forth herein.

203. Defendants, acting under color of state law, have singled out Plaintiffs as targets for investigation, subpoenas, and other forms of prosecutorial power, while others similarly situated were not targeted.

204. The decision to target Plaintiffs was based on arbitrary classifications, including without limitation, the exercise of their First Amendment rights and the content and viewpoint of their First Amendment protected speech. This conduct has deprived and continues to deprive Plaintiffs of their rights under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, causing them irreparable harm.

205. As a direct result of Defendants' violation of the First and Fourteenth Amendments, Plaintiffs have sustained damages in an amount to be determined at trial.

206. Unless Defendants are enjoined from committing the above-described constitutional violations, Plaintiffs will continue to suffer irreparable harm.

COUNT III:
BAD FAITH EXERCISE OF PROSECUTORIAL POWER WITH NO LEGITIMATE GOVERNMENT PURPOSE IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS

207. Plaintiffs repeat and re-allege the averments of paragraphs 1-195 as if fully set forth herein.

208. The Defendants' continued investigation into Plaintiffs, under color of law, has no reasonable possibility or expectation of obtaining a lawful conviction.

209. The Defendants' investigation into Plaintiffs' activities is in bad faith and has the purpose of retaliating against Plaintiffs for exercise of their constitutional rights, including without limitation freedom of speech and association, and has the purpose of discouraging and preventing the exercise of their constitutional rights, including without limitation free speech and association, in the future.

210. Defendants' continued investigation into Plaintiffs has thereby deprived them and continues to deprive them of their rights under the First and Fourteenth Amendments, causing irreparable harm.

211. As a direct result of Defendants' violation of the First and Fourteenth Amendments, Plaintiffs have sustained damages in an amount to be determined at trial.

212. Unless Defendants are enjoined from committing the above-described constitutional violation, Plaintiffs will continue to suffer irreparable harm.

COUNT IV:
INFRINGEMENT OF FIRST AMENDMENT PRIVILEGE IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS

213. Plaintiffs repeat and re-allege the averments of paragraphs 1-195 as if fully set forth herein.

214. Defendants have compelled disclosure, through subpoenas and home raids, of materials including, among other things, information about donors to WCFG and WCFG's internal deliberations and strategies.

215. This compelled disclosure already has and will continue to result in harassment of Plaintiffs and others affiliated with them, including WCFG donors, unless enjoined.

216. This compelled disclosure already has and will continue to chill Plaintiffs' political speech and association. Other consequences of the demands include depriving Plaintiffs

of fundraising ability and intimidating Plaintiffs into refraining from free speech, with the result of negative consequences, including the inability to participate in the 2014 legislative session and campaign period.

217. This compelled disclosure already has and will continue to discourage others from becoming affiliated with WCFG, including through donations, unless enjoined.

218. Defendants have no compelling interest in forcing these disclosures, as the investigation is undertaken in bad faith and the means of compelling disclosure are not narrowly tailored.

219. As a result of Defendants' violation of the Fourth and Fourteenth Amendments, Plaintiffs have sustained damages in an amount to be determined at trial.

220. Unless Defendants are enjoined from committing the above-described constitutional violation, Plaintiffs will continue to suffer irreparable harm.

COUNT V:
INFRINGEMENT OF THE RIGHT OF FREE SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS

221. Plaintiffs repeat and re-allege the averments of paragraphs 1-195 as if fully set forth herein.

222. The First Amendment protects Plaintiffs' speech about government officials, the conduct of state government, and other matters of public interest.

223. The Secrecy Order imposed by Defendants and Peterson acting under color of state law prohibits Plaintiffs from disclosing much of the facts alleged above regarding the actions of the Defendants, who are public officials, and the conduct of the John Doe investigation, a matter of public interest.

224. The Secrecy Order threatens punishment by contempt for protected expression, and thereby unconstitutionally deprives Plaintiffs of their free speech rights under the First Amendment, causing them irreparable injury.

225. Unless Defendants and Peterson are enjoined from committing the above-described constitutional violation, Plaintiffs will continue to suffer irreparable harm.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment against Defendants and Peterson, including:

a) A finding that Defendants' acts and conduct constitutes a violation of Plaintiffs' constitutional rights, including those guaranteed by the First and Fourteenth Amendments;

b) Both preliminary and permanent injunctions restraining Defendants and all those in privity, concert, or participation with them from continuing the John Doe investigation;

c) An order relieving O'Keefe, WCFG, and others from any duty to cooperate further with Defendants in their bad faith investigation;

d) An order mandating that Defendants immediately return all materials obtained in the John Doe investigation to their rightful owner and destroy all copies of such materials;

e) An order relieving O'Keefe and WCFG from compliance with the Secrecy Order;

f) Compensatory damages sustained as a result of Defendants' unlawful deprivation of Plaintiffs' constitutional rights;

g) An award of the attorneys' fees and costs and other expenses, including pre-judgment and post-judgment interest, that Plaintiffs have been forced to incur; and

h) Any and all other relief that the Court determines is just and proper.

JURY DEMAND

Pursuant to Fed. R. Civ. P. 38(b), Plaintiffs respectfully demand a trial by jury of all issues triable by a jury in their Complaint.

Dated: February 10, 2014

Respectfully submitted,

/s/ David B. Rivkin

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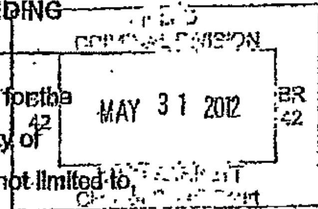
* Admission to the Eastern District of Wisconsin pending

Exhibit A

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

IN THE MATTER OF A JOHN DOE PROCEEDING Case No.

PETITION FOR COMMENCEMENT OF A JOHN DOE PROCEEDING



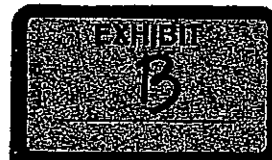
WHEREAS, I, Bruce J. Landgraf, Assistant District Attorney in and for the County of Milwaukee have been assigned to an investigation in the County of Milwaukee, State of Wisconsin, relating to potential crimes including, but not limited to, a violation of Wisconsin Statutes §943.20(1)(b), Theft by Bailee;

WHEREAS, based upon the investigation as set forth in the attached Affidavit of Investigator Jeffrey Doss, I have reson to believe that a violation of §943.20(1)(b) of the Wisconsin Statutes, Theft by Bailee, has taken place and further, I have reason to believe this violation has been committed within the jurisdiction of this court; and

WHEREAS, I believe based upon these investigations that further information concerning this criminal violation can be revealed via a John Doe proceeding;

NOW, THEREFORE, based upon the information contained in the attached Affidavit of Investigator Jeffrey Doss showing evidence that a criminal violation of Wisconsin Statutes §943.20(1)(b), Theft by Bailee, may have been committed in Milwaukee County, I hereby request that a John Doe proceeding, pursuant to Section 968.26, Stats., be conducted and that witnesses be subpoenaed and questioned on oath relating thereto.

FURTHER, I request that these John Doe proceedings be secret for the following reasons. This investigation will focus upon "Operation Freedom," an annual event sponsored by the Office of the Milwaukee County Executive. According to the Operation Freedom 2006 flyer, the event is intended to "thank. . . our United States Armed Forces members and Veterans for a Job Well Done." In about 2006, the Military Order of the Purple Heart ("the Order") received monies from Milwaukee County for the purpose of administering expenses related to Operation Freedom. No satisfactory explanation for the disposition of about $11,000 has been forthcoming from the Order. As part of the pre-Doe investigation, Investigator Jeffrey Doss sought to obtain documentation that would form the basis of tracing the funds from Milwaukee County to the Order. The Office of the County Executive has been unwilling or unable



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to provide such documentation. It is unclear at this juncture why the Office of the County Executive has not produced (or has not caused another Department to produce) these records. Consequently, it is expected that this investigation will lead to an examination of business records maintained by the County Executive's office and other county Departments. Likewise, I anticipate subpoenaing county officials as part of an effort to identify the origin of the funds transferred to the Order. If held publicly, an investigation into this matter will likely be the subject of significant publicity in the print and broadcast media. This publicity of allegations and inferences would be particularly unfair to the County Executive, a man who is seeking the nomination of the Republican Party for the Office of Governor of the State of Wisconsin in this Election Year. While it was possible to approach and potentially interview witnesses outside the construct of a John Doe proceeding, such an investigative tactic has not yielded satisfactory results. It may be that the County Executive's Office is reluctant to provide information to investigators due to a fear of political embarrassment. It is therefore my opinion that the formality and the secrecy of a John Doe proceeding will increase the likelihood of complete and frank statements by persons who may – in an informal, non-secret setting – feel uneasy about providing a candid, voluntary statement.

FURTHER, for these reasons, I respectfully submit that the balance between – on the one hand - the public's right to be informed about this John Doe proceeding, and – on the other hand – the legitimate need to maintain the secrecy of these proceedings, must be struck, at this juncture, in favor of a secret proceeding. *In re John Doe Proceeding*, 2003 WI 30, 260 Wis.2d 653, 660 N.W.2d 260 at ¶66.

FURTHER, notwithstanding any secrecy order, I request that the court allow the following classes of persons to have access to the record of the John Doe proceedings to the extent necessary to perform their duties: all prosecutors, support staff and investigative staff of the Milwaukee County District Attorney's Office. I anticipate individuals from the investigative staff of the District Attorney's Office will assist during the John Doe investigation and will conduct work both in support of the John Doe investigation and in response to information gathered at the John Doe hearings.

FURTHER, notwithstanding any secrecy order, I request the court to allow prosecutors and investigators acting in support of the John Doe proceeding to use the

information, transcripts, documents and other materials that will be gathered in this investigation for all appropriate law enforcement purposes, including but not limited to the interview of witnesses in support of this investigation.

FINALLY, as to the scope of the secrecy order, I request that the court order that secrecy be maintained during this John Doe proceedings as to court docket and activity records, court filings, process issued by the court, information concerning the questions asked and the answers given during a John Doe hearing, transcripts of the proceedings, exhibits and other papers produced during the proceedings, as well as to all other matters observed or heard in the John Doe proceeding. See, generally, *In re John Doe Proceeding*, 2003 WI 30 at ¶62.

Dated this 5 day of May 2010.

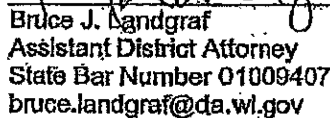

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Exhibit B

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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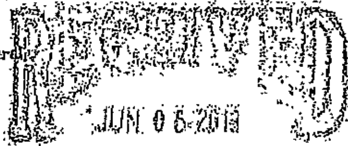


May 31, 2013

Office of District Attorney
Milwaukee, WI 53233

Mr. John T. Chisholm
District Attorney, Milwaukee County
821 West State Street, Room 405
Milwaukee, WI 53233

RE: Request for Assistance Relating To Campaign Finance Investigation

Dear District Attorney Chisholm:

Earlier this year, we met with you at your request to discuss the developments in a John Doe investigation relating to potential campaign finance violations involving campaign coordination (and thus the possibility that at least one non-candidate committee and possibly Friends of Scott Walker filed false reports with the Government Accountability Board). Deputy District Attorney Kent Lovern, Deputy Attorney General Kevin St. John, and DCI Administrator David Matthews also attended that meeting. You were concerned that the investigation was leading to subjects outside of your office's prosecutorial jurisdiction, and thus were seeking the assistance of the Department of Justice.

For the following reasons, we decline assistance at this time.

First, I am concerned about potential conflicts of interests that arise by virtue of our ongoing representation of Scott Walker in his official capacity as Governor. I have previously stated the basis of my concern in a December 3, 2010 correspondence relating to a prior investigation, and those concerns do not need to be repeated in detail here. While it is not clear that this investigation will indicate that Governor Walker has violated any Wisconsin laws, it is reasonably foreseeable that this may be a subject of the investigation. When lawyers have conflicts, client confidence that the lawyer is acting in their interest can erode and clients will be less willing to share information that is essential to providing sound legal advice.

Second, even in the absence of a true conflict by virtue of my representation of Governor Walker in his official capacity, I am concerned about the perception that my office can not act impartially, thus undermining public confidence in the investigation as a whole, particularly if the investigation does not result in an enforcement action. These perceptions may arise because of the general governmental relationship between the Administration and the Department of

Justice or because of my personal relationship with the Governor.

I know that you appreciate this concern. In the past, you have requested my office review criminal complaints that were related to actions by the Milwaukee County Executive in his personal capacity and criminal complaints involving the conduct of a former state representative with whom you were personally acquainted.

Third, beyond my relationship with the governor, this investigation is likely to involve subjects who are politically involved on the conservative side of the political spectrum. At this point, I do not know all of the potential witnesses and subjects (and these will only be known with further investigation), but suffice it to say, this is a campaign finance investigation and there are a finite number of conservative-minded political activists, campaign operatives, and major donors in Wisconsin. Therefore, it is reasonable to foresee that if this investigation develops further, it could involve additional individuals with whom I or my campaign have had significant personal or business relationships. This may exacerbate any public perception that my office's involvement in an investigation would be biased.

To be sure, the statutory responsibilities of my office, which include both the legal representation of government officials and the enforcement of certain laws against all individuals and entities (including government officials), by their nature, create the potential for conflicts. In certain cases, the rules of professional conduct might not be strictly applied in order to accommodate statutory commands. *See, e.g.,* SCR Chapter 20, Preamble [18]. In some cases, conflict screens might be established to minimize the potential for conflict.

This is not a matter, however, where such devices should be employed, even if they could be employed effectively. This is because there is no necessity, at this time, for my office's involvement because there are other state officials who have equal or greater jurisdictional authority without the potential disabilities I have mentioned. The Government Accountability Board has statewide jurisdiction to investigate campaign finance violations, which may be civil or criminal in nature. Thus, there is no jurisdictional necessity to involve my office. Should the Government Accountability Board, after investigation, believe these matters are appropriate for civil enforcement, they have the statutory authority to proceed. Should the Government Accountability Board determine, after investigation, that criminal enforcement is appropriate, they may refer the matter to the appropriate district attorney. Only if that district attorney and a second district attorney declines to prosecute would my office have prosecutorial authority. *See generally* Wis. Stat. § 5.05(2m).

In many respects, the Government Accountability Board as a lead investigator and first decisionmaker is preferable in this specific context. First, the potential violations involve statutes that the Government Accountability Board administers. The specific area of campaign finance law that may be applicable in this case, coordination, is not a model of statutory precision or consistency. *Compare* Wis. Stat. § 11.06(7)(a) (specifying nature of oath of independent expenditures to include no "cooperation or consultation" with the supported candidate) *with* Wis. Stat. § 11.06(4)(a),(d) (requiring a candidate "control" or "direct" a contribution to be reportable). The Government Accountability Board's prior involvement administering and advising on these statutes increases the likelihood that they will be applied in

this case in a manner consistent with prior interpretations. Second, this experience will better inform the discretionary determination of whether or not the civil or criminal enforcement is appropriate. Third, as a non-partisan entity, the Government Accountability Board's investigation may inspire more public confidence than an investigation led by partisan-elected officials.

This approach has precedent. Previously, my office made an initial inquiry into the actions of a high ranking Wisconsin government official relating to a potential violation of laws that the Government Accountability Board administers and enforces. The information was shared with the Government Accountability Board and we determined it was appropriate for the Government Accountability Board to conduct further inquiry while my office stepped back due to considerations similar to those expressed in this letter.

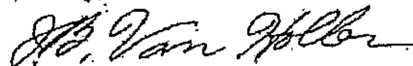
* * * * *

The decision to decline to be involved at this time is based upon the specific facts and circumstances that have been presented to me. Unlike many circumstances involving investigation of potential criminal activity that transcends multiple jurisdictions, here there is a capable agency with equal statewide jurisdiction, meaning that my decision to decline participation will not undermine the state's ability to enforce the law. Moreover, there is no indication that there is a public safety threat or that there are ongoing violations of the public trust – factors that could augur for force multiplication. In summary, there is no necessity for the Department to exercise a discretionary authority where the exercise of that authority could also disable the Department's ability fulfill its other duties and responsibilities.

Moreover, this decision is made recognizing that conflict and impartiality issues are stressed within the context of the dynamic nature of a campaign financing investigation that could foreseeably involve individuals with whom I have relationships – individuals whose involvement may very well depend on the discretionary decisionmaking of investigators. Should the investigation develop into a more concrete form and potentially require the Department of Justice exercise of a different duty or power, we will revisit the appropriateness of our involvement – as occurred when the 2010 Milwaukee County probe led to particular criminal prosecutions that my office supported in the appellate courts.

Please contact me with any questions concerning this matter or if further explanation is required.

Sincerely,



J.B. Van Hollen
Attorney General

Cc: Kent Lovern, Deputy District Attorney
Kevin St. John, Deputy Attorney General
David Matthews, DCI Administrator

Exhibit C

BEFORE THE JOHN DOE JUDGE

STATE OF WISCONSIN CIRCUIT COURT

IN THE MATTER OF
JOHN DOE PROCEEDINGS

COLUMBIA Co. Case No.	13JD000011
DANE Co. Case No.	13JD000009
DODGE Co. Case No.	13JD000006
IOWA Co. Case No.	13JD000001
MILWAUKEE Co. Case No.	12JD000023

STATE'S CONSOLIDATED RESPONSE TO MOTIONS TO QUASH SUBPOENAS DUCES TECUM

I. INTRODUCTION

The State is filing a consolidated response to the motions to quash subpoenas filed in this John Doe proceeding by Friends of Scott Walker (FOSW), Wisconsin Club for Growth (WiCFG), Citizens for a Strong America (CFSA), Wisconsin Manufacturers and Commerce (WMC) and Wisconsin Manufacturers and Commerce – Issues Mobilization Council (WMC-IMC).[1] The State believes that a consolidated response is proper as the movants make similar arguments concerning the scope and constitutionality of the subpoenas.[2] In asserting their defenses, the movants fail to appreciate the consequences of coordination under Wisconsin campaign finance law. Coordination results in contributions and disbursements subject to regulation regardless of whether the activities constitute express advocacy.

As the movants all speculate as to the nature of the investigation, a detailed summary of the factual basis for this investigation is included. As those facts show, the investigation focuses on a wide-ranging scheme to coordinate activities of several organizations with various candidate committees to thwart attempts to recall Wisconsin Senate and Gubernatorial candidates. That coordination included a nationwide effort to raise undisclosed funds for an organization which then funded the activities of other

[1] For the remainder of this response, the initials of the respective entities will be used.
[2] Indeed, the legal arguments made by the WiCFG and CFSA are virtually identical.

organizations supporting or opposing candidates subject to recall. The subpoenas are necessarily broad in an effort to collect additional evidence because the coordination activities were extensive and involving at least a dozen separate organizations.

The State recognizes the important First Amendment protections implicated in election campaigns and fundraising. However, the Wisconsin Legislature has also declared that the State of Wisconsin has a compelling interest in transparent campaign financing and that "our democratic system of government can only be maintained if the electorate is informed." Wis. Stat. § 11.0001(1). Furthermore, the United States Supreme Court has found that the citizens' right to know is inherent in the nature of the political process and transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages. *Citizens United v. FEC*, 130 S.Ct. 876, 899 and 916 (2010.) No court has ever recognized that secret, coordinated activity resulting in "undisclosed" contributions to candidates' campaigns and used to circumvent campaign finance laws is protected by the First Amendment. Accordingly, the purpose of this investigation is to ensure the integrity of the electoral process in Wisconsin.

II. PROCEDURAL POSTURE[3]

REDACTED.[4]

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[3] Pursuant to the Secrecy Order previously entered in this John Doe investigation, the procedural posture of this case relevant to the issuance of the above subpoenas has been redacted from the brief provided to counsel for the movants, but is filed with the John Doe Judge.

[4] The August 10, 2012 petition for commencement of the John Doe proceeding and supporting affidavit are incorporated by reference.

[5] The letter was received on June 5, 2013.
[6] The May 31, 2013 letter of is attached and included as Exhibit A.
[7] The respective petitions and orders are part of the record and incorporated by reference.
[8] The letter of August 21, 2013 is attached as Exhibit B.

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III. THE LEGAL PREDICATE FOR THE JOHN DOE INVESTIGATION

Most of the issues raised by the movants have already been decided in *Wisconsin Coalition for Voter Participation, Inc. v. State Elections Board (WCVP v. SEB)*, 231 Wis.2d 670, 605 N.W.2d 654 (Wis. Ct. App. 1999). *See* generally Section V.C.4 at page and specifically a discussion, pp 24-25.

It is axiomatic in the law of campaign finance that, consistent with First Amendment considerations, campaign contributors must be identified and contributions may be limited in amount. *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Campaign reporting laws, which require disclosure of the true source and extent of candidate support, guard against potential corrupting influences that undermine the democratic process. *Id.; See also* Wis. Stat. §11.001(1).

A contribution, under the law, is "[a] gift ... of money or anything of value ... made for political purposes." Wis. Stat. § 11.01(6)(a)1. Contributions are not limited to acts of "express advocacy." Under Wis. Stat. §11.01(16), for example, an act is also done for a political purpose if it is undertaken "for the purpose of influencing the recall from or retention in office of an individual holding a state or local office." In addition, an act is also done for a political purpose if it is undertaken "for the purpose of influencing the election ... of any individual ...." *WCVP v. SEB*, 231 Wis.2d at 680. In-kind contributions are subject to reporting requirements just the same as cash contributions. Wis. Stats. §§11.06(1) and 11.01(6)(a)1. *See also* Wis. Adm. Code GAB §1.20(1)(e).

Contributions to a candidate's campaign must be reported *whether or not* they constitute express advocacy. See §11.06(1). *WCVP v. SEB*, 231 Wis.2d at 679 (emphasis in original). The fact that a third party runs "issue ads" versus "express advocacy ads" is not a defense to illegal "coordination" between a candidate's authorized committee and third party organizations. *See id.*

In addition, another Wisconsin statute specifically provides that no candidate may establish more than one personal campaign committee; however such committee may have subcommittees. Wis. Stat. §11.10(4). Any subcommittees shall have the

[9] The order of appointment dated August 23, 2013 is attached as Exhibit C.

candidate's personal campaign treasurer deposit all contributions received in and make all disbursements from the candidate's campaign depository account. *Id.* If a committee coordinates with a candidate's campaign committee, by statute, such committee is a subcommittee of the candidate's campaign committee.[10] This requires the candidate's campaign committee to report any contribution made to and any disbursements made by the subcommittee. This also mandates that the subcommittee may only accept permissible contributions and make only permissible disbursements in compliance with Wis. Stats. ch. 11 because it is in effect the candidate's campaign committee.

A candidate's campaign committee commits a crime when it knowingly coordinates with other organizations without reporting either permissible in-kind contributions from those organizations or all activity of those organizations as required by Wis. Stats. ch. 11.[11]

This investigation is premised upon information which provides the State strong reason to believe that coordination occurred in the 2011 and 2012 Wisconsin Senate and Gubernatorial recall elections. Consequently, significant in-kind or direct contributions to the recall candidates were not disclosed on campaign finance reports as required. In addition, prohibited contributions from corporations or contributions well beyond legal contribution limits were made and accepted.

None of the candidate campaign, legislative campaign, or other political committees identified in this investigation could have legally coordinated with other organizations. The coordination under investigation resulted in either prohibited and illegal in-kind or direct contributions that were not reported by the candidate campaign committees as required by law.

IV. THE FACTUAL PREDICATE PROVIDING A "REASON TO BELIEVE" A CRIME HAS OCCURRED.

A John Doe proceeding commenced under Wis. Stat. § 968.26 is a special investigative proceeding commenced with a petition and a corresponding finding that there is a *reason to believe* that a crime has occurred within the jurisdiction of the court.

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[10] Wis. Stat. §11.10(4) provides that, when a third party "acts with the cooperation of or upon consultation with a candidate or agent or authorized committee of a candidate, or which acts in concert with or at the request or suggestion of a candidate or agent or authorized committee of a candidate, [it] is deemed a subcommittee of the candidate's personal campaign committee."

[11] Wis. Stat. §11.27(1) provides, "No person may prepare or submit a false report or statement to a filing officer under this chapter."

State ex. rel. Reimann v. Circuit Court for Dane County, 214 Wis.2d 605, 611, 571 N.W.2d 385, 386 (1997). This section summarizes the factual basis which provides the State the reason to believe that a crime has been committed in violation of the statutes referenced in Section III.

A. Overview.

The investigation presently focuses on activities of a number of "organizations," candidate campaign committees, and a legislative campaign committee during the 2011 and 2012 Wisconsin Senate and Gubernatorial recall election campaigns. These organizations include movants WiCFG, CFSA, and WMC-IMC, as well as other organizations funding or funded by those entities. Under Wisconsin law, coordination between purportedly "independent entities" and candidate campaign committees (such as FOSW) has either of these effects: (1) the "independent entity" is deemed a subcommittee of the candidate's personal campaign committee (Wis. Stats. §11.10(4))[12] and all permissible contributions and disbursements must be disclosed on the candidate's personal campaign committee reports pursuant to Wis. Stat. §11.06 or (2) permissible coordinated expenditures must be disclosed as in-kind contributions on the candidate's personal campaign committee reports pursuant to Wis. Stat. §11.06. Permissible contributions do not include corporate contributions (Wis. Stat. §11.38) or certain contributions exceeding statutory limits (Wis. Stat. §11.26.) For this reason the investigation focuses on the degree of coordination, if any, between the respective organizations and candidate campaign committees.

Consequently, the legal / factual issue relative to the propriety of subpoenas issued is whether the documents in possession of the movants are relevant to an investigation of campaign coordination. That is, are the documents "in some manner connected" with improper campaign coordination. *See State v. Washington*, 83 Wis.2d 808, 843, fn. 35, 266 N.W.2d 597, 614 (1978)("The test [of relevance] is whether the information sought is in some manner connected with the suspected criminal activity under investigation.")

[12] *See* FN 10.

B. Factual basis for the issuance of the subpoenas duces tecum to the movants.[13]

1. Background of the Movants

a. Wisconsin Club for Growth (WiCFG)

WiCFG is a tax exempt "social welfare organization" formed under Title 26 U.S.C. 501(c)(4). State of Wisconsin online records related to incorporation reflect that WiCFG is a "non-stock" corporation. In the 2009 and 2010 federal tax filings for the WiCFG, Eric O'Keefe was listed as the Director, Charles Talbot was the President/Director, and Eleanor Hawley was the Director / Secretary / Treasurer.[14] Deborah Jordahl is a signatory on the WiCFG bank account. During the 2011 to 2012 Wisconsin Senate and Gubernatorial recall elections, R.J. Johnson exercised direction and control over WiCFG.[15]

b. Citizens for a Strong America (CFSA)

CFSA is also a "501(c)(4)" organization. Federal tax filings reflect that John Connors is the President. CFSA, however, was the creation of Deborah Jordahl and R.J. Johnson.[16] R.J. Johnson's wife, Valerie, was the treasurer for CFSA and a signatory on the CFSA bank account.[17]

c. Wisconsin Manufacturers and Commerce (WMC) and WMC – Issues Mobilization Council (WMC-IMC)

WMC is a Wisconsin business trade organization that through WMC-IMC[18] became a means used by WiCFG for placement of advertisements during the recall campaign supporting Governor Scott Walker and criticizing his opponents.[19] WiCFG contributed $2,500,000 to Wisconsin Manufacturers and Commerce (WMC), which was deposited in the WMC-IMC bank account. In turn, WMC-IMC ran advertisements supporting gubernatorial candidate Scott Walker and advertisements critical of his

[13] For the benefit of the court, reference will be made in this brief to the particular affidavits, paragraphs and exhibits that provide the legal and factual basis for the subpoenas. Since those documents are subject to the secrecy order, they will not be provided to the movants.
[14] *See* Affidavit of December 10, 2012, ¶19
[15] Affidavit of September 28, 2013, ¶¶21-27.
[16] *See* Affidavit of December 10, 2012, ¶14 and 15; Affidavit of September 28, 2013, ¶16.
[17] *See* Affidavit of December 10, 2012, ¶15; also Affidavit of September 28, 2013, ¶17.
[18] WMC-IMC is a 501(c)(4) corporation.
[19] *See* Affidavit of September 28, 2013¶41.

opponent, Tom Barrett.[20] James Buchen was Senior Vice President of WMC and participated conference calls with Governor Walker and others involving the 2011 and 2012 Wisconsin Senate and Gubernatorial recall elections.[21]

d. Friends of Scott Walker (FOSW)

The Friends of Scott Walker (FOSW) was the personal campaign committee for the gubernatorial candidate, Scott Walker, at all times throughout the period before and during the recall elections. R.J. Johnson and Deborah Jordahl were political consultants, and worked together as R.J. Johnson and Associates, Coalition Partners, and Jordahl / Johnson Strategic Communications.[22]. R J. Johnson was an agent of the FOSW campaign, as were other individuals.[23] R.J. Johnson was involved in fundraising, media buys and production, as well as campaign strategy and other campaign activities. Similarly, his partner, Deborah Jordahl, was involved in the media production and strategy for FOSW.[24]

2. Factual basis for the issuance of the subpoenas

The affidavits which are a part of the record outline the close coordination by R.J. Johnson with other FOSW agents, including Governor Scott Walker, in the 2011 and 2012 Wisconsin Senate and Gubernatorial recall campaigns.[25] Agents of FOSW and WiCFG such as Mary Stitt and Kelly Rindfleisch, were involved in fundraising for the 2011 and 2012 Wisconsin Senate and Gubernatorial recall campaigns not only for FOSW, but also for WiCFG.[26] Kate Doner and Doner Fundraising, additional agents of FOSW and WiCFG, coordinated fundraising on behalf of both organizations. During the 2011 Wisconsin Senate recall elections, Governor Walker's Chief of Staff, Keith Gilkes was included in discussions involving coordination between several different

[20] *See* Affidavit of September 28, 2013, ¶41.
[21] *See* Affidavit of September 28, 2013, ¶41; Affidavit of December 10, 2012, ¶27.
[22] *See* Affidavit of September 28, 2013¶10.
[23] *See* Affidavit of December 10, 2012, ¶12- 20. Those individuals included: 1) Scott Walker, the gubernatorial candidate; 2) Keith Gilkes – the FOSW campaign manager; 3) Kate Lind – treasurer for FOSW; 4) R. J. Johnson - a paid advisor to FOSW who worked for WiCFG and with CFSA; 5) Deborah Jordahl - an advisor to FOSW (who was paid by R.J. Johnson and Associates, a paid consultant to FOSW) who issued checks for WiCFG; 6) Kate Doner and Doner Fundraising – fundraisers working for FOSW and WiCFG; 7) Kelly Rindfleisch – a fundraiser for FOSW and WiCFG; 8) Mary Stitt – a fundraiser for FOSW and WiCFG.
[24] *See* Affidavit of December 10, 2012, ¶67 and ¶69.
[25] *See* Affidavit of September 28, 2013 and December 10, 2012 generally.
[26] *See* Affidavit of September 28, 2013, ¶58

organizations. During the 2012 Wisconsin Senate and Gubernatorial recall elections, Keith Gilkes served as the Campaign Manager for Governor Scott Walker and again was included in discussions involving coordination between several different organizations. In addition to fundraising for FOSW, Governor Scott Walker simultaneously raised funds for WiCFG for "coordinated activities" under the control and direction of R.J. Johnson during the 2011 and 2012 Wisconsin Senate and Gubernatorial recall elections. Concurrently, R.J. Johnson directed many activities of both WiCFG and FOSW.[27]

For all practical purposes, movant WiCFG "was" R.J. Johnson and Deborah Jordahl. R.J. Johnson has stated, "We own CFG."[28] Deborah Jordahl was a signatory for the WiCFG bank account and is believed to have signed all WiCFG checks from January 2011 to June 2012.[29]

During the 2011 and 2012 Wisconsin Senate and Gubernatorial recall elections, R.J. Johnson used WiCFG as the hub for the coordinated activities involving 501(c)(4) organizations and FOSW. Beginning in March 2011,[30] there were open and express discussions of the need to coordinate the activities of entities like Americans for Prosperity (AFP), Club for Growth (CFG), Republican Party of Wisconsin (RPW), Republican State Leadership Committee (RSLC), and the Republican Governors Association (RGA). Conference calls were held involving entities such as FOSW, RGA, and WMC.[31]

WiCFG funded several other entities, including "501(c)(4)" organizations, enabling those organizations to run advertisements or conduct activity in support of Republican recall candidates or to oppose candidates running against the Republican recall candidates.[32] Money from WiCFG funded the political activities of CFSA, WMC-IMC, and other 501(c)(4) organizations.[33] WiCFG also funded CFSA, yet another organization that was controlled by R.J. Johnson. Of the $4,620,025 in revenue reported by CFSA in 2011, WiCFG contributed $4,620,000, or 99.99%, of CFSA revenue. In turn, CFSA provided funding to Wisconsin Family Action ($1,169,045), Wisconsin Right

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[27] *See* Affidavit of September 28, 2013, ¶¶21-27, 46.
[28] *See* Affidavit of December 10, 2012, ¶19 and FN 9.
[29] *See* Affidavit of September 28, 2013, ¶¶17, 24, FN 24.
[30] *See* Affidavit of December 10, 2012, ¶¶24-25.
[31] *See* Affidavit of December 10, 2012, ¶¶27-28, ¶44-46; Affidavit of September 28, 2013, ¶¶34-37.
[32] *See* Affidavit of September 28, 2013, ¶16; Affidavit of December 10, 2012, ¶39 and Exhibit 28.
[33] *See* Affidavit of September 28, 2013, ¶¶21-27; 41-44.

to Life ($347,582), and United Sportsmen of Wisconsin ($245,000).[34] These 501(c)(4) organizations were all actively involved in coordinated absentee ballot application activities during at least the 2011 Wisconsin Senate recall elections.[35]

While working with WiCFG, R.J. Johnson was also coordinating with the RSLC in at least the 2011 Wisconsin Senate recall elections.[36] In an email sent to Karl Rove on May 4, 2011, Governor Scott Walker extolled R.J. Johnson's importance in leading the coordination effort when he wrote:

> Bottom-line: R.J. helps keep in place a team that is wildly successful in Wisconsin. We are running 9 recall elections and it will be like running 9 Congressional markets in every market in the state (and Twin Cities.)(emphasis added)[37]

In comments prepared by R.J. Johnson and sent to Governor Walker for use in an August 18, 2011 conference call,[38] Johnson said WiCFG efforts were run by

> . . . operative R.J. Johnson and Deborah Jordahl, who coordinated spending through 12 different groups. Most spending by other groups were directly funded by grants from the Club.[39]

During the 2012 Gubernatorial recall election, R.J. Johnson sought and received the assistance of other entities such as "Ending Spending" that also ran television ads.[40]

WiCFG is likely to possess relevant documentary evidence dating back to 2009. Notably, prior to the 2011 Wisconsin Senate recall elections, the national Club for Growth organization raised concerns about coordination or interaction between WiCFG and FOSW as early as 2009.[41] R.J. Johnson was a paid advisor to FOSW during the 2010 Gubernatorial election, and through at least January 2012.[42] For this reason, evidence related to the activities of WiCFG and FOSW beginning in 2009 are relevant and

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[34] *See* Affidavit of September 28, 2013, ¶17.
[35] *See* Affidavit of September 30, 2013, pgs. 20, 33; also Affidavit of September 28, 2013, ¶57
[36] *See* Affidavit of September 28, 2013, pg. 25.
[37] *See* Affidavit of December 10, 2012, ¶31.
[38] Coincidentally, August 18, 2011 was also the date the GAB certified the official results of the 6 Republican Senate recall elections held on August 9, 2011.
[39] *See* Affidavit of December 10, 2012, ¶39, Exhibit 28.
[40] *See* Affidavit of September 28, 2013, ¶30 and FNs 36-37; Affidavit of December 10, 2012, ¶70.
[41] *See* Exhibit 15, Affidavit of December 10, 2012, ¶23. On April 28, 2009, David Keating the Executive Director of the (national) Club for Growth at that time told R.J. Johnson that Keating had "legal concerns" about whether WiCFG should continue to run ads that featured Scott Walker, who had declared his candidacy for Governor. Keating requested that R.J. Johnson brief the CFG on legal issues prior to running such ads.
[42] *See* Affidavit of December 10, 2012, ¶20; Affidavit of September 28, 2013, ¶¶10, 12.

probative of knowledge and discussions of any potential illegality involving coordinated activities between those entities and others involved with R.J. Johnson.

V. ISSUES PRESENTED BY THE CHALLENGES TO THE SUBPOENAS DUCES TECUM.

A. The Motions to Quash Ignore Established Wisconsin Precedent

The motions to quash filed by Citizens for a Strong America (CFSA), Wisconsin Club for Growth (WiCFG), Friends of Scott Walker (FOSW), Wisconsin Manufacturers and Commerce (WMC), and Wisconsin Manufacturers and Commerce –Issue Mobilization Council (WMC-IMC) challenge the issuance of the respective subpoenas, each similarly asserting that the government's likely theory of liability is invalid and subpoenas are unconstitutionally overbroad.

The movants argue that coordination by WiCFG, CFSA, FOSW, WMC and WMC-IMC through its agents, with 501(c)(4) organizations, legislative campaign committees, or political committees is legal and permissible when those organizations are airing issue-centered advertising, rather than express advocacy advertising. However, in asserting this defense, the movants fail to recognize Wisconsin authority which is directly adverse to the movants' primary arguments. In *WCVP v. SEB*, 231Wis.2d 670, 605 N.W.2d 654 (Wis. Ct. App. 1999), as discussed below in greater detail, the Wisconsin Court of Appeals addressed issues nearly identical to those presented in this case and ruled against the parties seeking to halt an investigation into illegal coordination between a candidate's campaign and an issue advocacy group. The court held that the First Amendment could not be interpreted to bar an investigation into potential violations of the state's campaign finance law as a consequence of coordination. *Id.*

B. The Subpoenas Duces Tecum Are Not Impermissibly Overbroad

1. <u>The Authority of the John Doe Judge to Issue Subpoenas Duces Tecum</u>

Under Wis. Stat. §968.26(1), a John Doe Judge has the authority to issue subpoenas. In the context of a John Doe proceeding, the John Doe Judge must determine if the documents sought are relevant to the topic of the inquiry; that is, that the information sought is "in some manner connected with" the suspected criminal activity under investigation. *State v. Washington*, 83 Wis.2d 808, 843, 266 N.W.2d 597, 614 (1978) As set forth in *In re Doe Proceeding Commenced by Affidavit Dated July 25, 2001*, 2004 WI 149, 277 Wis.2d 75, 689 N.W.2d 908:

> [W]e conclude that any subsequent subpoena duces tecum issued in this John Doe proceeding satisfies the requirements of Wis. Stat. §§ 968.26 and 968.135 and the constitutional concerns regarding an overly broad subpoena explained above, when the affidavit submitted to request the subpoena for documents: (1) limits the requested data to the subject matter described in the John Doe petition; (2) shows that the data requested is relevant to the subject matter of the John Doe proceeding; (3) specifies the data requested with reasonable particularity; and (4) covers a reasonable period of time.

Id. at 78 (citations omitted).

Wisconsin Statutes §968.13(2) defines "documents" for purposes of a subpoena or search warrant. "Documents" as defined in Wis. Stat. §968.13(2) includes, but is not limited to, "books, papers, recordings, tapes, photographs, films or computer or electronic data."

2. The Contents of the Subpoenas Duces Tecum

As set forth in the petition for the commencement of the John Doe proceeding and as summarized in Section III above, the scope of the criminal scheme under investigation is expansive. It includes criminal violations of multiple elections laws, including violations of Filing a False Campaign Report or Statement and Conspiracy to File a False Campaign Report or Statement in violation of Wis. Stats. §§11.27(1), 11.26(2)(a), 11.61(1)(b), 11.36, 939.31 and 939.05. As a result, the investigation necessarily will touch on many activities and communications of FOSW, the involved 501(c)(4) organizations, a legislative campaign committee, and other political committees.

On September 30, 2013, the John Doe Judge issued a subpoena duces tecum (hereafter subpoenas) to the respective movants requiring the production of documents related to the criminal scheme of R.J. Johnson, Deborah Jordahl, Governor Scott Walker and Friends of Scott Walker ("FOSW") to utilize and direct 501(c)(4) organizations, as well as other political committees. The affidavits in support of the subpoenas established a concerted effort to circumvent Wisconsin's campaign finance contribution prohibitions, limitations and disclosure requirements during the 2011 and 2012 Wisconsin Senate and Gubernatorial recall elections. As illustrated below by the comparison of subpoenas, each were tailored to the respective movant consistent with the information in the affidavits.[43]

[43] Pursuant to the secrecy order, each movant is only provided with a reproduction of their subpoena within this brief.

The timeframes in which a movant would have documents relevant to the John Doe investigation differed, and accordingly, this was reflected in the timeframe for document production. The individual movants had contact with differing entities, so the document production was tailored to those relevant individuals and entities. In addition, it should be noted that there are some similar persons or organizations identified in each subpoena, but that is simply the result of the significant level of coordinating activities among the various involved organizations.

For example, the subpoena to WiCFG directed the production of the following:

> 1. For the timeframe of March 1, 2009 to the present, all records and information in the possession of the corporation or any of its Employees, Agents, Officers and/or Directors, including but not limited to Eric O'Keefe, Eleanore Hawley and Charles Talbot, as follows:
>
> a. All corporate minutes and resolutions;
>
> b. All communications between corporate directors, officers, employees and/or agents on the one hand, and R.J. Johnson and/or Deborah Jordahl on the other hand;
>
> c. All communications naming R.J. Johnson in the body of the communication;
>
> d. All communications naming Deborah Jordahl in the body of the communication;
>
> e. All contracts, agreements, accords or understandings of any kind which have been entered into with any of the following:
>
> i. R.J. Johnson & Associates, Inc;
>
> ii. Citizens for a Strong America, Inc.;
>
> iii. Coalition Partners, L.L.C.;
>
> iv. Doner Fundraising Inc.;
>
> v. Richard "R.J." Johnson;
>
> vi. Deborah Jordahl; or
>
> vii. Kate Doner.
>
> f. All invoices and payment records relating to any item identified in the preceding subparagraph;
>
> g. All records of income received, including fundraising information and the identity of persons contributing to the corporation;

The subpoena to CFSA directed production of the following:

See Exhibit E and F.[44]

[44] Additionally, each of the movants were directed to produce the documents identified on Attachment A to their respective subpoenas. *See* Exhibit D.

As noted above, the document production was tailored to the activities of each of the respective movants as evidenced by the differing timeframes and requests for production of records. Both WiCFG and CFSA were directed to produce records related to R.J. Johnson and Deborah Jordahl that included communications, contracts and agreements, as well as several entities with which they were involved. Given the fact that CFSA was nearly completely funded by WiCFG for all practical purposes and was largely an agent for WiCFG's activities, CFSA was directed to produce records of money spent. [45]

In contrast, the production from WMC and WMC-IMC differs substantially from that of WiCFG, CFSA, and FOSW. The WMC and WMC-IMC subpoena requested production of the following:

See Exhibit G.

The WMC timeframe is limited to 2011-2012, the period that we believe that WMC has documents relevant to the investigation into the 2011 and 2012 Wisconsin Senate and Gubernatorial recall elections as described in the affidavit, as that was the timeframe WiCFG funded advertising placed by WMC-IMC. WiCFG gave WMC $988,000 in 2011 and $2,500,000 in 2012.[46] WMC-IMC in turn paid for ads related to the various recall elections, primarily the 2012 Gubernatorial recall election.[47]

[45] *See* Affidavit of September 28, 2013, ¶¶16-20.
[46] *See* Affidavit of September 28, 2013, ¶42
[47] *See* Affidavit of September 28, 2013, ¶41 and Exhibit 18; *See* Affidavit of December 10, 2012, ¶46.

The FOSW subpoena requested production of the following:

See Exhibit H.

The FOSW timeframe and production differs from that of WiCFG, CFSA, and WMC, as noted above. Additional individuals involved with FOSW in recall strategy and activities, as well as fundraising for both FOSW and WiCFG, are included in that production request.

3. The Subpoenas Duces Tecum Fulfill the Requirements of Wisconsin Case Law

As articulated by the court in *In re John Doe Proceeding Commenced by Affidavit Dated July 25, 2001,* 2004 WI 149, 277 Wis.2d 75, 689 N.W.2d 908, quoted above in Section V, a John Doe subpoena duces tecum is lawfully issued (and is not overbroad) when: (1) it limits the requested data to the subject matter described in the John Doe petition; (2) it shows that the data requested is relevant to the subject matter of the John Doe proceeding; (3) it specifies the data requested with reasonable particularity; and (4) it covers a reasonable period of time.

a. The requested documents are limited to the Subject Matter of the John Doe Proceeding.

There should be no reasonable dispute that the subpoenas seek information within the scope of the original petition papers. The John Doe Judge authorized an investigation into potential campaign finance violations including Wis. Stats. §§11.27(1), 11.26(2)(a), 11.61(1)(b), 11.36, 939.31 and 939.05, *viz.*, Filing a False Campaign Report or Statement (PTAC), Conspiracy to File a False Campaign Report or Statement, by Governor Scott

Walker, FOSW, WiCFG, various 501(c)4 organizations, and political campaign committees.[48]

The scope of a subpoena is not overbroad if it does not exceed the parameters of the authorized investigation and the more extensive the probable wrongdoing, the greater the permissible scope of the subpoena.[49] In this instance, the affidavits allege extensive unlawful activity involving Governor Scott Walker, FOSW, WiCFG, other 501(c)(4) organizations, and political committees. Accordingly, the respective subpoenas are squarely within scope of this John Doe investigation into the 2011 and 2012 Wisconsin Senate and Gubernatorial recall elections.

b. The requested documents are relevant to the Subject Matter of the John Doe Proceeding.

The relevancy of the documents sought in the subpoenas is predicated on the detailed information outlined in several affidavits that specifically addressed the basis for the requests for documents from CFSA, WiCFG, WMC, WMC-IMC and FOSW.[50] The basis for the subpoenas was outlined in the Affidavit of September 30, 2013 (33 pages) that directly incorporated the Affidavit of September 28, 2013 (26 pages with 143 pages of exhibits), and the Affidavit of December 10, 2012 (46 pages with 243 pages of exhibits).[51]

Each of these affidavits established that the evidence and records sought from the movants were connected with the suspected criminal activity under investigation. For example, in the context of the 2011 Wisconsin Senate recall elections, R.J. Johnson stated that he coordinated spending through 12 different groups.[52] The broad scope of R.J.

[48] *See* Petition and Affidavit for the Commencement of a John Doe dated August 10, 2013.

[49] *See United States v. Hickey*, 16 F.Supp.2d 223, 240 (E.D.N.Y. 1998), motion for reconsideration granted on other grounds, in the context of an 4th Amendment overbreath challenge to a search warrant that is equally applicable here. The court stated, "... a warrant – no matter how broad – is, nonetheless, legitimate if its scope does not exceed the probable cause upon which it is based. The more extensive the probable wrongdoing, the greater the permissible breadth of the warrant."

[50] *In the Matter of a John Doe Proceeding*, Id. at 240, 680 N.W.2d at 807, 2004 WI 65, ¶52, the court noted in its ruling that the court did not have the affidavit supporting the subpoena duces tecum, nor the John Doe petition used to begin the proceeding.

[51] The September 30, 2013 affidavit and of Robert Stelter with accompanying exhibits, and referenced September 28, 2013 affidavit of Investigator Dean Nickel and accompanying exhibits are part of the record and incorporated herein by reference.

[52] *See* Affidavit of December 10, 2012, Exhibit 28.

Johnson's activities justify the permissible breadth of the subpoenas, and the subpoenas are proportionate to the potential wrongdoing identified in the affidavits.[53]

For this reason, the present case is unlike the "overbroad" subpoenas that were quashed in *In the Matter of a John Doe Proceeding*, 2004 WI 65, 272 Wis.2d 208, 680 N.W.2d 792 (2004). There, the John Doe subpoenas:

> " . . . requested all of the data from the computer system of an entire branch of state government in order to investigate whether a crime has been committed. It did not specify the topics or the types of documents in which evidence of a crime might be found. The subpoena also did not specify any time period for which it sought records."

In the Matter of a John Doe Proceeding, 272 Wis.2d at 239.

c. The documents are specified with reasonable particularity.

Each subpoena identifies with specificity the entities potentially involved with the movants in illegal coordination. The subpoena provided to each movant identifies and directs the production of particular classes of documents related to specific entities and the movants, all relating to the 2011 and 2012 Wisconsin Senate and Gubernatorial recall elections.[54]

d. The requested documents cover a reasonable period of time.

The timeframe for the production of documents by each of the movants is appropriately identified, each timeframe relating to the existance of potential evidence related to the subject matter of the John Doe investigation.

The timeframe for the production of documents by CFSA begins on February 16, 2010. This is in accord with the general timeframe of R.J. Johnson's and Deborah Jordahl's involvement with CFSA.[55] Since they used WiCFG and CFSA to coordinate campaign activities, documents related to their involvement with and possible control of CFSA are highly relevant evidence of coordination.

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[53] *See* FN 45 that identifies paragraphs in the affidavits that address the overlap in activities between R.J. Johnson, Deborah Jordahl, WiCFG, and WMC and that establishes the relevancy of the documents sought in the subpoena.

[54] Additionally, the movants have been provided with the names of individuals within the organization to assist in identifying documents and communications relevant to the investigation.

[55] *See* Affidavit of September 28, 2013, ¶16 and Exhibit 3 establishing the involvement of R.J. Johnson and Deborah Jordahl with CFSA as early as March 3, 2010. Online public records reflect that CFSA was incorporated on October 23, 2009.

The subpoena duces tecum to WiCFG seeks documents for a broader timeframe, *i.e.*, March 1, 2009 to the present. Again, the broader timeframe is justified by the specific evidence identified in the supporting affidavit, an April 2009 discussion between the national Club for Growth and R.J. Johnson questioning the legality of pro-Walker ads run by WiCFG.[56] This establishes the probability of other relevant information following that timeframe involving WiCFG. As discussed in the affidavits, R.J. Johnson and Deborah Jordahl were involved in the various recall campaigns with FOSW, while simultaneously directing the activities of WiCFG, CFSA, R.J. Johnson and Associates, and Coalition Partners in the same recall campaigns.[57] Accordingly, the result is a significant overlap in the requested document production involving those entities and individuals.

In contrast, the timeframe for FOSW and WMC are limited to the timeframe of the 2011 to 2012 Wisconsin Senate and Gubernatorial recall elections,[58] as the affidavits establish that as the timeframe that those respective entities are likely to possess documents for production and relevant to the John Doe.[59]

C. The conduct under investigation clearly violates Wisconsin law and the subpoenas do not infringe on constitutionally protected speech or activity.

1. Entities involved in coordinated activity with political campaign committees must comply with Wisconsin campaign finance laws.

The movants assert the John Doe subpoenas are improper because they are predicated on an "invalid" theory of criminal liability. In order to address the claimed invalidity" of the subpoenas, the court must examine the legal and factual basis for the

[56] *See* Affidavit of December 10, 2012, ¶23 and Exhibit 15.
[57] Specifically, the overlap of activities is detailed as follows: with respect to R.J. Johnson, see the Affidavit of September 28, 2013, ¶¶11-15, and 46 with respect to Nonbox and FOSW; Affidavit of December 10, 2013, ¶¶23-31, ¶¶36-42 with respect to the activities of R.J. Johnson and R.J. Johnson and Associates; with respect to Deborah Jordahl see Affidavit of September 28, 2013, ¶¶11-15, Affidavit of December 10, 2013, ¶¶65, 67, 69, 71, 74; for CFSA see Affidavit of September 28, 2013, ¶¶16-20, Affidavit of December 10, 2013, ¶75; for Coalition Partners see Affidavit of September 28, 2013, ¶¶11-15; for Doner Fundraising see Affidavit of September 28, 2013, ¶50-¶52, December 10, 2013, ¶¶30, 32, 51, 56-57, 48, 76-77; for FOSW see Affidavit of September 28, 2013, ¶¶34-36 re RGA, ¶45 with respect to R.J. Johnson and NonBox; ¶¶53-55 with respect to R.J. Johnson, FOSW and RSLC (also ¶36, Affidavit of December 10, 2012 re RSLC); ¶¶28-40 with respect to FOSW, RGA, and Doner Fundraising; Affidavit of December 10, 2012, ¶27, and generally Affidavit of December 10, 2013.
[58] The State has advised FOSW that the timeframe could be narrowed to February 1, 2011 to July 31, 2012.
[59] With respect to FOSW, *See* Affidavit of December 10, 2012, ¶¶21-89; for WMC see Affidavit of September 28, 2013, ¶¶41-44; Affidavit of December 10, 2012, ¶¶67-68

issuance of the subpoenas. As a starting point, Wis. Stats. ch. 11 governs campaign financing. In particular, Wis. Stat. §11.10(4) provides:

> "No candidate may establish more than one personal campaign committee. Such committee may have subcommittees provided that all subcommittees have the same treasurer, who shall be the candidate's campaign treasurer. The treasurer shall deposit all funds received in the campaign depository account. **Any committee which is organized or acts with the cooperation of or upon consultation with a candidate or agent or authorized committee of a candidate, or which acts in concert with or at the request or suggestion of a candidate or agent or authorized committee of a candidate is deemed a subcommittee of the candidate's personal campaign committee.**" (Emphasis added)

By operation of law, any "committee"[60] acting in concert with or with the cooperation of or upon consultation with, or at the request or suggestion of Governor Scott Walker or FOSW, or the personal campaign committees of Wisconsin State Senate candidates, are deemed to be a subcommittee of the relevant candidate's personal campaign committee.[61] As a consequence of Wis. Stats. §§11.16 and 11.10(4), the third party organizations were subject to the same restrictions on the receipt of contributions and expenditures as FOSW itself. The contributions had to be permissible and disclosed by the candidates' personal campaign committees, but were not. In addition, every expenditure by any subcommittee must be a permissible disbursement and disclosed.

In addition, Wis. Stat. §11.06(7) provides that a committee wishing to make a truly independent disbursement, must affirm that it does not act in concert with, or at the request or suggestion of, any candidate or agent or authorized committee of a candidate. If such a committee does not comply with this oath and makes expenditures that are coordinated with a candidate or agent or authorized committee of a candidate, that expenditure becomes a reportable in-kind contribution to the candidate's campaign committee and must also be a permissible contribution. Wis. Adm. Code GAB §§1.20,

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[60] Wis. Stat. §11.01(4) broadly defines "committee" as "any person other than an individual and any combination of 2 or more persons, permanent or temporary, which makes or accepts contributions or makes disbursements, whether or not engaged in activities which are exclusively political, ..."

[61] *See* ¶11 of the December 10, 2012 affidavit. As noted in FN 5 of that affidavit, in 2005, former Wisconsin State Senator Charles "Chuck" Chvala was convicted in Dane County Circuit Court Case No. 2002CF2451 of violating Wisconsin Stats. §§ 946.12(2) and 11.26(2)(b). The violations of Wis. Stat. §11.26(2)(b) arose out of the campaign coordination involving Chvala, personal campaign committees and "independent interest groups" that are analogous to the potential violations here.

1.42(6)(a).[62] *See also WCVP v. SEB,* 231 Wis.2d 670 at fn. 2 (citing Wis. Stats. §§11.01(6)(a)1. and 11.12(1)(a)); *OAG-05-10,* ¶*20* (recognizing that a "disbursement" may also qualify as a "contribution" under Wisconsin statutes).

Accordingly, contrary to the defense assertions and for the reasons set forth in greater detail below, Wisconsin law clearly does regulate, and long has regulated, "coordinated" activities.[63]

2. Relevant Wisconsin Statutes and Administrative Code implicated by the coordinated activity.

The following statutes are relevant to the discussion herein:

> Wis. Stat. §11.05(1) provides, "Every committee...which makes or accepts contributions, incurs obligations, or makes disbursements in a calendar year in an aggregate amount in excess of $25 shall register with the appropriate filing officer."
>
> Wis. Stat. §11.05(6) provides, "Except as provided in subs. (7) and (13), no person, committee or group subject to a registration requirement may make any contribution or disbursement from property or funds received prior to the date of registration under this section."
>
> Wis. Stat. §11.01(4) provides, "A "committee" means any person and any combination of two or more persons, which makes or accepts political contributions or political disbursements, whether or not engaged in activities which are exclusively political."

In relevant part, a "contribution" means a contract, promise or agreement to make or actually making a gift, subscription, loan, advance, or deposit of money or anything of value made for political purposes or a transfer of funds between candidates,[64]

[62] Interestingly, the language in Wis. Adm. GAB § 1.42 uses the term "expenditure" instead of "disbursement" when describing the scope and treatment of independent committee activities. This rule uses a broader definition of activity that could be attributable to a candidate committee by the use of the term "expenditure" as opposed to the term "disbursement" (which by definition in Wis. Stats. §11.01(7) requires that the activity be for a political purpose.)

[63] This basic principle is apparently lost on CFSA and WiCFG as demonstrated by the statement that "... regardless of the degree of communication or coordination between CFSA and any candidate campaign, no campaign had to report CFSA's advertisements as a contribution." CFSA motion, Pg 8. The motion filed by WiCFG makes an identical statement. *See* WiCFG motion, Pg. 10

[64] FOSW asserts that Wisconsin's campaign finance laws somehow did not apply to Governor Walker or to FOSW and its agents because Governor Walker was not a "recall candidate" at the time of some of the activities under investigation. In fact FOSW, at all relevant times, is and was Governor Scott Walker's personal campaign committee for Governor and it was actively raising and spending campaign contributions. Wis. Stat. §11.01 (1) provides:

committees, individuals or groups subject to a filing requirement under Wis. Stats. ch. 11. *See* Wis. Stats. §11.01(6)(a)1, 3 and 4. In relevant part, a "disbursement" means a contract, promise or agreement to make or actually making a purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value made for political purposes or a transfer of personalty, including but not limited to campaign materials and supplies, valued at the replacement cost at the time of transfer.

A contribution or disbursement must have a "political purpose." Wis. Stats. §§ 11.01 (6) and (7). In part, an act is for a "political purpose" "when it is done for the purpose of influencing the 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. Stats. §11.01(16). Importantly, "political purpose" "is not restricted by the cases, the statutes, or the code, to acts of express advocacy." *WCVP v. SEB*, 231 Wis.2d 670, 680, 605 N.W. 2d 654 (Wis. Ct. App. 1999).

3. Wisconsin's coordination standard.

Wisconsin law clearly distinguishes between independent political activities and coordinated political activities. The meaning of coordination can be further understood by looking to the requirements an independent committee must meet.

Pursuant to Wis. Stat. §11.06(7), committees making independent disbursements must sign an oath affirming:

1. That the committee ... does not act in cooperation or consultation with any candidate or agent or authorized committee of a candidate who is supported,

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"Candidate" means every person for whom it is contemplated or desired that votes be cast at any election held within this state, other than an election for national office, whether or not the person is elected or nominated, and who either tacitly or expressly consents to be so considered. *A person does not cease to be a candidate for purposes of compliance with this chapter or ch. 12 after the date of an election and no person is released from any requirement or liability otherwise imposed under this chapter or ch. 12 by virtue of the passing of the date of an election.*
(Emphasis added).

Under Wisconsin statutes, an individual is a candidate unless and until one terminates one's campaign committee. Under FOSW's view, an incumbent would apparently stop being a candidate after election until the next election is called and would be free from the restraints of the law between one election and the time for circulating nomination papers for the next election – an illogical interpretation.

2. That the committee ... does not act in concert with, or at the request or suggestion of, any candidate or agent or authorized committee of a candidate who is supported,
3. That the committee ... does not act in cooperation or consultation with any candidate or agent or authorized committee of a candidate who benefits from a disbursement made in opposition to a candidate, and
4. That the committee ... does not act in concert with, or at the request or suggestion of, any candidate or agent or authorized committee of a candidate who benefits from a disbursement made in opposition to a candidate.

The former State Elections Board issued a formal opinion subsequent to *WCVP v. SEB*. *See* El.Bd.Op. 00-2 (affirmed by the G.A.B. on 3/26/08). This formal opinion addressed a host of campaign finance issues including the coordination of expenditures. *Id.* at pp. 8-13. The former SEB, and now the G.A.B., have always treated any expressive coordinated expenditure made at the request or suggestion of the candidate or an authorized agent of a candidate as a contribution. *See id.* at pp. 11-12. (citing *FEC v. The Christian Coalition,* 52 F.Supp.2d 45, 98 (Dist. Ct. for D.C. 1999)). "The fact that the candidate has requested or suggested that a spender engage in certain speech indicates that the speech is valuable to the candidate, giving such expenditures sufficient contribution-like qualities to fall within FECA's prohibition on contributions." *Id.* The formal opinion explores case law regarding the regulation of coordinated activity and clarifies the coordination standard for Wisconsin. The formal opinion melds the standard established in *Christian Coalition* with Wisconsin's statutory language. As set forth in the opinion:

> Coordination is sufficient to treat a communication (or the expenditure for it) as a contribution if:
>
> 1. The spender's communication is made at the request or suggestion of the campaign (i.e., the candidate or agents of the candidate); or,
> 2. In the absence of a request or suggestion from the campaign, the cooperation, consultation or coordination between the spender and the campaign is such that the candidate or his/her agents can exercise control over, or where there has been substantial discussion or negotiation between the spender and campaign over, a communication's: a) contents; b) timing; c) location, mode or intended audience (e.g., choice between newspaper or radio advertisement); or d) "volume" (e.g., number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the spender and the candidate emerge as partners or joint venturers in the

> expressive expenditure, but the spender and the candidate need not be equal partners.

See El.Bd.Op. 00-2 at p. 12.

4. Campaign Coordination to Subvert Campaign Finance Laws Is a Crime in Wisconsin.

Movants argue that "coordination" of political activities that do not arguably involve express advocacy cannot be a crime under Wisconsin law.[65] These arguments fail to recognize or misinterpret Wisconsin statutes, administrative rules, and G.A.B. formal opinions. Movants have also ignored controlling Wisconsin case law. Indeed, in their submissions, movants - FOSW,[66] Citizens for a Strong America, Inc. (CFSA),[67] Wisconsin Manufacturers & Commerce, Inc. (WMC) and Wisconsin Manufacturers &

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[65] However, Justice Wilcox and former State Senator and Majority Leader Chuck Chvala were implicated in highly public cases involving illegal coordination activities. *See State of Wisconsin v. Charles Chvala*, Dane Co. Case No. 02-CF-2451 (criminal complaint filed on 10-17-2002), Counts 11-20 and Bradley Kust Complaining Witness Statement, ¶¶ 210-233, 236, 250-255 (Former Senator Chuck Chvala's illegal coordination of fundraising and expenditures of "independent" entities, including an issue advocacy entity.) Recently, Vermont and California have also had highly publicized cases resulting in significant forfeitures for coordination or circumvention schemes. *See State of Vermont v. Republican Governors Association and Brian Dubie*, Civil Division Docket No. 762-12-11 (Coordination case where RGA agreed to pay a $30,000 civil penalty and Candidate Dubie pay a $10,000 civil penalty), *See also Fair Political Practices Commission v. The Center to Protect Patients Rights and Americans for Responsible Leadership*, Sacramento County, CA, Case No. ____ ("Dark money" case where Center to Protect Patients Rights and Americans for Responsible Leadership were required to pay civil penalties of $1,000,000 each. In addition, the recipients of the "dark money" were require to forfeit the illegal contributions. The Fair Political Practices Commission required the Small Business Action Committee PAC to forfeit $11,000,000 and the California Future Fund to forfeit $4,080,000.) "Dark money" defines funds used to pay for an election campaign without disclosure before voters go to the polls, often associated with 501(c) corporations.

[66] FOSW Memorandum in Support of Motion to Quash Subpoena (October 16, 2013), pp. 8-9 ("Moreover, even after that point, Walker, his agents, and those involved in his authorized campaign were permitted to engage in 'coordinated' activity and communications regarding other candidates because the statute and regulation apply only to coordination between a candidate and groups supporting that candidate."), p. 14 ("Equally important, at no point do the restrictions apply when Scott Walker, his agents or representatives engage in coordination activities regarding communications in support of or opposition to candidates other than recall candidates for governor.").

[67] CFSA Motion to Quash Four Subpoenas (October 25, 2013), p. 8 ("Accordingly, regardless of the degree of communication or coordination between CFSA and any candidate campaign, no campaign had to report CFSA's advertisements as a contribution."), pp. 8-9 ("The government's coordination theory cannot be sustained because, regardless of the quality and extent of communications between CFSA and any candidate campaign, all advertisements paid for by CFSA fall outside of the ambit of the Wisconsin campaign finance law. None of the advertisements constituted 'express advocacy.'"), p. 18 ("These communications may establish 'coordination' among groups on one side of the legislative and political spectrum, but they have nothing to do with coordination between issue groups and candidate campaigns.").

Commerce-Issues Mobilization Council (WMC-IMC),[68] and Wisconsin Club for Growth (WiCFG)[69] appear to have tacitly admitted to violating Wisconsin law.

The clearly stated purpose of Wisconsin's campaign finance laws is set out in legislative findings codified in Wis. Stats. §11.001:

> "The legislature finds and declares that our democratic system of government can be maintained only if the electorate is informed. It further finds that excessive spending on campaigns for public office jeopardizes the integrity of elections. . . . One of the most important sources of information to voters is available through the campaign finance reporting system. Campaign reports provide information which aids the public in fully understanding the public positions taken by a candidate or political organization. When the true source of support or extent of support is not fully disclosed, or when a candidate becomes overly dependent upon large private contributors, the democratic process is subjected to a potential corrupting influence. The legislature therefore finds that the state has a compelling interest in designing a system for fully disclosing contributions and disbursements made on behalf of every candidate for public office, and in placing reasonable limitations on such activities. Such a system must make readily available to the voters complete information as to who is supporting or opposing which candidate or cause and to what extent, whether directly or indirectly. This chapter is intended to serve the public purpose of stimulating vigorous campaigns on a fair and equal basis and to provide for a better informed electorate."

In Wisconsin, it is illegal to use coordination to avoid statutorily required campaign finance disclosure laws and limits. The movants' argument that candidates are permitted to coordinate with issue-centered organizations and committees, without

[68] Affidavit of Kurt Bauer (October 24, 2013), ¶13 ("In addition, WMC participates in formal and informal coalitions of groups with shared goals and policy positions, including the decision to support or oppose specific questions of public policy, and separately, candidates for public office-legislative, executive and judicial.").

[69] Wisconsin Club for Growth Motion to Quash Five Subpoenas (October 25, 2013), p. 11 ("The government's coordination theory cannot be sustained because, regardless of the quality and extent of communications between the Club and any candidate campaign, all advertisements paid for by the Club fall outside of the ambit of the Wisconsin campaign finance law. None of the advertisements constituted 'express advocacy.'"). p. 20 ("These communications may establish 'coordination' among groups on one side of the legislative and political spectrum, but they have nothing to do with coordination between issue groups and candidate campaigns."). *See also*, Affidavit of Eric O'Keefe (October 24, 2013), ¶13 ("The Club also gave grants to some organizations that then decided to use their money to express their own views--in accord with the Club's views--on public issues."), ¶28 ("For example, many Club records were stored at the homes of Deborah Jordahl and R.J. and Valerie Johnson, who had contractual relationships with the Club.").

compliance with campaign finance disclosure laws, was squarely rejected in *WCVP v. SEB*, 231 Wis.2d 670, 605 N.W. 2d 654 (Wis. Ct. App. 1999).

In *WCVP*, the Wisconsin Court of Appeals specifically relied upon the rationale first espoused by the United States Supreme Court in *Buckley v. Valeo* in 1976. In *WCVP v. SEB*, plaintiffs sought to enjoin an investigation by the State Elections Board into illegal coordination between Supreme Court Justice Jon Wilcox's campaign and Wisconsin Coalition for Voter Participation, Inc. (WCVP). At issue was the dissemination of a post card that WCVP maintained did not constitute express advocacy. The Court of Appeals considered both statutory and constitutional affirmative defenses, rejected them and dismissed plaintiffs' motions. The Court of Appeals definitively wrote, "[c]ontributions to a candidate's campaign must be reported *whether or not* they constitute express advocacy."[70] *WCVP*, 231 Wis.2d at 679 (emphasis in original). The Court of Appeals emphasized that if the WCVP mailing was coordinated, it was a contribution, and it was illegal *regardless* of how one might interpret the postcards' language.[71] *Id.* (emphasis added).

In a subsequent enforcement action in March 2000, those involved with WCVP and the coordination paid significant civil forfeitures in exchange for a non-referral to a District Attorney to assess criminal liability for having coordinated an issue advocacy postcard .[72]

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[70] The court noted, " 'express advocacy' is one part of the statutory definition of 'political purpose,' it is not the only part. . . . It encompasses many acts undertaken to influence a candidate's election; Contrary to plaintiff's assertions...the term 'political purposes' is not restricted by the cases, the statutes or the code to acts of express advocacy." *WCVP* v. *SEB*, 231 Wis.2d at 680. When an entity "coordinates" with a political campaign, that entity and those activities are no longer independent and are subject to campaign finance regulations. *See WRTL v. Barland*, 664 F.3d. 139, 155 (7th Cir., 2011) This is needed to insure transparency and fairness in elections.

[71] The movants have had due notice of the Wisconsin Statutes, administrative rules, appellate decisions, and formal GAB opinion explaining in detail the case law, statutes and administrative rules, and coordination principles. This GAB opinion was originally published by the former State Elections Board in 2000 and later reviewed and affirmed by the Government Accountability Board. *See El. Bd. Op. 00-2* (affirmed by the G.A.B. 3/26/08).

[72] *See* Exhibit I, Stipulations and Orders for Judgment, *Elections Board of the State of Wisconsin v. Mark J. Block, Brent J. Pickens, James M. Wigderson, Wisconsin Coalition for Voter Participation, and Justice Wilcox for Justice Committee*, Dane County Case No. 00-CV-797 (filed 3-24-2000) . Wilcox campaign paid $10,000, Mark Block paid $15,000, and Brent Pickens paid $35,000.

5. The regulation of "coordinated activity" does not infringe upon constitutionally "protected speech".

The Wisconsin Statutes and Administrative Code provisions are consistent with federal campaign finance laws approved by the United States Supreme Court in *Buckley*. They regulate – but do not prohibit – expenditures that are "coordinated" with, or made "in cooperation with or with the consent of the candidate . . . or an authorized committee" as campaign contributions. *Id.* at 681. Contributions to a candidate's campaign committee must be reported, and they must be reported whether or not they constitute express advocacy – the content of the message is immaterial. *Id.* at 679 (citing Wis. Stat. §11.06(1)).

As noted above, Wisconsin law specifically prohibits a candidate from establishing more than one personal campaign committee or working in concert with a second committee. *See* Wis. Stat. §11.10(4). Where concerted activity occurs, contributions resulting from concerted activity are reportable as if the second organization was a subcommittee of the campaign committee.

When a 501(c)(4) organization and its agents act as the alter ego of a candidate, collecting money raised by the candidate (contributions) and make coordinated expenditures benefiting the candidate or authorized committee (disbursements), the 501(c)(4) organization is engaged in activities with a political purpose and qualifies as a "committee" under Wisconsin Statutes. The statutes prohibit a candidate's circumvention of the campaign finance statutes through the secret activities of agents (and the candidates themselves) -- the very conduct being investigated here. When that same 501(c)(4) organization acts at the request or suggestion of, or with the cooperation of, or consultation with a candidate or with an agent or authorized committee of a candidate, the 501(c)(4) is also deemed a subcommittee of the candidate's personal campaign committee.[73]

Pursuant to Wis. Stat. §11.10(4), any donations to these 501(c)(4) organizations and other entities constitute "contributions" directly to FOSW. Any expenditures by these organizations constitute "disbursements" by FOSW, regardless for what purpose these organizations were organized or whether the organizations engaged in speech

[73] *See also* Wis. Adm. Code §1.42 (6) (a) and El.Bd.Op. 00-2 (affirmed by the G.A.B. 3/26/08) (citing *FEC v. The Christian Coalition*, 52 F. Supp.2d 45 (D.C. Dist. Ct. 1999).

qualifying as express advocacy or its functional equivalent. As subcommittees of FOSW, each 501(c)(4) organization or other entity are subject to all campaign contribution prohibitions and limitations, as well as all disclosure requirements, that are applicable to FOSW. Violation of these statutes carries both civil and criminal penalties. *See* Wis. Stats. §§11.60 and 11.61. This regulation of "coordinated" activity is consistent with federal and state court decisions addressing First Amendment concerns and the applicability of campaign finance laws.

Although First Amendment restrictions should be fully respected, no court has ever recognized that secret, coordinated activity resulting in "undisclosed" contributions to candidates' campaigns and used to circumvent campaign finance laws is so protected.[74] In fact, as established in 1976 by the United States Supreme Court in *Buckley v. Valeo*, "prearranged or coordinated expenditures" are equivalent to contributions, subject to the same limitations as contributions, and any restrictions on coordinated expenditures are subject to only the intermediate level of scrutiny—any restriction must be closely drawn to match a sufficiently important government interest. *Buckley*, 424 U.S. at 25. Contribution limitations, whether by direct contribution or resulting from coordinated expenditures, are closely drawn restrictions designed to limit corruption and the appearance thereof resulting from large individual contributions. This is a sufficiently important government interest to support regulation. *Id.* at 25-26.

The United States Supreme Court and other federal appellate and district courts have consistently upheld the proposition that coordinated expenditures are contributions

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[74] The United States Supreme Court has recognized that the citizens' right to know is inherent in the nature of the political process. On January 21, 2010, the United States Supreme Court stated "voters must be free to obtain information from diverse sources in order to determine how to cast their votes." *Citizens United v. FEC*, 130 S.Ct. 876, 899, 916 (2010). By an 8-1 vote, the Supreme Court held that campaign finance disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way, such transparency enabling the electorate to make informed decisions and give proper weight to different speakers and messages. *Id.* at 916.

By the same 8-1 vote, the Supreme Court rejected the contention that disclosure requirements are limited to speech that is the functional equivalent of express advocacy. The court determined that while disclaimer and disclosure requirements may burden the ability to speak, they "impose no ceiling on campaign-related activities" and "do not prevent anyone from speaking." *Id.* at 914-915 (citing *Buckley v. Valeo*, 424 U.S. 1, 64, 96 S. Ct. 612 (1976); *McConnell v. FEC*, 540 U.S. 93, 201, 124 S. Ct. 619 (2003)). In the context of the *Citizens United* decision and an analysis of Wisconsin's campaign finance laws, the Wisconsin Attorney General has stated that "the Constitution does not categorically limit disclosure and disclaimer regulations to only express advocacy or its functional equivalent." *OAG-05-10, ¶¶35-6 (August 2, 2010).*

subject to campaign finance limitations and disclosure requirements in the context of First Amendment challenges to campaign finance regulations. *See, e.g., Citizens United v. FEC*, 130 S. Ct. at 908, 910; *McConnell v. FEC*, 540 U.S. 93, 202, 219-223 (2003); *FEC v. Colorado Republican Fed. Campaign Committee (Colorado II)*, 533 U.S. 431, 456, 465, 121 S. Ct. 2351 (2001)(coordinated expenditures, unlike truly independent expenditures, may be restricted to minimize circumvention of contribution limits); *WRTL v. Barland*, 664 F.3d 139, 153, 155 (7th Cir., 2011); *Cao v. FEC*, 619 F.3d 410, 427, 433-34 (5th Cir., 2010).

Coordinated "issue advocacy" is subject to campaign finance regulations as contributions This is particularly applicable when the candidate or agents have requested or suggested that the spender engage in certain speech because that indicates it is valuable to the candidate. It would be equally applicable where the candidate or agents can exercise control over certain speech; or where there has been substantial discussion or negotiation between the campaign and the spender over expenditures which give such expenditures sufficient contribution-like qualities to fall within the prohibition on contributions. *FEC v. Christian Coalition*, 52 F.Supp.2d 45, 91-2, 98-9 (D.C., 1999)

"The First Amendment permits the government to regulate coordinated expenditures." *WRTL*, 664 F.3d at 155 (citing *Colorado II*, 533 U.S. at 465). The court stated that the "free speech safe harbor for independent expenditures" would not be available if there was collusion between a candidate and an independent committee, as the "independent group is not truly independent", thus permitting regulation. *Id.* Conversely, an independent expenditure is political speech when not coordinated with a candidate. *WRTL*, 664 F.3d at 153 (citing *Citizens United*, 130 S. Ct. at 910). The Court of Appeals for the Seventh Circuit clarified that the "separation between candidates and independent expenditure groups" negates the possibility that independent expenditures will lead to, or create the appearance of, quid pro quo corruption. *Id.*

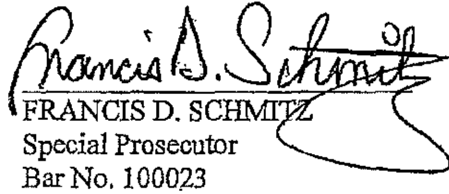
In the instant matter, the evidence shows an extensive coordination scheme that pervaded nearly every aspect of the campaign activities during the historic 2011 and 2012 Wisconsin Senate and Gubernatorial recall elections. The John Doe Judge has already relied upon this evidence in finding probable cause to issue subpoenas to the movants,

therefore, the despite the movants' protestations otherwise, the John Doe Judge should deny all movants' motions to quash the very same subpoenas.

VI. CONCLUSION

Based on the authorities set forth herein, the motions to quash should be denied so that this investigation can move forward expeditiously.

Respectfully submitted this 9th day of December, 2013.

By: 

FRANCIS D. SCHMITZ
Special Prosecutor
Bar No. 100023

Exhibit D

STATE OF WISCONSIN BEFORE THE JOHN DOE JUDGE

IN THE MATTER OF A JOHN DOE PROCEEDING

COLUMBIA COUNTY CASE NO.	13JD000011
DANE COUNTY CASE NO.	13JD000009
DODGE COUNTY CASE NO.	13JD000006
IOWA COUNTY CASE NO.	13JD000001
MILWAUKEE COUNTY CASE NO.	12JD000023

DECISION AND ORDER GRANTING MOTIONS TO QUASH SUBPOENAS AND RETURN OF PROPERTY

MOTIONS TO QUASH

Motions to quash subpoenas have been filed by: (1) Friends of Scott Walker (FOSW); (2) Wisconsin Manufacturers & Commerce, Inc. and its affiliate WMC-IMC.; (3) Wisconsin Club for Growth directors and accountant; and (4) Citizens for a Strong America, Inc. directors and officers. The motions have been fully briefed. The State's brief is a consolidated response, so I assume a consolidated decision will not adversely affect the secrecy order.

I am granting the motions to quash and ordering return of any property seized as a result of the subpoenas. I conclude the subpoenas do not show probable cause that the moving parties committed any violations of the campaign finance laws. I am persuaded the statutes only prohibit coordination by candidates and independent organizations for a political purpose, and political purpose, with one minor exception not relevant here (transfer of personalty, Wis. Stat. 11.01(7)(a)2.), requires express advocacy. There is no evidence of express advocacy.

The motions were filed over two months ago, before I was even assigned this case. They are overdue for a decision. This decision will be brief, enabling me to produce it more quickly. Any reviewing court owes no deference to my rationale, so giving the parties a result is more important that a delay to write a lengthy decision on election and constitutional law. For more detail, readers should consult the parties' briefs. In fact, in order to fully understand the factual and legal context of this decision, that will be necessary for anyone, such as an appellate court, not familiar with this case.

The subpoenas reach into the areas of First Amendment freedom of speech and freedom of association. As a result, I must apply a standard of exacting scrutiny and, in interpreting statutes, give the benefit of any doubt to protecting speech and association.

As a general statement, independent organizations can engage in issue advocacy without fear of government regulation. However, again as a general statement, when they coordinate spending with a candidate in order to influence an election, they are subject to regulation.

The State relies heavily on some rather broad language in *Wisconsin Coalition for Voter Participation, Inc. v. State Elections Board,* 231 Wis. 2d 670, 605 N.W.2d 654 (Wis. Ct. App. 1999). This case did give me some pause. However, I agree with the Wisconsin Club for Growth that the case is distinguishable. (Club's response brief at 10-14). But even more important, considerable First Amendment campaign financing law has developed in the fifteen years since that case was decided. (See, e.g., Wisconsin Manufacturers & Commerce initial brief at 5-6). It is unlikely that the broad language relied on by the State could withstand constitutional scrutiny today.

Wisconsin Club for Growth's analysis of the campaign financing statutory scheme is particularly helpful. As the Club explains in its reply brief, the legislature crafted definitions of four key terms: committee, disbursement, contribution and political purposes. All statutory regulations emanate from these four definitions. Before there is coordination there must be political purposes; without political purposes, coordination is not a crime.

To be a committee, an organization must have made or accepted contributions or disbursements for political purposes. Wis. Stat. 11.01(4). As relevant here, acts are for political purposes when they are made to influence the recall or retention of a person holding office. Wis. Stat. 11.01(16). If the statute stopped here, the definition of political purposes might well be unconstitutionally vague. *Buckley v. Valeo,* 424 U.S. 1, 77 (1976). But the definition continues: acts for political purposes include, but are not limited to, making a communication that expressly advocates the recall or retention of a clearly identified candidate. Wis. Stat. 11.01(16)(a). In GAB 1.28, the Government Accountability Board attempted to flesh out other acts that would constitute political purposes, but because of constitutional challenges it has stated it will not enforce that regulation. So the only clearly defined political purpose is one that requires express advocacy.

The State is not claiming that any of the independent organizations expressly advocated. Therefore, the subpoenas fail to show probable cause that a crime was committed.

Friends of Scott Walker is a campaign committee, not an independent organization. Election laws do not ban all coordination between a candidate and independent organizations. As the GAB has recognized, broad language to the contrary is constitutionally suspect. El.Bd. 00-2

(reaffirmed by GAB in 2008). Furthermore, I am persuaded by FOSW that the statutes do not regulate coordinated fundraising. (See FOSW reply at 10-18). Only coordination of expenditures may be regulated and the State does not argue coordination of expenditures occurred. Therefore, the subpoena issued to FOSW fails to show probable cause

The subpoenaed parties raise other issues in their briefs, some quite compellingly. However, given the above decision, it is not necessary to address those issues.

MOTIONS FOR RETURN OF PROPERTY

R.L. Johnson and Deborah Johnson have filed motions for the return of property seized pursuant to search warrants. The Johnsons claim the warrants were defective for several reasons, some of which are among the undecided issues in the above decision on the motions to quash. The Johnsons have not specifically raised the issues that are decided above. However, in the interests of fairness, the same legal conclusions should apply to all parties who have raised challenges in this case. Therefore, for the reasons stated above regarding the limitations on the scope of the campaign finance laws, I conclude that the Johnson warrants lack probable cause. Accordingly, their motions are granted.

ORDER

The subpoenas issued to Friends of Scott Walker, Wisconsin Manufacturers & Commerce, Inc. and its affiliate WMC-IMC, Wisconsin Club for Growth directors and accountant, and Citizens for a Strong America, Inc. directors and officers are quashed and any property seized pursuant to the subpoenas shall be returned.

Any property seized pursuant to search warrants served on R.L. Johnson and Deborah Johnson shall be returned.

Dated: January 10, 2014.

By the John Doe Judge:

Gregory A. Peterson
Reserve Judge

Exhibit E

COPY

STATE OF WISCONSIN CIRCUIT COURT IOWA COUNTY

IN THE MATTER OF A JOHN DOE PROCEEDING **Case No. 13JD000001**

Circuit Court, Iowa County, WI
FILED
AUG 27 2013
LIA N. GUST, CLERK

SECRECY ORDER

IT IS HEREBY ORDERED that the John Doe proceeding, commenced by order of the court rendered this day and pending before me, shall be secret. All persons having access to these proceedings are hereby ordered not to disclose to anyone the court docket and activity records, court filings, process issued by the court, information concerning the questions asked and the answers given during a John Doe hearing, transcripts of the proceedings, exhibits and other papers produced during the proceedings, as well as all other matters they may observe or hear in the John Doe proceeding. This order is made:

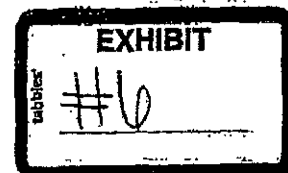
1) To prevent persons from collecting perjured testimony for any future trial.
2) To prevent those interested in thwarting the inquiry from tampering with prospective testimony or secreting evidence.
3) To render witnesses more free in their disclosures.
4) To prevent testimony which may be mistaken, untrue, insubstantial or irrelevant from becoming public.

IT IS FURTHER ORDERED that all Investigators admitted to this John Doe may also be present at any and all sessions of this John Doe. I find that they are public officials with law enforcement responsibilities and that their presence will materially aid this investigation in the following ways:

1) They may be conducting interviews of witnesses outside of these proceedings. Information gained from these proceedings may be useful to them in eliciting relevant and accurate information from those witnesses.

2) Because they are and will be familiar with the subject matter of this investigation, they will aid the court and the prosecutors assigned to this investigation in the eliciting of relevant and accurate information from witnesses who may be called at these proceedings.

3) They will be able to help examine, organize and summarize the records and documents expected to be obtained during this investigation.



IT IS FURTHER ORDERED that the following persons may have access to the record of these proceedings to the extent necessary for the performance of their duties, because such access will materially aid the progress of this investigation:

District Attorney Larry E. Nelson; and

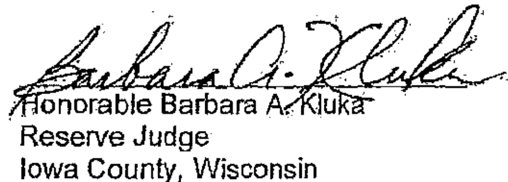
Legal Assistant Jennifer H. Ramsden

IT IS FURTHER ORDERED that the persons acting in support of this John Doe proceeding may use the information, transcripts, documents and other materials that will be gathered in this investigation for all appropriate law enforcement purposes, including but not limited to the interview of witnesses outside the context of John Doe hearings, in support of this investigation.

IT IS FURTHER ORDERED that secrecy shall be maintained during this John Doe proceeding as to court docket and activity records, court filings, process issued by the court, information concerning the questions asked and the answers given during a John Doe hearing, transcripts of the proceedings, exhibits and other papers produced during the proceedings, as well as to all other matters observed or heard in the John Doe proceeding. See, generally, In re John Doe Proceeding, 2003 WI 30 at ¶62.

Dated at Dodgeville, Wisconsin this 21st day of August 2013.

BY THE COURT:



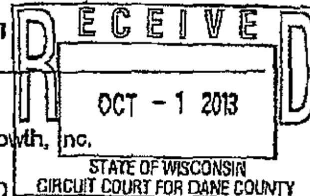
Honorable Barbara A. Kluka
Reserve Judge
Iowa County, Wisconsin

Exhibit F

STATE OF WISCONSIN **BEFORE THE JOHN DOE JUDGE**

IN THE MATTER OF A JOHN DOE PROCEEDING	COLUMBIA COUNTY CASE NO.	13JD000011
	DANE COUNTY CASE NO.	13JD000009
	DODGE COUNTY CASE NO.	13JD000006
	IOWA COUNTY CASE NO.	13JD000001
	MILWAUKEE COUNTY CASE NO.	12JD000023

JOHN DOE SUBPOENA DUCES TECUM



THE STATE OF WISCONSIN, TO: Eric O'Keefe
Director, Wisconsin Club for Growth, Inc.
c/o Godfrey and Kahn
One East Main Street, Suite 500
Madison, Wisconsin 53703

YOU ARE HEREBY REQUIRED TO APPEAR ON Tuesday, October 29, 2013 at 8:00 A.M. before the Honorable Barbara A. Kluka, sitting as a Reserve Judge in and for the above referenced Counties, in Courtroom 7A of the Dane County Courthouse, 215 South Hamilton Street, Madison, Wisconsin, 53703, and to bring with you the following documents, records and information as those and other terms are defined in Attachment A:

1. For the timeframe of March 1, 2009 to the present, all records and information in the possession of the corporation or any of its Employees, Agents, Officers and/or Directors, including but not limited to Eric O'Keefe, Eleanore Hawley and Charles Talbot, as follows:

a. All corporate minutes and resolutions;

b. All communications between corporate directors, officers, employees and/or agents on the one hand, and R.J. Johnson and/or Deborah Jordahl on the other hand;

c. All communications naming R.J. Johnson in the body of the communication;

d. All communications naming Deborah Jordahl in the body of the communication;

e. All contracts, agreements, accords or understandings of any kind which have been entered into with any of the following:

i. R.J. Johnson & Associates, Inc;

ii. Citizens for a Strong Amercia, Inc.;

iii. Coalition Partners, L.L.C.;

iv. Doner Fundraising Inc.;

v. Richard "R.J." Johnson;

vi. Deborah Jordahl; or

vii. Kate Doner.

f. All invoices and payment records relating to any item identified in the preceding subparagraph;

g. All records of income received, including fundraising information and the identity of persons contributing to the corporation;

h. All records of money spent, including expense and other disbursements data, invoices, payroll records, billing records and related memoranda; and

i. All Recall Related Information and Records as defined in Attachment A.

Failure to appear may result in punishment for contempt which may include monetary penalties, imprisonment and other sanctions.

In lieu of appearing at the above time and place with these documents, you are authorized to forward copies of the documents on or before the return date of this Subpoena Duces Tecum to the following address: Special Prosecutor Francis D. Schmitz, P.O. Box 2143, Milwaukee, Wisconsin, 53201.

If you elect to challenge this Subpoena for any reason, you must file any challenge papers with the John Doe Judge by mailing or delivering them to: Honorable Barbara A. Kluka, Reserve Judge, P.O. Box 2143, Milwaukee, Wisconsin, 53201.

All questions regarding this Subpoena must be directed to Special Prosecutor Francis D. Schmitz at (414) 278-4659 or fd.schmitz@da.wi.gov.

By order of the court, pursuant to a Secrecy Order that applies to this proceeding, you are hereby commanded and ordered not to disclose to anyone, other than your own attorney, the contents of this subpoena and/or the fact that you have received this subpoena. Violation of this Secrecy Order is punishable as Contempt of Court.

Dated at Milwaukee, Wisconsin, this 30th day of September 2013.

By the Court:

Honorable Barbara Kluka
Reserve Judge

1. For purposes of this Subpoena, the terms "records," "documents" and/or "information" include all items in whatever form and by whatever means they may have been created or stored, including any form of computer or electronic storage (such as hard disks, jump drives, thumb drives, CDs, DVDs, external USB drives, 3.5" disks or other media that can store data); any handmade form (such as writing, drawing, painting); any mechanical form (such as printing or typing); and any photographic form (such as microfilm, microfiche, prints, slides, negatives, videotapes, motion pictures, photocopies).

2. For purposes of this Subpoena and for purposes of the definition of **Recall Related Information and Records** contained in ¶5 below, the term **2011 Senate Recall Elections** means any one or more of the following **2011 Senate Recall Elections**, including both the general Recall Elections specified below and any primary elections leading up to the general Recall Elections as follows:

a. July 19, 2011

i. District 30 - Dave Hansen (Democrat), David VanderLeest (Republican);

b. August 9:

i. District 2 - Robert Cowles (Republican) and Nancy J. Nusbaum (Democrat);

ii. District 8 – Alberta Darling (Republican) and Sandy Pasch (Democrat);

iii. District 10 Sheila Harsdorf (Republican) and Shelly Moore (Democrat);

iv. District 14 - Luther Olsen (Republican) and Fred Clark (Democrat);

v. District 18) -Randy Hopper (Republican) and Jessica King (Democrat);

vi. District 32 Dan Kapanke (Republican) and Jennifer Shilling (Democrat).

c. August 16:
   i. District 12 - Kim Simac (Republican) and Jim Holperin (Democrat);
   ii. District 22 Robert Wirch (Democrat) and Jonathan Steitz (Republican)

3. For purposes of this Subpoena and for purposes of the definition of **Recall Related Information and Records** contained in ¶5 below, the term **2012 Senate Recall Elections** means any one or more of the following **2012 Senate Recall Elections,** including both the general Recall Elections specified below and any primary elections leading up to the general Recall Elections as follows:

a. June 5, 2012
   i. District 21 - Van Wanggard (Republican) and John Lehman (Democrat);
   ii. District 23 - Terry Moulton (Republican) and Kristen Dexter (Democrat);
   iii. District 29 - Jerry Petrowski (Republican) and Donna Seidel (Democrat);
   iv. District 13 - Scott Fitzgerald (Republican) and Lori Compas (Democrat)

4. For purposes of this Subpoena and for purposes of the definition of **Recall Related Information and Records** contained in ¶5 below, the term **2012 Gubernatorial Recall Election** means the **2012 Gubernatorial Recall Election** between Scott Walker (Republican) and Tom Barrett (Democrat) , and the term **2012 Gubernatorial Recall Elections** includes any primary election leading up the general Gubernatorial Recall Election held June 5, 2012.

5. For purposes of this Subpoena, I use the phrase "**Recall Related Information and Records**" to mean information, records and documents which relate to the **2011 Senate Recall Elections**, the **2012 Senate Recall Elections** and/or the **2012 Gubernatorial Recall Election** and are further described as follows:

a. All memoranda, email (including archived e-mail), correspondence, and communications between you as the person or the entity receiving this Subpoena, including (if you are a corporate entity, an unincorporated organization, a political party or a political committee) your directors, officers, agents or employees, on the one hand, and on the other hand, the directors, officers, agents or employees of the following:[1]

i. Coalition Partners, L.L.C.;

ii. R.J. Johnson and Associates, Inc.;;

iii. Citizens for a Strong America, Inc.;

iv. William Eisner & Associates, Inc.

v. Nonbox, an enterprise operating as a d/b/a of William Eisner & Associates, Inc. (among others) and which utilizes an Internet domain identified as www.nonbox.com, including e-mail addresses ending in "@nonbox.com" and "@"nonboxconsulting.com;"

vi. Ten Capitol Inc. of Ashburn, Virginia;

vii. Wisconsin Manufacturers and Commerce, Inc.;

viii. WMC – Issues Mobilization Council, Inc.;

ix. Metropolitan Milwaukee Association of Commerce, Inc.;

x. American Federation for Children, Inc.;

xi. Doner Fundraising, Inc.;

xii. Americans for Prosperity, Inc.;

xiii. Club for Growth, Inc.;

[1] If you yourself, as the subpoenaed party, appear in one the subparagraphs that follow this footnote, you may disregard such subparagraph that names you and you need not provide documents in response to that subparagraph line that names you.

xiv. Wisconsin Club for Growth;

xv. Americans for Prosperity – Wisconsin

xvi. American Crossroads;

xvii. League of American Voters;

xviii. Republican Governors Association (RGA);

xix. Right Direction Wisconsin;

xx. Republican State Leadership Committee;

xxi. Committee to Elect a Republican Senate;

xxii. Wisconsin Family Action, Inc.;

xxiii. Wisconsin Right to Life, Inc.;

xxiv. Wisconsin Recall Action Fund;

xxv. The Jobs First Coalition, Inc.;

xxvi. Ending Spending, Inc.;

xxvii. Friends of Scott Walker;

xxviii. Republican Party of Wisconsin; or

xxix. United Sportsmen of Wisconsin Inc.

b. All memoranda, email (including archived e-mail), correspondence, and communications between you as the person or the entity receiving this Subpoena, including (if you are a corporate entity, an unincorporated organization, a political party or a political committee) your directors, officers, agents or employees, on the one hand, on the one hand, and on the other hand:[2]

i. . R. J. Johnson;

ii. Deborah Jordahl;

iii. Kate Doner; or

iv. William Eisner.

[2] If you yourself, as the subpoenaed party, appear in one the subparagraphs that follow this footnote, you may disregard such subparagraph that names you and you need not provide documents in response to that subparagraph line that names you.

c. All memoranda, email (including archived e-mail), correspondence, and communications between you as the person or the entity receiving this Subpoena, including (if you are a corporate entity, an unincorporated organization, a political party or a political committee) your directors, officers, agents or employees, on the one hand, and on the other hand, the officers, agents or employees (including the candidate) of the following:

   i. The campaign committees of the candidates involved in the **2011 Senate Recall Elections;**

   ii. The campaign committees of the candidates involved in the **2012 Senate Recall Elections**; or

   iii. The campaign committees of the candidates involved in the **2012 Gubernatorial Recall Election.**

d. Calendars or other records of meetings, phone calls, video conferencing and/or conference calls on Recall related topics and issues.

e. All contracts, agreements, accords or understandings of any kind into which you, the party receiving this subpoena, entered into for performance of services of any kind related to the **2011 Senate Recall Elections**, the **2012 Senate Recall Elections** and/or the **2012 Gubernatorial Recall Election.**

f. All billing, invoices, receipts, financial documents and other records of expenditures, disbursements or transfers made in connection with the **2011 Senate Recall Elections**, the **2012 Senate Recall Elections** and/or the **2012 Gubernatorial Recall Election.**

g. All bank records, credit card bills and other financial records evidencing a disbursement identified in subparagraph f immediately preceding this subparagraph;

h. All correspondence, e-mail (including archived e-mail), communications, memos and/or notes related to the items identified in subparagraphs e and f above;

i. All records (including drafts) of advertisements, public service announcements, broadcast scripts, mailings, flyers and other material you produced and/or published in connection with the **2011 Senate Recall Elections**, the **2012 Senate Recall Elections** and/or the **2012 Gubernatorial Recall Election.**

j. All records (including drafts) of advertisements, public service announcements, broadcast scripts, mailings, flyers and other material, the production and/or publication of which you participated (although you may not have directly produced and/or published the material yourself), and which productions and/or publications were made in connection with the **2011 Senate Recall Elections**, the **2012 Senate Recall Elections** and/or the **2012 Gubernatorial Recall Election.**

k. All contracts, agreements and communications related to the items identified in subparagraphs i and j immediately preceding this subparagraph.

EXHIBIT 5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ERIC O'KEEFE and WISCONSIN CLUB FOR GROWTH, Inc.,

Plaintiffs,

-vs-

FRANCIS SCHMITZ, in his official and personal capacities,

JOHN CHISHOLM, in his official and personal capacities,

Case No. 14-C-139

BRUCE LANDGRAF, in his official and personal capacities,

DAVID ROBLES, in his official and personal capacities,

DEAN NICKEL, in his official and personal capacities, and

GREGORY PETERSON, in his official capacity,

Defendants.

DECISION AND ORDER

Eric O'Keefe is a director for the Wisconsin Club for Growth, Inc. ("WCFG"), a 501(c)(4) social welfare organization that promotes free-market ideas and policies. O'Keefe and WCFG are two among several targets of a secret five-county John Doe criminal investigation. Wis. Stat. § 968.26. This procedure, unique under Wisconsin law, is an "independent, investigatory tool used to ascertain whether a crime has been

committed and if so, by whom." *In re John Doe Proceeding*, 660 N.W.2d 260, 268 (Wis. 2003). O'Keefe alleges that this investigation is being conducted for the primary purpose of intimidating conservative groups, impairing their fundraising efforts, and otherwise preventing their participation in the upcoming election cycle. O'Keefe seeks an order enjoining the defendants from continuing their investigation on the grounds that it is an abuse of prosecutorial power and infringes upon his right to freedom of speech.

Five of the six defendants move to dismiss O'Keefe's complaint: Francis Schmitz, special prosecutor in the current phase of the John Doe investigation; John Chisholm, Milwaukee County District Attorney; Bruce Landgraf and David Robles, Milwaukee County Assistant District Attorneys; and Dean Nickel, a contract investigator for the Government Accountability Board. The last defendant, Gregory Peterson, is a retired appeals court judge now presiding over the John Doe proceeding. Judge Peterson has been served with process, and his answer to the complaint is due on April 29.

For the reasons that follow, the motions to dismiss are denied in their entirety.

I. Abstention

A motion to dismiss based on an abstention doctrine implicates the Court's exercise of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1); *City of N.Y. v. Milhelm Attea & Bros., Inc.*, 550 F. Supp. 2d 332, 341-42 (E.D.N.Y. 2008). Therefore, the Court may look outside the pleadings and consider extrinsic materials in

making its ruling. *Nissan N. Am., Inc. v. Andrew Chevrolet, Inc.*, 589 F. Supp. 2d 1036, 1039 (E.D. Wis. 2008). All five of the moving parties raise *Younger* abstention, so the Court will begin its analysis there.

A. *Younger* abstention

Younger abstention "generally requires federal courts to abstain from taking jurisdiction over federal constitutional claims that involve or call into question ongoing state proceedings." *FreeEats.com, Inc. v. Indiana*, 502 F.3d 590, 595 (7th Cir. 2007). Courts have typically analyzed whether the state proceedings are "judicial in nature," involve "important state interests," and offer "an adequate opportunity to review the federal claim." *Majors v. Engelbrecht*, 149 F.3d 709, 711 (7th Cir. 1998) (citing *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 429 (1982)). However, the Supreme Court recently "rephrased the question," such that the so-called *Middlesex* factors "were not dispositive; they were, instead, *additional* factors appropriately considered by the federal court before invoking Younger. These factors remain relevant, but the critical consideration . . . is how closely [the proceeding] resembles a criminal prosecution." *Mulholland v. Marion Cnty. Elec. Bd.*, --- F.3d ---, 2014 WL 1063411, at *5 (7th Cir. March 20, 2014) (citing *Sprint Comm'n, Inc. v. Jacobs*, 134 S. Ct. 584, 593 (2013)). "Divorced from their quasi-criminal context, the three *Middlesex* conditions would extend *Younger* to virtually all parallel state and federal proceedings, at least where a party could identify a plausibly important state interest." *Sprint* at 593.

As stated and clarified in *Sprint*, *Younger* only applies in three "exceptional circumstances." *Id.* at 591. First, *Younger* precludes "federal intrusion into ongoing criminal prosecutions." *Id.* Second, certain "civil enforcement proceedings" warrant abstention. *Id.* Third, *Younger* precludes federal courts from interfering with pending civil proceedings involving certain orders "uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id.* (quoting *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989) (*NOPSI*)). "We have not applied *Younger* outside these three 'exceptional' categories, and today hold . . . that they define *Younger*'s scope." *Id.*

Wisconsin's John Doe procedure is an investigatory device, similar to a grand jury proceeding, but lacking the oversight of a jury. It is "not so much a procedure for the determination of probable cause as it is an inquest for the discovery of crime in which the judge has significant powers." *State v. Washington*, 266 N.W.2d 597, 604 (Wis. 1978). "By invoking the formal John Doe investigative proceeding, law enforcement officers are able to obtain the benefit of powers not otherwise available to them, i.e., the power to subpoena witnesses, to take testimony under oath, and to compel the testimony of a reluctant witness." *Id.* The judge's responsibility is to "ensure procedural fairness. The John Doe judge should act with a view toward issuing a complaint or determining that no crime has occurred." *Id.* at 605. So understood, the John Doe proceeding does not fit into any of the categories for *Younger* abstention. It is an investigatory process, not an ongoing criminal prosecution

or civil enforcement proceeding. Nor is it a proceeding – like a civil contempt order, *Juidice v. Vail*, 430 U.S. 327, 336 n.12 (1977), or the requirement to post a bond pending appeal, *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 13 (1987) – that implicates a State's interest in "enforcing the orders and judgments of its courts, . . ." *Sprint* at 588. The John Doe is a criminal investigation, but it is not "akin to a criminal prosecution." *Id.* at 592. *Younger* is inapplicable until a criminal proceeding is actually commenced. *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 594 (7th Cir. 2012) ("*Younger* abstention is appropriate only where there is an action in state court against the federal plaintiff and the state is seeking to *enforce the contested law in that proceeding*") (emphasis added); *United States v. South Carolina*, 720 F.3d 518, 527 (4th Cir. 2013) ("*Younger* does *not* bar the granting of federal injunctive relief when a state criminal prosecution is expected and imminent. We have also drawn a distinction between the commencement of 'formal enforcement proceedings,' at which point *Younger* applies, versus the period of time when there is only a 'threat of enforcement,' when *Younger* does not apply") (emphasis in original) (internal citations omitted); *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 519 (1st Cir. 2009) (a rule "requiring the commencement of 'formal enforcement proceedings' before abstention is required, better comports with the Supreme Court's decisions in *Younger* and its progeny, in which an indictment or other formal charge had already been filed against the parties seeking relief at the time the federal action was brought").

Further, the Court notes that it would not abstain even if the investigation fit

within one of *Younger*'s exceptional circumstances. As the Court will explain in its discussion of *Pullman* abstention, *infra*, the John Doe proceeding does not offer O'Keefe the opportunity to adjudicate the federal constitutional issues that are raised in this lawsuit. *See, e.g., Time Warner Cable v. Doyle*, 66 F.3d 867, 884 (7th Cir. 1995) ("the critical fact for purposes of the *Younger* abstention doctrine is whether a party has an adequate opportunity to raise constitutional challenges").

Finally, *Younger* abstention does not apply when the plaintiff alleges "specific facts" that the state proceeding was "brought in bad faith for the purpose of retaliating for or deterring the exercise of constitutionally protected rights." *Collins v. Kendall Cnty., Ill.*, 807 F.2d 95, 98 (7th Cir. 1986). O'Keefe's complaint easily satisfies this standard, precisely alleging that the defendants have used the John Doe proceeding as a pretext to target conservative groups across the state. *See, e.g., In re John Doe Proceeding*, 680 N.W.2d 792, 808 (Wis. 2004) (reminding "all who participate in John Doe investigations that the power wielded by the government is considerable. Accordingly, there is a potential for infringing on . . . constitutional rights").

B. *Pullman* abstention

Federal courts also have the discretion to abstain under what is known as *Pullman* abstention. *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). This doctrine applies only when there is substantial uncertainty as to the meaning of state law, and there exists a reasonable probability that the state court's clarification of state law might obviate the need for a federal constitutional ruling. *Int'l Coll. of*

Surgeons v. City of Chi., 153 F.3d 356, 365 (7th Cir. 1998). The purpose of *Pullman* abstention is to "avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication." *Pullman*, 312 U.S. at 500. It is a narrow exception to the duty of federal courts to adjudicate cases properly before them and is used only in exceptional circumstances. *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1119 (10th Cir. 2008).

In granting a motion to quash subpoenas issued in the John Doe investigation, Judge Peterson held that the subpoenas did not show "probable cause that the moving parties committed any violations of the campaign finance laws. I am persuaded the statutes only prohibit coordination by candidates and independent organizations for a political purpose, and political purpose, with one minor exception not relevant here . . ., requires express advocacy. There is no evidence of express advocacy." ECF No. 1-5. Later, in an order granting the prosecutors' motion to stay pending appeal, Judge Peterson noted that the State's theory of criminal liability "is not frivolous. In fact, it is an arguable interpretation of the statutes. I simply happen to disagree. An appellate court may indeed agree with the State. In that event, I encourage the appellate court to address the alternative and significant Constitutional arguments raised in this case." ECF No. 7-9. The special prosecutor's petition for a supervisory writ is still pending before the court of appeals.

Defendants argue that the Court should abstain because if the court of appeals affirms Judge Peterson's order quashing the subpoenas, the "ultimate and inevitable

consequence will be to terminate the John Doe investigation."[1] Of course, this argument fails to account for the opposite outcome, wherein the John Doe investigation would likely proceed. Whatever the eventual state court ruling may be, it would not obviate the need for a federal court ruling on O'Keefe's constitutional claims. The underlying theory of this case is that O'Keefe, along with other conservative groups, are being targeted for their political activism, whereas the "coordination" activities of those on the opposite side of the political spectrum are ignored. The alleged bogus nature of the prosecutors' theory of criminal liability as a matter of federal constitutional law is simply more evidence of the defendants' bad faith. Even if the need for injunctive relief somehow fell by the wayside, the merits of O'Keefe's claims can and should still be adjudicated here in federal court.

Finally, the *Pullman* doctrine is discretionary, and it is almost never applicable in a First Amendment case because "the guarantee of free expression is always an area of particular federal concern." *Wolfson v. Brammer*, 616 F.3d 1045, 1066 (9th Cir. 2010). The Court will not sidestep its duty to exercise jurisdiction in this context. *Id.* ("constitutional challenges based on the First Amendment rights of free expression are the kind of cases that the federal courts are particularly well-suited to hear. That is why abstention is generally inappropriate when First Amendment rights are at stake"); *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) ("the First Amendment has its

[1] Defendants Chisholm, Landgraf and Robles attribute this quote to Judge Peterson in their brief, but the Court cannot locate when and where Judge Peterson may have made this statement.

fullest and most urgent application to speech uttered during a campaign for political office").

C. *Burford* abstention

Burford abstention applies to "certain types of cases confided by state law to state administrative agencies . . ." *Ill. Bell Tel. Co., Inc. v. Global NAPs, Ill., Inc.*, 551 F.3d 587, 595 (7th Cir. 2008); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Abstention under *Burford* is an "equitable decision [that] balances the strong federal interest in having certain classes of cases, and certain federal rights, adjudicated in federal court, against the State's interests in maintaining uniformity in the treatment of an essentially local problem, and retaining local control over difficult questions of state law bearing on policy problems of substantial public import." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996). This balance "only rarely favors abstention," and the power to dismiss under *Burford* "represents an extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it." *Id.*

As an initial matter, the defendants cannot argue that their investigation implicates an administrative or regulatory scheme, especially since they declined the Attorney General's invitation to refer their investigation to the Government Accountability Board, a government agency with state wide jurisdiction to investigate campaign finance violations. Complaint, Exhibit B. More than that, the *Burford* doctrine cannot be used to cast aside the important First Amendment rights that are at stake in this litigation. *See Felmeister v. Office of Attorney Ethics*, 856 F.2d 529, 534

(3d Cir. 1988) (expressing "serious doubts as to whether *Burford* abstention ever would be appropriate where substantial first amendment issues are raised"). Again, the success or failure of O'Keefe's claims do not depend upon the state court's interpretation of its own campaign finance laws. O'Keefe's rights under the First Amendment are not outweighed by the state's purported interest in running a secret John Doe investigation that targets conservative activists.

II. Standing/Ripeness

Defendants Chisholm, Landgraf and Robles (referred to as the Milwaukee Defendants) argue that the plaintiffs' claims should be dismissed for lack of standing. *Am. Fed'n of Gov't Emps., Local 2119 v. Cohen*, 171 F.3d 460, 465 (7th Cir. 1999) ("if a plaintiff cannot establish standing to sue, relief from this court is not possible, and dismissal under [Rule] 12(b)(1) is the appropriate disposition").

This argument holds no water. "Chilled speech is, unquestionably, an injury supporting standing." *Bell v. Keating*, 697 F.3d 445, 453 (7th Cir. 2012). O'Keefe has engaged in extensive issue advocacy in the past. He wants to jump back into the fray for purposes of the upcoming election cycle, but he is prevented from doing so because he is the target of the John Doe investigation, subjecting him and his associates to secret investigatory proceedings and the threat of criminal prosecution. Thus, O'Keefe has standing to bring this lawsuit. *Id.* at 454 ("plaintiffs in a suit for prospective relief based on a 'chilling effect' on speech can satisfy the requirement that their claim of injury be 'concrete and particularized' by (1) evidence that in the past they have

engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so because of a credible threat that the statute will be enforced").

For similar reasons, O'Keefe's claims are clearly ripe for adjudication. They do not depend upon whether he is eventually charged with a crime. *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 507 (7th Cir. 1998) (adequate injury where the plaintiff "ceased its activities due to fear of prosecution for not satisfying the reporting and disclosure requirements . . ."). The threat of prosecution is enough. His injury does not involve "uncertain or contingent events that may not occur as anticipated, or not occur at all." *Wis. Right to Life State Political Action Committee v. Barland*, 664 F.3d 139, 148 (7th Cir. 2011). In "challenges to laws that chill protected speech, the hardship of postponing judicial review weighs heavily in favor of hearing the case." *Id.* The Milwaukee Defendants also ignore the injuries *already suffered* by O'Keefe, which will remain to be adjudicated even if, as noted above, the John Doe investigation is halted.

III. Failure to state a claim

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the factual allegations in the complaint must be sufficient to state a claim that is plausible on its face, not merely speculative. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A claim is facially plausible when it allows the Court to draw the

reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court must accept the complaint's well-pleaded allegations as true, drawing all reasonable inferences in favor of the plaintiffs. *Christensen v. Cnty. of Boone*, 483 F.3d 454, 457 (7th Cir. 2007).

To state a claim for selective prosecution or retaliation, a plaintiff must only allege facts to show the exercise of a constitutional right, state action likely to deter that exercise, and that the protected exercise was at least a "motivating factor" in the state action. *Massey v. Johnson*, 457 F.3d 711, 716 (7th Cir. 2006); *Esmail v. Macrane*, 53 F.3d 176, 179 (7th Cir. 1995). The plaintiffs' 60-page, 225-paragraph complaint easily, and plausibly, sets forth actionable claims for relief.

Some of the defendants attempt to distance themselves from the motives that allegedly underlie the John Doe investigation. For example, Schmitz argues that O'Keefe's official capacity claims should be dismissed because they fail to plausibly allege retaliatory animus. *Hartman v. Moore*, 547 U.S. 250, 259-60 (2006). Here, Schmitz attempts to insulate himself because, unlike the Milwaukee Defendants, he is not a known liberal. However, as the complaint alleges, it is entirely plausible that Schmitz was appointed special prosecutor in an effort to minimize the "appearance of impropriety" because Schmitz "lacked the publicly known ties to liberal politics plaguing" the other defendants. Complaint, ¶ 91. In any event, the Court is not persuaded by Schmitz's attempt to disclaim all knowledge of the retaliatory motive behind an investigation he was chosen to lead. Similarly, the complaint alleges that

Nickel plays an "active and supervisory role," *id.*, ¶ 92, and it also alleges that the Milwaukee Defendants commenced and now actively conduct the investigation. *Id.*, ¶¶ 56-57, 75, 91-92. This is enough to plausibly allege that each defendant meets the "personal responsibility" requirement for liability under 42 U.S.C. § 1983. *Maltby v. Winston*, 36 F.3d 548, 559 (7th Cir. 1994) ("An official satisfies the personal responsibility requirement of section 1983 if he or she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent").

IV. Immunities

The defendants raise a variety of immunity defenses: sovereign immunity, prosecutorial immunity, qualified immunity, and "quasi-judicial" immunity. Motions to dismiss on immunity grounds are considered under Rule 12(b)(6). Once again, the Court must accept the complaint's well-pleaded allegations as true, drawing all reasonable inferences in favor of the plaintiffs. *Christensen*, 483 F.3d at 457.

A. Sovereign immunity

The prosecutor-defendants (i.e., the Milwaukee Defendants plus Schmitz) argue that they are entitled to sovereign immunity under the Eleventh Amendment to the extent that O'Keefe seeks injunctive relief against them in their official capacity. This is simply wrong. O'Keefe's complaint rather easily states a claim under *Ex Parte Young*. "In determining whether the doctrine of *Ex Parte Young* avoids an

Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *McDonough Assoc., Inc. v. Grunloh*, 722 F.3d 1043, 1051 (7th Cir. 2013). For similar reasons, none of the defendants can rely on the panoply of immunity defenses to avoid the imposition of injunctive relief. *See, e.g.*, *African Trade & Info. Ctr., Inc. v. Abromaitis*, 294 F.3d 355, 360 (2d Cir. 2002) (qualified immunity "not an issue" when injunctive relief is sought); *Martin v. Keitel*, 205 Fed. App'x 925, 928 (3d Cir. 2006) ("Absolute prosecutorial immunity . . . extends only to claims for monetary damages and not to requests for declaratory or injunctive relief") (citing *Supreme Court of Va. v. Consumers Union of the United States*, 446 U.S. 719, 736 (1980)); *Harris v. Champion*, 51 F.3d 901, 905 (10th Cir. 1995) (absolute immunity does not shield judges from "claims for prospective relief") (citing *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984)).

B. Prosecutorial immunity

Prosecutors enjoy absolute immunity from federal tort liability because of the concern that "harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by the public trust." *Imbler v. Pachtman*, 424 U.S. 409, 423 (1976). However, absolute immunity only applies to acts committed within the scope of employment as prosecutors. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273-76 (1993). Courts apply a

functional approach, which looks to the "nature of the function performed, not the identity of the actor who performed it . . ." *Id.* at 269.

The employment duties of a prosecutor often "go beyond the strictly prosecutorial to include investigation, and when they do non-prosecutorial work they lose their absolute immunity and have only the immunity, called 'qualified,' that other investigators enjoy when engaged in such work." *Fields v. Wharrie*, 740 F.3d 1107, 1111 (7th Cir. 2014) (citing *Buckley*, *supra*, at 275-76). As the Court has already explained, the John Doe proceeding is an ongoing investigation, not a criminal prosecution. A prosecutor's absolute immunity is "limited to the performance of his prosecutorial duties, and not to other duties to which he might to assigned by his superiors or perform on his own initiative, such as *investigating a crime before an arrest or indictment*, . . ." *Id.* (emphasis added). Put another way, a prosecutor "does not enjoy absolute immunity before he has probable cause." *Whitlock v. Brueggemann*, 682 F.3d 567, 579 (7th Cir. 2012); *Buckley* at 274 ("A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested"). As the defendants admit, the John Doe proceeding seeks "information necessary to *determine whether probable cause exists* that Wisconsin's campaign finance laws have been violated." Chisholm's Motion to Dismiss at 13 (emphasis added).

The prosecutors argue that the actual existence of probable cause is not the precise trigger for prosecutorial immunity. For example, determining whether

charges should be brought and *initiating* a prosecution obviously qualify as functions that are "intimately associated with the judicial phase of the criminal process." *Lewis v. Mills*, 677 F.3d 324, 330 (7th Cir. 2012). Yet the Court has no way of knowing if the prosecutors are currently determining whether charges should be brought, or whether this supposedly ongoing determination stretches back for months on end. On the other hand, O'Keefe plausibly alleges that he is being investigated solely because of his political ideology, with no particular eye towards the actual commencement of a criminal prosecution. *Buckley* at 273 (prosecutor entitled to absolute immunity for the "professional evaluation of evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury *after a decision to seek an indictment has been made*") (emphasis added). In other words, O'Keefe does not attempt to hold the prosecutors liable for their participation in the formal processes of the John Doe proceeding. Instead, he calls them to account for pursuing the investigation in the first instance. *See Burns v. Reed*, 500 U.S. 478, 487 (1991) (finding that a prosecutor was entitled to immunity for his participation in a probable cause hearing, but not for his "motivation in seeking the search warrant or his conduct outside of the courtroom relating to the warrant"). This is more than enough to state a claim that avoids the absolute immunity defense. The prosecutors cannot insulate their investigatory, non-prosecutorial activities under the guise of evaluating evidence.

C. Qualified immunity

To determine whether the defendants are entitled to qualified immunity, the Court must address two issues: (1) whether the defendants violated plaintiffs' constitutional rights, and (2) whether the right at issue was clearly established at the time of the violation. *Rooni v. Biser*, 742 F.3d 737, 742 (7th Cir. 2014). As the Court has already explained, the complaint states plausible claims for relief against each of the defendants. As for the second prong, the defendants cannot seriously argue that the right to express political opinions without fear of government retaliation is not clearly established. *See, e.g., Delgado v. Jones*, 282 F.3d 511, 520 (7th Cir. 2002); *Pieczynski v. Duffy*, 875 F.2d 1331, 1336 (7th Cir. 1989); *Bennett v. Hendrix*, 423 F.3d 1247, 1255 (11th Cir. 2005) ("This Court and the Supreme Court have long held that state officials may not retaliate against private citizens because of the exercise of their First Amendment rights").

D. Quasi-judicial immunity

Out of all the defendants, only Schmitz moves to dismiss on the grounds that he is entitled to quasi-judicial immunity, which applies to persons who are "performing a ministerial function at the direction of the judge . . ." *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1238 (7th Cir. 1986); *Kincaid v. Vail*, 969 F.2d 594, 601 (7th Cir. 1992) ("when functions that are more administrative in character have been undertaken pursuant to the explicit direction of a judicial officer, we have held that that officer's immunity is also available to the subordinate"). As the Court has

already explained, Schmitz's actions, according to the well-pleaded allegations of the complaint, go far beyond the performance of ministerial duties at the direction of the John Doe judge. Rather, the complaint plausibly alleges that Schmitz is an active participant in the ongoing, unlawful investigation into the plaintiffs' supposed violation of Wisconsin's campaign finance laws. *See, e.g.*, Complaint, Ex. C, State's Consolidated Response to Motion to Quash (signed by Schmitz).

V. Indispensible parties

Finally, the defendants argue that the District Attorney for Iowa County (O'Keefe's county of residence), as well as some other district attorneys, should have been joined as necessary, indispensable parties. Fed. R. Civ. P. 12(b)(7); Fed. R. Civ. P. 19(a). To determine whether a party is a necessary party, the Court must consider (1) whether complete relief can be accorded without joinder, (2) whether the absent party's ability to protect his interest will be impaired, and (3) whether the existing parties will be subjected to a substantial risk of multiple or inconsistent obligations unless he is joined. *Davis Co. v. Emerald Casino, Inc.*, 268 F.3d 477, 481 (7th Cir. 2001). Defendants argue that any criminal prosecution against O'Keefe would have to be brought in Iowa County, but this does not mean that the Iowa County District Attorney is an indispensible party. O'Keefe is trying to stop a John Doe investigation that happens to encompass Iowa County, but the Iowa County District Attorney has no control over the direction and conduct of the investigation.

Ultimately, the Court is not at all persuaded that any other district attorneys are

indispensable parties, but if they are, the proper remedy would be joinder, not dismissal. Fed. R. Civ. P. 19(a)(2). The Court will not dismiss the complaint on these grounds.

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. The plaintiffs' motions to file materials under seal and to file an oversized memorandum [ECF Nos. 70, 71] are **GRANTED**;
2. The defendants' motions to seal and to file reply briefs [ECF Nos. 72, 73, 75, 76, 78] are **GRANTED**;
3. The plaintiffs' motion for leave to file supplemental authority and to seal [ECF No. 80] is **GRANTED**;
4. Schmitz's motion for leave to file a response to the notice of supplemental authority and to seal [ECF No. 82] is **GRANTED**; and
5. The defendants' motions to dismiss [ECF Nos. 40, 43 and 52] are **DENIED**.

Dated at Milwaukee, Wisconsin, this 8th day of April, 2014.

BY THE COURT:

HON. RUDOLPH T. RANDA
U.S. District Judge

EXHIBIT 6

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ERIC O'KEEFE and
WISCONSIN CLUB FOR GROWTH, Inc.,

Plaintiffs,

-vs-

FRANCIS SCHMITZ, in his official and personal capacities,

JOHN CHISHOLM, in his official and personal capacities,

Case No. 14-C-139

BRUCE LANDGRAF, in his official and personal capacities,

DAVID ROBLES, in his official and personal capacities,

DEAN NICKEL, in his official and personal capacities, and

GREGORY PETERSON, in his official capacity,

Defendants.

DECISION AND ORDER

On April 8, the Court denied the defendants' various motions to dismiss. ECF No. 83, 2014 WL 1379934. This was only after the Court set an expedited briefing schedule on those motions, promising a decision by a specific date in light of the plaintiffs' allegations of ongoing irreparable harm. The denial of the defendants' motions to dismiss — at minimum — meant that the Court would decide the plaintiffs'

motion for a preliminary injunction. The defendants now attempt to derail this ruling by appealing the Court's decision and moving to stay pending appeal.

In response, the plaintiffs cross-move for an order certifying the defendants' appeals as frivolous. *See Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989) ("a notice of appeal may be so baseless that it does not invoke appellate jurisdiction"). The Court is inclined to agree that the appeals are frivolous, especially as it pertains to the defendants' argument that the plaintiffs somehow failed to state a claim under *Ex Parte Young*. Decision and Order at 13 (describing the argument as "simply wrong"). For now, it suffices to hold, as discussed below, that the notice of appeal clearly does not deprive the Court of jurisdiction to rule on the injunction motion.

Although "the filing of a timely notice of appeal confers jurisdiction over the matter on the court of appeals and divests the district court of its control," that rule "does not operate . . . where there is a purported appeal from a nonappealable order . . ." *JPMorgan Chase Bank, N.A. v. Asia Pulp & Paper Co., Ltd.*, 707 F.3d 853, 860 n.7 (7th Cir. 2013). The question then becomes whether the Court's denial of a motion to dismiss for failure to state a claim under *Ex Parte Young* is immediately appealable under the collateral order doctrine. Collateral-order review is based on a "practical" construction of 28 U.S.C. § 1291; it is not an exception to the final-judgment rule. *Ott v. City of Milwaukee*, 682 F.3d 552, 554 (7th Cir. 2012) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994)). The collateral-order doctrine "confers finality on an

otherwise interlocutory order if the order conclusively resolves an important question completely separate from the merits of the action and the question is effectively unreviewable on appeal from a final judgment." *JPMorgan* at 868.

The defendants cite *Goshtasby v. Bd. of Trustees of the Univ. of Ill.*, 123 F.3d 427, 428 (7th Cir. 1997), which held that the district court must stay proceedings after an appeal by the state under the Eleventh Amendment. *Goshtasby* did not involve a claim under *Ex Parte Young*, and the case relied upon by *Goshtasby* — *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) — distinguished such claims:

> The doctrine of *Ex Parte Young*, which ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law, is regarded as carving out a necessary exception to Eleventh Amendment immunity. Moreover, the exception is narrow: It applies only to prospective relief, does not permit judgments against state officers declaring that they violated federal law in the past, and has no application in suits against the States and their agencies, which are barred regardless of the relief sought. Rather than defining the nature of Eleventh Amendment immunity, *Young* and its progeny *render the Amendment wholly inapplicable to a certain class of suits. Such suits are deemed to be against officials and not the States or their agencies*, which retain their immunity against all suits in federal court.

Id. at 146 (emphasis added). In other words, *Ex Parte Young* employed a "chameleon-like legal fiction, reasoning that when a state official violates the federal Constitution, that official is 'stripped of his official or representative character' and thus also of any immunity defense." *McDonough Assoc., Inc. v. Grunloh*, 722 F.3d 1043, 1050 (7th Cir. 2013).

In finding that the plaintiffs' complaint "rather easily states a claim under *Ex Parte Young*," the Court conducted a "straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." Decision and Order at 12-13 (quoting *McDonough* at 1051). This ruling did not conclusively determine that the Eleventh Amendment is "wholly inapplicable." Nor is that issue completely separate from the merits. Instead, the issue is indelibly related to the merits of the plaintiffs' pursuit of injunctive relief. If the defendants are violating the plaintiffs' constitutional rights, the Eleventh Amendment does not apply and the plaintiffs are entitled to injunctive relief. Since the essence of the plaintiffs' claim is that the defendants are "stripped" of their "official or representative character" by violating the constitution, the Court's denial of the defendants' motion to dismiss is not immediately appealable. *See Ruffino v. Sheahan*, 218 F.3d 697, 700 (7th Cir. 2000); *Feldman v. Bahn*, 12 F.3d 730, 732 (7th Cir. 1993) (dismissing interlocutory appeal because official-capacity defendants share the State's "imperviousness to damages" and "are not at personal risk"); *see also Libby v. Marshall*, 833 F.2d 402, 406 (1st Cir. 1987) (because the state is subjected to the "not inconsiderable burden" of defending a *Young*-type suit, it "cannot be convincingly argued that the entitlement possessed by the state under the Eleventh Amendment is an entitlement not to stand trial").

The defendants also move for a discretionary stay pending appeal on the issues of qualified immunity, absolute immunity, and various abstention doctrines. From a

discretionary standpoint, the Court will not stay injunction proceedings pending appeal. For now, the Court will defer ruling on the defendants' motion to stay to the extent that it applies to non-injunction proceedings. The Court will also defer ruling on the plaintiffs' motion to certify the appeals as frivolous.

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. Francis Schmitz's motions to join the motion to stay [ECF No. 150] and for leave to file a reply brief in support of the motion to stay [ECF No. 165] are **GRANTED**;

2. Dean Nickel's motion to join the motion to stay [ECF No. 153] is **GRANTED**; and

3. The defendants' motion to stay injunction proceedings pending appeal [ECF No. 96] is **DENIED**. The parties should await further order from the Court regarding the injunction motion.

Dated at Milwaukee, Wisconsin, this 1st day of May, 2014.

BY THE COURT:

HON. RUDOLPH T. RANDA
U.S. District Judge

EXHIBIT 7

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

ERIC O'KEEFE, and WISCONSIN CLUB FOR GROWTH, INC., Plaintiffs, v. FRANCIS SCHMITZ, in his official and personal capacities, JOHN CHISHOLM, in his official and personal capacities, BRUCE LANDGRAF, in his official and personal capacities, DAVID ROBLES, in his official and personal capacities, DEAN NICKEL, in his official and personal capacities, GREGORY PETERSON, in his official capacity, Defendants.	Case No. 2:14-cv-00139-RTR

JOINT CIVIL L. R. 7(h) EXPEDITED NON-DISPOSITIVE MOTION FOR A PRETRIAL CONFERENCE

Plaintiffs Eric O'Keefe and the Wisconsin Club for Growth, Inc. ("Plaintiffs") and Defendants Schmitz, Chisholm, Landgraf, Robles and Nickel ("Defendants"), pursuant to Federal Rule Civil Procedure 16 and Civil Local Rules 7(h) and 16, respectfully move the Court to schedule a pretrial conference on April 24, 2014, or as soon thereafter as is convenient for the Court.

The Court scheduled a preliminary injunction hearing for May 7, 2014. In advance of that hearing, the Parties believe a scheduling conference would be helpful to discuss the structure and order of the hearing, including the allocation of time among the parties.

Plaintiffs' position is that the May 7 hearing should be an oral argument on the Parties' submissions. The Parties have submitted extensive declarations and documentary evidence. An evidentiary hearing at this time would be cumulative of that evidence or would bring in new evidence, prejudicing Plaintiffs. Given the ongoing harm to Plaintiffs, any evidentiary hearing or trial on Plaintiffs' request for injunctive relief should occur after expedited discovery, in addition to a preliminary injunction issued in conjunction with the May 7 hearing.

Defendants' position is that Plaintiffs cannot sustain their burden of proof in the absence of live witnesses as Plaintiffs allege that the conduct of the Defendants is motivated by partisanship, animus, political purposes and bad faith. Defendants dispute these allegations and intend to put Plaintiffs to their proof. Defendants will call witnesses to rebut Plaintiffs' allegations and to defend against Plaintiffs' attacks on Defendants' declarations and credibility. Defendants believe the Court's guidance will lead to the efficient scheduling of witness testimony and will result in conservation of the Court's time.

In addition, the Parties agree there are outstanding issues regarding the John Doe secrecy orders and Wisconsin Statute § 12.13(5), with regard to certain Defendants, that require the Court's guidance prior to the start of the preliminary injunction hearing.

As a final matter, the Court's guidance regarding the timing of its ruling on Defendant's pending Motion to Stay (Dkt. No. 96) may serve to preclude additional filings leading up to the hearing related to that Motion.

The Parties certify that no other memorandum or other supporting papers will be filed in support of this Motion.

Defendant Judge Gregory Peterson does not oppose the joint motion for an expedited pretrial conference.

WHEREFORE, the Parties respectfully request the Court to grant their motion and schedule a pretrial conference on April 24, 2014, or as soon thereafter as is convenient for the Court.

Dated: April 22, 2014.

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EXHIBIT 8

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ERIC O'KEEFE and
WISCONSIN CLUB FOR GROWTH, Inc.,

Plaintiffs,

-vs-

FRANCIS SCHMITZ, in his official and personal capacities,

JOHN CHISHOLM, in his official and personal capacities,

Case No. 14-C-139

BRUCE LANDGRAF, in his official and personal capacities,

DAVID ROBLES, in his official and personal capacities,

DEAN NICKEL, in his official and personal capacities, and

GREGORY PETERSON, in his official capacity,

Defendants.

DECISION AND ORDER

Yesterday, the Court issued an order that set a briefing schedule on the pending motion to stay and moved the hearing on the plaintiffs' motion for a preliminary injunction to May 7. Now, the parties have filed a joint motion for a pretrial conference, asking for guidance on how to proceed at the injunction hearing.

In light of the jurisdictional issue raised by the motion to stay, the Court finds

that the most efficient manner of proceeding is to remove the hearing from its calendar. The Court understands the urgency of the situation, and while this case has occupied a great portion of the Court's docket to date, this matter will not linger. The expedited briefing schedule on the motion remains intact.

The parties' motion for a pretrial conference [ECF No. 136] is **DENIED**.

Dated at Milwaukee, Wisconsin, this 22nd day of April, 2014.

BY THE COURT:

HON. RUDOLPH T. RANDA
U.S. District Judge

EXHIBIT 9

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

ERIC O'KEEFE and
WISCONSIN CLUB FOR GROWTH,
INC.,

Plaintiffs,

vs. Case No. 14-CV-139-RTR

FRANCIS SCHMITZ, in his official and
personal capacities, et al.,

Defendants.

DEFENDANTS CHISHOLM, LANDGRAF, AND ROBLES' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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Defendants John Chisholm, Bruce Landgraf, and David Robles ("the Milwaukee County prosecutors"), by their attorneys, submit this brief in support of their Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), 12(b)(7), and 12(c).

INTRODUCTION

Plaintiffs O'Keefe and Wisconsin Club for Growth ask the Court to preempt lawful state proceedings to excuse them from cooperating with state authorities investigating criminal violations of Wisconsin's campaign finance laws. They ask also that the Court immunize them from any charges or penalties that may result from the collected evidence. The request is outrageous. There are a plethora of reasons why this lawsuit should not go forward, among them the following:

First, the relief requested would trounce upon state authorities in a matter of surpassing state interest: free and fair elections. Specifically, the "investigation" that plaintiffs refer to generically is, in fact, five John Doe proceedings in five jurisdictions commenced at the request of district attorneys from both political parties.[1] Each proceeding is lawful and supported by Wisconsin's Government Accountability Board ("GAB"), the nonpartisan state agency charged with enforcement of Wisconsin's campaign finance rules. The GAB's Director and General Counsel supports the John Doe enforcement proceedings, deeming their continuation a matter of "profound" importance to the public and the GAB's mission. (Leib Decl.,¶ 3 Ex. A, Kennedy Aff., ¶ 13.)[2] The agency is on record disputing plaintiffs' interpretation of Wisconsin law as

[1] Columbia County Case No. 13-JD-000011, initiated by District Attorney Jane E. Kohlwey (Leib Decl.,¶ 4 Ex. B); Iowa County Case No. 13-JD-000001, initiated by District Attorney Larry E. Nelson (Leib Decl.,¶ 5 Ex. C); Dodge County Case No. 13-JD-000006, initiated by District Attorney Kurt F. Klomberg (Leib Decl.,¶ 6 Ex. D); and Dane County Case No. 13-JD-000009, initiated by District Attorney Ismael R. Ozanne (Leib Decl.,¶ 7 Ex. E).

[2] This Court is permitted to take judicial notice of matters of public record on a Rule 12(b)(6) motion to dismiss without converting it to summary judgment. *Pugh v. Tribune Co.*, 521 F.3d 686, 691 n.2 (7th Cir. 2008). This is especially true where the documents are referred to in a plaintiffs' complaint and are central to their claims. *Wright*

contrary to the principles and case authority that have guided the GAB since it was created in 2008. (Id. at ¶¶ 5, 9-13.)

Second, this lawsuit is rank forum shopping in an attempt to circumvent the authority of the state courts. Plaintiffs have full recourse to state court review processes at all levels and, in fact, have alleged that they were successful in those courts. (Compl., ¶¶ 20, 139, Ex. D.) Moreover, there are at least three pending appellate matters related to the John Doe proceedings, including actions by plaintiffs or their affiliates raising the same issues presented here. (Leib Decl., ¶¶ 8-10 Ex. F-H.) Those courts of Wisconsin are entitled to rule on the issues before them, particularly on an issue of such great importance to the state.

Plaintiffs' suggestion that they face imminent harm if the John Doe proceedings continue is baseless. The subpoenas served upon them have been quashed (Compl., ¶¶ 20, 139), and the pending petitions and appeals have effectively stayed the state proceedings. As the John Doe judge said just a few weeks ago, "[I]f my decision is upheld, the ultimate and inevitable consequence will be to terminate the John Doe investigation." (Leib Decl. ¶ 11, Ex. I, at 2.) There is simply no reason for this Court to circumvent the Wisconsin courts.

Finally, and perhaps revealing of their true purpose, plaintiffs have declined to sue or seek to enjoin the district attorneys who commenced proceedings in the counties of plaintiffs' own residency. The Milwaukee County prosecutors' authority is exclusive to Milwaukee

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v. Associated Companies, Inc., 29 F.3d 1244, 1248 (7th Cir. 1994). *Opoka v. INS* recognized that proceedings from other courts, "both within and outside the federal judicial system" may be judicially noticed where those proceedings "have a direct relation to matters at issue." 94 F.3d 392, 394 (7th Cir. 1996); *see also Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 444 (7th Cir. 2009) (noting that district court may "view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists"); *Kanzelberger v. Kanzelberger*, 782 F.2d 774, 777 (7th Cir. 1986) (explaining that court is "duty-bound to demand proof" of jurisdictional facts); *Paige v. Waukesha Health System, Inc.*, 2013 WL 3560944 (E.D. Wis. July 11, 2013) (slip op.) ("court may take judicial notice of matters of public record, including court records," in addressing Fed. R. Civ. P. 12(b)(1) or 12(b)(6) challenges to court's jurisdiction) (citing *Henson v. CSC Credit Srvs.*, 29 F.3d 280, 284 (7th Cir. 1994) (holding that court documents from state court proceedings can be judicially noticed and considered on motion to dismiss)).

County; they do not have legal authority to commence proceedings in the counties of plaintiffs' residency, Iowa and Dane, respectively. Wis. Stat. § 11.62(2). In their fervor to spin a narrative of partisanship, the plaintiffs have neglected to address the district attorneys and actual John Doe proceedings relevant to their alleged activities.

In fact, plaintiffs' complaint is so lacking in specificity and legally baseless one can only infer that it was filed as a vessel for partisan mud-slinging and to distract defendants from fulfilling their prosecutorial duties. Respectfully, the Court should not indulge it further.

a. Wisconsin's Campaign Finance Laws.

Plaintiffs assert that the John Doe proceedings are founded upon a flawed reading of Wisconsin's campaign finance laws. They claim, specifically, that the activity being investigated conforms to Wisconsin's campaign finance disclosure requirements, but that the John Doe prosecutors have misinterpreted those laws. (Compl., ¶ 95 et seq.) The following is intended to introduce the Court to those requirements and the parties' position.

The stated purpose of the state's campaign finance laws is to protect the integrity of the electoral process and assure free government. Wis. Stat. § 11.001(3). The legislature cautioned that "when the true source of support or extent of support is not fully disclosed, or when a candidate becomes overly dependent upon large private contributors, the democratic process is subjected to a potential corrupting influence." *Id.*, § 11.001(1). In furtherance of those principles, Wisconsin's laws prohibit candidate coordination with "independent" organizations, like a 501(c)(4) organization, to channel donations from the campaign to the candidate-controlled organization, thus avoiding both contribution limits and disclosure of the donor identity as required by law. If the "independent" organization then spends that money on "issue" advocacy during an election cycle, the campaign has effectively used private donations in violation of

public reporting and other requirements. The result is that the electorate is prevented from knowing that substantial sums—sometimes millions of dollars—have been made available to the candidate campaign by unnamed donors.

It is against this background that plaintiffs—a so-called "independent" organization and its director—urge the Court to enjoin the state's and several district attorneys' enforcement of Wisconsin's laws governing campaign coordination with organizations like theirs. Plaintiffs' position is that such coordinated activity can never be construed as an illegal "contribution" by an organization to a candidate. (Compl., ¶ 100.) Their position is contrary to the position of the GAB, Wisconsin's nonpartisan agency charged with enforcing campaign finance laws. The GAB has backed the John Doe prosecutors, asserting that plaintiffs' position, if successful, "would result in millions of dollars of undisclosed corporate and individual contributions without limitation on the amounts accepted," a result that would "undermine Wisconsin's system of campaign finance regulation." (Leib Decl.,¶ 3 Ex. A, Kennedy Aff., ¶ 13.)

Aside from that debate, it is equally important to understand the prosecutorial jurisdiction as defined by Wisconsin's campaign finance law. With exceptions not relevant here, the law requires that criminal prosecutions for violations of such laws must be "conducted by the district attorney for the county where the defendant resides." Wis. Stat. § 11.61(2). Each county's district attorney is required by Wisconsin law, therefore, to act upon evidence of criminal activity within his or her county. No exception is made for the prosecutor's political affiliation.

b. Nature of Wisconsin's John Doe Proceedings.

As plaintiffs acknowledge only in passing, the "investigation" they describe in the Complaint is in fact five John Doe proceedings commenced in five counties based upon evidence of violations of the state's campaign finance laws in each county. (Compl., ¶ 89.) The plaintiffs'

complaint does not question the evidentiary basis for commencing the distinct proceedings, nor could they in this forum. Rather, plaintiffs center their attack on the Milwaukee County defendants, accusing them of political bias and prosecutorial impropriety. Plaintiffs allege that the five John Doe proceedings are sham proceedings instituted and directed by a few prosecutors. The allegation is fundamentally inconsistent with the nature and statutory structure of proceedings under Wis. Stat. § 968.26.

A John Doe proceeding in this state is neither unusual nor suspect. It is an "institution which has been sanctioned by long usage and general recognition." *State v. Washington*, 266 N.W.2d 597, 606 (Wis. 1978) (citing *State ex rel. Niedzieko v. Coffey*, 22 Wis. 2d 392, 396, (1964) and *State ex rel. Long v. Keyes*, 75 Wis. 288, 295 (1889)). The proceedings are not, as plaintiffs imply, unfettered fishing expeditions by prosecutors. Rather, they are statutorily-governed, convened by a judge, and directed by the judge's discretionary rulings. *See* Wis. Stat. § 928.26 (1), (3); *Ryan v. State*, 225 N.W.2d 910, 916 (Wis.1977); *State ex rel. Newspapers, Inc. v. Circuit Court*, 221 N.W.2d 894, 897 (Wis.1974). Since the inception of John Doe proceedings in the latter part of the nineteenth century, Wisconsin's statutes have withstood constitutional scrutiny and continue to serve a valuable purpose in Wisconsin's law enforcement scheme. *Washington*, 266 N.W.2d at 603 (holding that the proceeding does not violate separation of powers); *State ex rel. Jackson v. Coffey*, 18 Wis. 2d 529, 118 N.W.2d 939, 948-49 (1963) (holding that the secrecy aspect of a John Doe proceeding does not infringe upon a witness' First Amendment right of free speech).

The John Doe proceeding is not, as plaintiffs also insinuate, a prosecutorial-driven process. Once appointed, a judge acts as a neutral and detached tribunal, retaining significant power to direct the proceeding and prosecutors. *See State v. Noble*, 646 N.W.2d 38, 48 (Wis.

2002); *Wolke v. Fleming*, 29 N.W.2d 841, 844-45 (Wis. 1964). As the Wisconsin Supreme Court explained,

> The John Doe judge is a judicial officer who serves an essentially judicial function. The judge considers the testimony presented. It is the responsibility of the John Doe judge to utilize his or her training in constitutional and criminal law and in courtroom procedure in determining the need to subpoena witnesses requested by the district attorney, in presiding at the examination of witnesses, and in determining probable cause. It is the ***judge's responsibility to ensure procedural fairness***.

Washington, 266 N.W.2d at 605 (emphasis added).

The John Doe judge has a dual obligation "to enable the prosecution to use the tools of a John Doe proceeding to facilitate the investigation of purported criminal activity and to insure that the witness is treated fairly and protected from oppressive tactics." *Davis*, 697 N.W.2d at 809 (emphasis added). Witnesses and persons under investigation have substantial rights and due process protections, *State ex rel. Unnamed Person No. 1 v. State*, 660 N.W.2d 260, 275 (Wis. 2003); *see also State v. Doe*, 254 N.W.2d 210, 212-13 (Wis. 1977), including the right to counsel. *State ex rel. Unnamed Person No. 1*, 660 N.W.2d at 275. The Wisconsin Court of Appeals has supervisory jurisdiction over the proceedings. *Id.* Moreover, if a complaint results, any party charged may request circuit court review. *State ex rel. Reimann v. Circuit Court*, 571 N.W.2d 385, 392 (Wis. 1997).

Finally, the statute authorizes, and Wisconsin courts have recognized, the need for such proceedings to be carried out in secrecy. *See, e.g., State ex rel. Newspapers, Inc.*, 221 N.W.2d at 897. Secrecy is necessary to protect the process as well as a privilege of the witness. *State ex rel. Kowaleski v. District Court*, 36 N.W.2d 419, 423-24 (Wis. 1949). As the state supreme court noted, "secrecy may assist the fact-finding process. It keeps information from a target who might consider fleeing; prevents a suspect from collecting perjured testimony for the trial; prevents

those interested in thwarting the evidence; and renders witnesses more free in their disclosures." *State ex rel Doe*, 697 N.W.2d at 808. It also helps prevent testimony which may be mistaken, untrue, or irrelevant from becoming public. *O'Connor*, 252 N.W.2d at 678; *see also State ex rel. Distenfeld v. Neelen*, 38 N.W.2d 703, 704 (Wis. 1949).

c. John Doe Proceedings at Issue.

Consistent with the statute, each of the John Doe proceedings at issue was commenced by petition of a district attorney and approved by chief judges of the respective counties based upon evidence of potential criminal activity within those counties. (Leib Decl.,¶¶ 4-7, 12 Ex. B-E, J "Petitions," ¶¶ 13-7, Ex. K-O, "Orders"). Unfortunately, the Complaint fails to distinguish between the distinct John Doe proceedings it references. The following is intended to address the procedural posture and facts leading up of the active John Doe proceedings.

- **August 2012** - Milwaukee County District Attorney petitions the Milwaukee County Circuit Court to commence John Doe proceeding, (Leib Decl.,¶ 12, Ex. J); Chief Judge Jeffrey A. Kremers finds cause to refer petition to Reserve Judge Barbara A. Kluka for resolution, (Leib Decl.,¶ 18, Ex. P); Chief Justice Shirley Abrahamson confirms appointment of Judge Kluka, (Leib Decl.,¶ 19, Ex. Q);

- **September 5, 2012** - Judge Kluka reviews petition and finds cause to commence Milwaukee County John Doe Proceeding 12-JD-00023, (Leib Decl.,¶ 17, Ex. 0);

- **January 18, 2013** - District Attorney John T. Chisholm meets with Attorney General J.B. Van Hollen to tender the matter to the Wisconsin Department of Justice, (Rivkin Aff. ¶ 34, Ex. 32, Chisholm Aff. ¶ 4 [ECF No. 7-2]);

- **May-June 2013** - Attorney General J.B. Van Hollen declines prosecutors' request to assume responsibility based on conflict or appearance of conflict of interest (Compl., Ex. B); district attorneys from five counties meet with GAB to review evidence (Leib Decl.,¶ 20, Ex. Q; Rivkin Aff. ¶ 34, Ex. 32, Chisholm Aff. ¶ 7 [ECF No. 7-2]);

- **July-August 2013** - district attorneys of Columbia, Iowa, Dodge, and Dane Counties petition for commencement of John Doe proceedings in their counties; each petition reviewed by chief judges; Judge Kluka commences proceedings in

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four additional counties (*see* Leib Decl.,¶¶ 4-7, Ex. B-E, "Petitions," ¶¶ 13-7, Ex. K-N, "Orders");[3]

- **August 2013** - five district attorneys submit joint letter asking Judge Kluka to consider appointment, on her own motion, of a special prosecutor to lead proceedings, (Leib Decl.,¶ 20, Ex. R); Judge Kluka appoints Attorney Fran Schmitz as special prosecutor in charge of coordinated John Doe proceedings (Leib Decl.,¶ 21, Ex. S);

- **September 30, 2013** - Judge Kluka approves certain subpoenas, including those issued to plaintiffs O'Keefe and Wisconsin Club for Growth ("WCFG") (Leib Decl.,¶ 22, Ex. T);

- **October 25, 2013** - plaintiffs O'Keefe and WCFG file motion to quash subpoenas, (Leib Decl.,¶ 23, Ex. U);

- **November 14, 2013** - three unnamed petitioners seek writs in Wisconsin Court of Appeals challenging appointment of judge and special prosecutor;[4] petitions denied on January 30, 2014; denial of petition appealed to Wisconsin Supreme Court is ***currently pending***;

- **January 10, 2014** - Judge Kluka's successor, Judge Gregory A. Peterson, grants O'Keefe and WCFG's motion to quash, (Compl., Ex. D);

- **February 6, 2014** - two unnamed petitioners seek original jurisdiction in Wisconsin Supreme Court regarding interpretation of campaign finance laws[5] are ***currently pending***, (Leib Decl.,¶ 9, Ex. G); and

- **February 21, 2014** – The State petitions Wisconsin Court of Appeals for supervisory review of John Doe judge's January 10, 2014 Order quashing subpoenas are ***currently pending***, (Leib Decl.,¶ 8, Ex. F).

d. Applicable Standards.

Consistent with *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 560 (2007), only a pleading that contains sufficient factual allegations to demonstrate a plausible entitlement to

[3] Columbia County Case No. 13-JD-000011, initiated by District Attorney Jane E. Kohlwey; Iowa County Case No. 13-JD-000001, initiated by District Attorney Larry E. Nelson; Dodge County Case No. 13-JD-000006, initiated by District Attorney Kurt F. Klomberg; and Dane County Case No. 13-JD-000009, initiated by District Attorney Ismael R. Ozanne.

[4] *State ex rel. Three Unnamed Petitioners v. Kluka*, 2013AP2504-W, 2013AP2505-W, 2013AP2506-W, 2013AP2507-W, 2013AP2508-W.

[5] *State ex rel. Two Unnamed Petitioners v. Peterson, et al.*, 14AP296-OA.

relief can withstand a motion to dismiss. This "requires more than labels and conclusions, and a formulaic recitation of the elements of the cause of action." *Id* at 545. The Supreme Court held in *Ashcroft v Iqbal*, 556 U.S. 662, 679 (2009), that courts "are not bound to accept as true a legal conclusion couched as a factual assertion." Per *Twombly* and ***Iqbal,*** allegations that are consistent with lawful conduct, even when characterized as unlawful, or coupled with conclusory assertions of wrongdoing fail to state a claim. *Brooks v. Ross,* 578 F.3d 574, 582 (7th Cir. 2009).

The Court explained in *Iqbal* that the analysis of whether a claim has been properly pled should begin "by identifying the allegations in the complaint that are not entitled to a presumption of truth"—the pleader's conclusory assertions. 556 U.S. at 1950. Once the pleader's conclusions are disregarded, a court can determine if the "well-pleaded factual allegations . . . plausibly give rise to an entitlement of relief." *Id.*

Here, plaintiffs' complaint consists almost entirely of conclusory assertions of political conspiracy that are not entitled to any credit when evaluating if they have stated a claim. Stripped of the conclusory assertions, plaintiffs' complaint fails to state a claim against the Milwaukee County prosecutors. The rules relevant to this Court's review of the plaintiffs' complaint include:

Fed. R. Civ. P. 12(b)(1). Rule 12(b)(1) requires a court to dismiss an action when it lacks subject matter jurisdiction. *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942, 946 (7th Cir. 2003). It is plaintiffs' burden to affirmatively allege, and to ultimately prove, the existence of subject matter jurisdiction. *Kontos v. United States Dept. of Labor*, 826 F.2d 573, 576 (7th Cir. 1987); *Rizzi v. Calumet City*, 11 F. Supp. 2d 994, 995 (N.D. Ill. 1998) (plaintiff bears the burden of persuading the court that subject matter jurisdiction exists by providing competent proof of jurisdictional facts). In deciding a Rule 12(b)(1) motion, a court may look

beyond the complaint's jurisdictional allegations and consider affidavits and other evidence to determine whether subject matter jurisdiction indeed exists. *See United Phosphorus,* 322 F.3d at 946; *Capitol Leasing Co. v. Federal Deposit Ins. Corp.*, 999 F.2d 188, 191 (7th Cir. 1993).

Fed. R. Civ. P. 12(b)(6) and *Fed. R. Civ. P. 12(c).* A Rule 12(b)(6) motion to dismiss challenges the legal sufficiency of the pleadings.[6] *Christensen v. County of Boone*, 483 F.3d 454, 458 (7th Cir. 2007). The complaint is construed in the light most favorable to plaintiff and all well-pleaded factual allegations are to be accepted as true. *Tamayo v Blagojevich,* 526 F.3d 1074, 1081 (7th Cir. 2008). A motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure is governed by the same standards as a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 633 (7th Cir. 2007). Fed. R. Civ. P. 12(c) permits a judgment based on the pleadings alone. *Alexander v. City of Chicago*, 994 F.2d 333, 336 (7th Cir.1993), *cert. denied sub nom.*, *Leahy v. City of Chicago,* 520 U.S. 1228 (1997).

Fed. R. Civ. P. 12(b)(7). Rule 12(b)(7) authorizes a motion to dismiss the action for failure to join a party in accordance with Rule 19. The purpose of Rule 19 is to "permit joinder of all materially interested parties to a single lawsuit so as to protect interested parties and avoid waste of judicial resources." *Moore v. Ashland Oil, Inc.*, 901 F.2d 1445, 1447 (7th Cir. 1990). Rule 12(b)(7) permits a motion to dismiss if a party is absent and without whom complete relief

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[6] The pleadings include the complaint, the answer, and any written instruments attached as exhibits. Fed. R. Civ. P. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is part thereof for all purposes."); *see also Warzon v. Drew*, 60 F.3d 1234, 1237 (7th Cir. 1995) (stating that exhibits attached to the complaint are incorporated into the pleading for purposes of Rule 12(c) motions); *Beam v. IPCO Corp.*, 838 F.2d 242, 244 (7th Cir. 1988) (stating that exhibits attached to the complaint are incorporated into the pleading for purposes of Rule 12(b) motions). Under Rule 10(c), the attached documents are incorporated into the pleadings. As mentioned previously, the Court may also take judicial notice of matters of public record. *See generally Louisiana ex rel. Guste v. United States*, 656 F.Supp. 1310, 1314 n.6 (W.D. La. 1986), *aff'd*, 832 F.2d 935 (5th Cir. 1987), *cert. denied*, 485 U.S. 1033 (1988); Wright & Miller, Federal Practice and Procedure: Civil 2d § 1357 (Supp. 1989).

cannot be granted or whose interest in the dispute is such that to proceed might prejudice the party or parties already before the court. *Hermes v. Hein*, 479 F. Supp. 820, 826 (N.D. Ill. 1979).

"Dismissal of a claim is appropriate if there exists no set of facts that would support the claim and entitle [the plaintiff] to recover." *Harris v. City of Auburn*, 27 F.3d 1284, 1285 (7th Cir. 1994) (citing *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1477 (7th Cir. 1990)). In this case, it is clear that no relief can be granted in favor of plaintiffs, and judgment on the pleadings in favor of defendants is appropriate, because the Court does not have subject-matter jurisdiction over this matter and the applicant has failed to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(1), 12(b)(6), 12(b)(7), 12(c).

ARGUMENT

Defendants Chisholm, Landgraf, and Robles respectfully request that the Court dismiss all claims on grounds that: (I) the Court lacks jurisdiction and must abstain in deference to the ongoing state proceedings; (II) the defendants are entitled to absolute immunity, or alternatively qualified immunity, from the claims; (III) plaintiffs have failed to show that they have standing to bring their claims or that their claims are ripe for adjudication; and (IV) plaintiffs have failed to join parties indispensable to the relief requested.

I. THE COURT SHOULD DISMISS THIS CASE UNDER DOCTRINES OF ABSTENTION.

In a transparent attempt to undermine lawful proceedings, plaintiffs have launched a multi-faceted attack on John Doe proceedings that they assume are investigating the legality of their campaign fundraising methods. These plaintiffs, or their affiliates, are actively challenging the John Doe proceedings in the proceedings themselves, before the Wisconsin Court of Appeals, and in at least two matters in the Wisconsin Supreme Court. (*See* footnotes 4-5 *supra*; Leib Decl.,¶ 24-25). When, as here, there are parallel state and federal proceedings involving

similar or overlapping issues, the doctrines of abstention generally direct a federal court to decline jurisdiction. Federal abstention is necessary to promote comity between and independence of the federal and state forums. *See, e.g.*, *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500-01 (1941). In the circumstance of this case, abstention is warranted to protect the State of Wisconsin from needless intrusion into its law enforcement processes, statutes, regulations, and policies.

A. Common Principles of Abstention.

The doctrines of abstention are not separated by definite, rigid boundaries. *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 11 n.9 (1987). Rather, they reflect common principles that counsel against federal intervention: (1) whether the litigant requesting federal intervention has adequate state mechanisms for vindicating his or her constitutional rights; (2) whether the dispute relates to important state interests; and (3) whether federal adjudication of constitutional issues of state law or process would be premature or otherwise offend the province of the states.

A federal court may defer jurisdiction when the litigant requesting federal intervention has adequate state mechanisms for vindicating his or her constitutional rights. *See New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 360-61 (1989) (interpreting the *Burford* doctrine); *Moore v. Sims*, 442 U.S. 415, 425, 430 (1979) (interpreting the *Younger* and *Pullman* doctrines). In the present case, there can be no dispute that plaintiffs are aggressively availing themselves of these mechanisms at each level of the Wisconsin judiciary. Plaintiffs or their affiliates have brought simultaneous motions or petitions to halt the John Doe proceedings before the John Doe judge, the Wisconsin Court of Appeals, and the Wisconsin Supreme Court. The state law questions and constitutional interests that plaintiffs ask this Court to review as necessary inquiries occasioned by this lawsuit are the very same issues that are awaiting

decisions at each level of the Wisconsin courts. There is no legitimate concern that plaintiffs' rights will go unaddressed absent this Court's review.

In addition to deference to ongoing proceedings, federal courts may decline jurisdiction in favor of state courts when important state interests are at stake. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 723 (1996) (discussing abstention generally). The regulation of campaign financing, particularly with respect to transparency of contribution and disclosure requirements, constitutes a substantial governmental interest. *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976). Additionally, states have an exceptional interest in enforcing their criminal laws. *Younger v. Harris*, 401 U.S. 37, 43-44 (1971). The John Doe proceedings seek information necessary to determine whether probable cause exists that Wisconsin's campaign finance laws have been violated. There can be no dispute that enforcement of campaign finance laws is a substantial state interest.

Finally, federal courts should abstain in favor of state courts to avoid unnecessary or premature constitutional rulings. *See Pennzoil Co.*, 481 U.S. at 11 (analyzing the *Pullman* doctrine); *Moore*, 442 U.S. at 428 (discussing abstention generally with reference to *Pullman*). In this case, the Wisconsin courts' ongoing review of the John Doe proceedings obviates any need for federal review. Consistent with the policies behind abstention, those state courts should be free to adjudicate their cases free from interference of federal courts. Adjudication by this Court is not necessary.

B. This Court Should Decline Jurisdiction in Favor of the Wisconsin Courts under the *Younger*, *Pullman*, and *Burford* Doctrines of Abstention.

Based on these common principles of abstention, the United States Supreme Court has recognized at least three abstention doctrines that are relevant here: *Younger*, *Pullman*, and *Burford*. In *Younger*, the Court established an important doctrine for abstention of federal

jurisdiction in deference to ongoing state proceedings. In *Pullman Co.*, the Court established a doctrine of abstention in circumstances of unsettled state law. Finally, in *Burford v. Sun Oil Co.*, the Court founded a doctrine pertaining to federal questions of complex state regulatory schemes. 319 U.S. 315 (1943). Plaintiffs' Complaint raises constitutional questions about the propriety of a Wisconsin criminal proceeding and defendants' enforcement of Wisconsin's campaign finance statutes, requiring abstention under each of these doctrines.

1. The Court is required to decline jurisdiction under the *Younger* Doctrine of Abstention.

The *Younger* doctrine of abstention provides that "the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." *Younger*, 401 U.S. at 45. The doctrine arose when John Harris, an individual indicted under California's Criminal Syndicalism Act, sought in federal court to enjoin the prosecution brought by the local district attorney, Younger. *Id.* at 38-39. Harris claimed that the prosecution and the Act curbed his constitutional rights of free speech and press. *Id.* at 39. The United States Supreme Court, in rebuking the district court's grant of an injunction against the prosecuting district attorney, directed that "courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Id.* at 44.

Since *Younger v. Harris* was decided, the *Younger* doctrine has been interpreted and applied in many circumstances, undergoing a substantial increase in breadth. Although the *Younger* doctrine originally applied only to ongoing criminal prosecutions, courts have extended the doctrine to include many other types of proceedings. *See*, *e.g.*, *Pennzoil Co.*, 481 U.S. 1 (bond proceedings); *Ohio Civil Rights Comm'n v. Dayton Christian Sch.*, Inc., 477 U.S. 619 (1986) (administrative proceedings); *Middlesex County Ethics Comm'n v. Garden State Bar*

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Assoc., 457 U.S. 423 (1982) (licensing proceedings); *Juidice v. Vail*, 430 U.S. 327 (1977) (contempt proceedings); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (civil proceedings which closely resemble criminal proceedings). A state court proceeding may be ongoing for purposes of *Younger* even if the defendants have not yet formally commenced any state court proceeding at the time the federal action is filed. *Hicks v. Miranda*, 422 U.S. 332, 349 (1975); *Pincham v. Illinois Judicial Inquiry Bd.,* 872 F.2d 1341 (7th Cir. 1989).

Perhaps most importantly, the courts have held that abstention by the district court is *required* if the elements of *Younger* are present. *Trust & Inv. Advisers v. Hogsett*, 43 F.3d 290, 294 (7th Cir. 1994)(noting "when a case meets the *Younger* criteria, the district court must abstain".) Those elements are present here, mandating the Court's abstention.

In the Seventh Circuit, a litigant seeking *Younger* abstention must show that the underlying state proceeding meets three elements: (1) the proceeding must be judicial in nature; (2) it must implicate important state interests; and (3) it must provide an adequate opportunity for asserting constitutional claims. *Green v. Benden*, 281 F.3d 661, 666 (7th Cir. 2002) (citing *Middlesex County Ethics Comm'n*, 457 U.S. 423). While no Seventh Circuit case has addressed the issue of whether the *Younger* doctrine applies specifically to state John Doe proceedings, the courts have generally applied the doctrine in the context of grand jury proceedings. *Texas Ass'n of Business v. Earle*, 388 F.3d 515, 519-21 (5th Cir. 2004); *Craig v. Barney*, 678 F.2d 1200, 1202 (4th Cir. 1982); *Kaylor v. Fields*, 661 F.2d 1177, 1182 (8th Cir. 1981); *Mirka United, Inc. v. Cuomo*, 2007 U.S. Dist. LEXIS 87385 (S.D.N.Y. 2007); *Law Firm of Daniel P. Foster, P.C. v. Dearie*, 613 F. Supp. 278, 280 (E.D.N.Y. 1985).

To that end, grand jury proceedings and John Doe proceedings under Wis. Stat. § 968.26 are nearly identical for purposes of abstention analysis generally and application of the *Younger*

doctrine specifically. *See In re Wisconsin Family Counseling Services, Inc.*, 291 N.W.2d 631, 635 (Wis. Ct. App. 1980) (describing Wisconsin's John Doe proceeding as a "one-man grand jury" proceeding). Both proceedings are essentially protracted probable cause hearings during which evidence may be collected and presented in a confidential setting. Moreover, both proceedings provide the finders-of-fact, respectively the grand jury and the John Doe judge, with subpoena power and the ability to call witnesses to provide sworn testimony. Therefore, an examination of cases considering abstention in the context of a grand jury is instructive.

In *Texas Association of Business v. Earle*, the plaintiff non-profit organization, Texas Association of Business ("TAB"), claimed to promote free enterprise ideas through television and print advertisements during an election cycle. 388 F.3d 515, 516-17 (5th Cir. 2004). TAB insisted "that the ads were created solely of their own volition without consultation with, or cooperation from, any candidate." *Id.* at 517. The defendant district attorney commenced a grand jury investigation into alleged violations of Texas' campaign finance laws, issuing subpoenas to the president and CEO of TAB, as well as others. *Id.*

As here, TAB and its CEO brought a federal action under 42 U.S.C. § 1983 seeking "(1) an injunction to prevent the District Attorney's office from enforcing the [] grand jury subpoenas, (2) an injunction to prevent the District Attorney's office from conducting a grand jury investigation into TAB's advertisements, and (3) a declaration that TAB's conduct during the [] election cycle was protected speech." *Id.* The federal district court declined to hear the federal lawsuit under the *Younger* doctrine. *Id.* While the district court's ruling was pending appeal, TAB and Hammond moved to quash the subpoenas on First Amendment grounds in the Texas state courts. *Id.* The state court judge denied the motion and permitted the grand jury

investigation to proceed. *Id.* TAB and Hammond then sought writs of mandamus in the Texas appellate courts which were also denied. *Id.* at 518.

The Fifth Circuit Court of Appeals concluded that the district court was justified in abstaining because the three *Younger* elements were present. *Id.* at 519-21. A grand jury proceeding, the court explained, "has both administrative functions, like investigating wrongdoing and making an initial determination of probable cause to file criminal charges, and judicial functions, wherein it may summon witnesses and compel the production of documents." *Id.* at 520. The court noted that both functions pertained to the "the enforcement of the state's criminal laws," an "arena where the federal courts' deference to state courts has been most pronounced." *Id.* The court further noted that, similar to Wisconsin's John Doe proceeding, the grand jury must obtain judicial approval of all subpoenas and witnesses so subpoenaed could challenge their bases in court. *Id.* at 521.

In another analogous case involving campaign regulations, *Fieger v. Cox*, the Sixth Circuit Court of Appeals determined that the *Younger* elements were met even in the absence of any formal proceeding like a grand jury. 524 F.3d 770 (6th Cir. 2008). The matter involved, once again, state regulators' attempts to apply state laws to alleged independent advocacy organizations active in state elections. After attempting to secure the organization's compliance, the Michigan Attorney General's office began an investigation into possible criminal violations. *Id.* Utilizing court-ordered search warrants, the investigators discovered anomalies in the group's reporting of expenditures and contributions. *Id.* at 772-73. The investigation focused on possible anonymous contributions and the filing of false organizational statements and reports, all contrary to Michigan criminal campaign finance laws. *Id.* at 773. The Attorney General served a court-ordered subpoena on a law firm, Fieger, Fieger & Johnson ("FFJ"), resulting, as here, in a

flurry of activity in multiple courts to halt the Attorney General's efforts. FFJ sought a temporary restraining order in federal court, but was denied. *Id.* FFJ then filed an action in the state circuit court to restrain the state judicial court from enforcing the subpoenas it had issued. *Id.* at 773-74. The state circuit court granted the motion, and the Attorney General appealed to the state appellate court. *Id.* During the pendency the appeal, FFJ and others commenced another federal district court lawsuit alleging that the Attorney General's investigation violated their Fourth and Fourteenth Amendment rights. *Id.* The district court concluded that abstention was appropriate under *Younger*, and the Sixth Circuit affirmed. *Id.*

The decisions in *Earle* and *Fieger* are on point and provide a well-reasoned basis for this Court to decline jurisdiction under *Younger*. The facts, of course, are strikingly similar. Both involve state campaign finance laws, as does this matter. Moreover, as in *Earle*, the John Doe judge oversaw all of these activities as they occurred, signing the subpoenas issued to the plaintiffs and later quashing those subpoenas. Furthermore, as in *Fieger*, the court orders are under active appeal at the time the federal litigation was commenced. This Court should follow the instruction in *Earle* and *Fieger* and defer to Wisconsin's ongoing proceedings on these important issues of state concern.

2. The *Pullman* Doctrine of Abstention Requires that Wisconsin Courts Be Given the Opportunity to Address State Law.

Federal court abstention under *Pullman* is appropriate when two criteria are met: "(1) there is a substantial uncertainty as to the meaning of the state law and (2) there exists a reasonable probability that the state court's clarification of state law might obviate the need for a federal constitutional ruling." *Int'l College of Surgeons v. City of Chicago*, 153 F.3d 356, 365 (7th Cir. 1998). The *Pullman* doctrine seeks to "avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication" and "is based on considerations of comity

and federalism." *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 150 (7th Cir. 2011) (citations omitted).

As an initial matter, plaintiffs' complaint does not challenge the constitutionality of any Wisconsin statute, either facially or as applied. Instead, plaintiffs allege that the John Doe proceedings are premised on an invalid interpretation of Wisconsin's campaign finance scheme. (Compl. ¶¶ 95-107.) Specifically, plaintiffs allege that the John Doe prosecutors have misinterpreted Wisconsin law to regard expenditures coordinated with candidate campaigns as contributions to those candidate campaigns, an activity requiring disclosure and reporting under Wisconsin law. (Compl. ¶¶ 95-98.) Plaintiffs argue that this interpretation is flawed because their expenditures are spent on issue advocacy alone and not express advocacy of a candidate. (Compl. ¶¶ 99-100.)

The state's position is explained in its memorandum supporting the recent petition for a supervisory writ, now pending with the Wisconsin Court of Appeals. (Leib Decl.,¶ 24, Ex. V.) First, when an ostensibly independent organization, such as a 501(c)(4) organization like the plaintiff WCFG, coordinates with a political committee, the resulting contributions and disbursements of the independent organization must comply with statutory amount limits and must be disclosed on the candidate's campaign finance reports under Wis. Stat. § 11.06. (Id. at 8.) This interpretation of Wisconsin law is based on four provisions within Chapter 11, Wisconsin Statutes, as well as related administrate rules promulgated by the state's Government Accountability Board:

- Wis. Stat. § 11.10(4) states in relevant part that "[a]ny committee which is organized or acts with the cooperation of or upon consultation with a candidate or agent or authorized committee of a candidate, or which acts in concert with or at the request or suggestion of a candidate or agent or authorized committee of a candidate is deemed a subcommittee of the candidate's personal campaign committee."

- Under Wis. Stat. § 11.01(4), a "committee" or "political committee" is defined as "any person other than an individual and any combination of 2 or more persons, permanent or temporary, which makes or accepts contributions or makes disbursements, whether or not engaged in activities which are exclusively political . . . ."

- Wis. Stat. § 11.06 sets forth the information that a political candidate must disclose in his or her campaign finance report, including information about contributions to and disbursements from the candidate or the candidate's political committees.

- Wis. Stat. § 11.01(6)(a) defines a "contribution" in relevant part as "[a] gift, subscription, loan, advance, or deposit of money or anything of value . . . made for political purposes." (Id. at 9.) Wis. Admin. Code GAB § 1.42(2) also defines a contribution as a "coordinated expenditure."

Second, and similarly, when an ostensibly independent organization becomes a subcommittee by virtue of its coordination with a political candidate or a candidate's committee, the coordinated expenditures must be disclosed as in-kind contributions on the political committee's campaign finance reports under Wis. Stat. § 11.06. (Id. at 8-9.) Furthermore, every committee must register and file campaign finance reports under Wis. Stat. §§ 11.05(1) and (6). (Id. at 9.) Wis. Admin. Code GAB § 1.42(2) also directs that "coordinated expenditures," which are treated as contributions, are subject to amount, disclosure, and reporting requirements.

The state, through the various John Doe proceedings commenced by the respective district attorneys, has reason to believe that certain organizations, including the plaintiff organization, coordinated with a candidate and his campaign committee to expend monies without regard for the limitations, registration, disclosure, and reporting requirements for such contribution and disbursement activities. Plaintiffs contend that the state's view of the above-referenced statutes is mistaken. (Compl., ¶ 95 et seq.) Right or wrong, the dispute is one of state law that the courts of Wisconsin should have the first opportunity to address.

In addition, the parties dispute whether Wisconsin's statutory provisions apply in the context of coordinated activities between 501(c)(4) organizations and candidates when the

organizations' communications do not constitute express advocacy. The dispute focuses in part on the extensive definition of "political purpose" in Wis. Stat. § 11.01(16). Addressing that very provision, the Wisconsin Court of Appeals held in *Wisconsin Coalition for Voter Participation v. Wisconsin Elections Board*, a decision relied upon by the GAB and John Doe prosecutors, that "political purpose" is not restricted to express advocacy of a candidate. 605 N.W.2d 654, 659 (Wis. Ct. App. 1999). Yet despite that law, on January 10, 2014 Judge Peterson, who oversaw the scope and collection of evidence in each of the proceedings, quashed the subpoenas served on plaintiffs on plaintiffs' motion. (Compl., Ex. D.) The judge construed the term "political purpose" in Wis. Stat. § 11.01(16) to apply only to express advocacy. (Compl., Ex. D at 1.) The judge conceded that the district attorneys' references to the language in *Wisconsin Coalition for Voter Participation* "did give me some pause," but nonetheless agreed with plaintiffs that the case was distinguishable and conflicted with recent developments in campaign finance jurisprudence. (Compl., Ex. D, at 2.) The district attorneys have petitioned the court of appeals for a supervisory writ, disputing Judge Peterson's interpretation of Wisconsin law. The petition is currently pending.

In short, this case presents a prototypical circumstance for *Pullman* abstention. Plaintiffs interpret Wisconsin statutes one way; the special prosecutor and GAB interpret the same statutes in another way. As Judge Peterson acknowledged, "it is a classic case of statutory interpretation" and "an appellate court may indeed agree with the State." (Rivkin Aff., Ex. 49, at 1 [ECF No. 7-2].) He further commented that, if his interpretation should be overturned on appeal, "I encourage the appellate court to address the alternative and significant Constitutional arguments raised in this case." (Id.) Clearly, if that scenario occurs, there is no need for this Court to

conduct a constitutional review. Its opinion would be advisory on a matter of predominantly state law.

If, on the other hand, the Wisconsin Court of Appeals determines that plaintiffs and Judge Peterson are correct, then there is again no need for this Court to conduct a constitutional review. Judge Peterson addressed that contingency as well, stating in a recent decision that, "if my decision [quashing subpoenas] is upheld, the ultimate and inevitable consequence will be to terminate the John Doe investigation." (Id.) There is simply no reason for this Court to intervene in a state court criminal proceeding where the presiding judge has issued a ruling that he believes terminates the matter.[7]

3. The Court Should Apply the *Burford* Doctrine of Abstention Because Defendants' Interpretation of State Law Implicates Wisconsin's Campaign Finance Regulatory Scheme.

As the previous subsection demonstrates, a central premise of the complaint is that the John Doe prosecutors' interpretation misapplies Wisconsin's campaign finance laws. The *Burford* doctrine is used by federal courts in such a circumstance out of deference to a state's regulatory schemes. *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 503 (7th Cir. 2011). The Seventh Circuit has interpreted the doctrine to apply either (1) "when [a federal court] is faced with difficult questions of state law that implicate significant state policies" or (2) "when concurrent federal jurisdiction would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Id.* at 504.

[7] There is also a possibility that the Wisconsin legislature may address these very laws, further obviating the Court's need to rule. A new bill introduced by Wisconsin Republican Senators Lazich and Fitzgerald on March 3, 2014, 2013 Senate Bill 654, proposes that a subsection be added to § 11.01(16) which states that "[a] 'political purpose' does not include . . . [a]n expenditure made by an individual other than a candidate, or by an organization that is not organized exclusively for a purpose specified in sub (16) (intro.) if the expenditure does not expressly advocate for the election or defeat of a clearly identified candidate . . . ." The legislature's proposal underscores the importance of this matter to the state.

Both requirements of the *Burford* doctrine are satisfied here. At the very least, plaintiffs' interpretation presents "difficult questions of state law." Moreover, the GAB has supported the John Doe proceedings, noting that plaintiffs' interpretation of the laws it enforces would "undermine Wisconsin's system of campaign finance regulation" and be of "profound" significance to its mission of ensuring an informed electorate. (Leib Decl.,¶ 3, Ex. A, Kennedy Aff., ¶ 13.) Those issues are being litigated in the state courts. This Court's intervention in the matter would only further hinder Wisconsin's effort to maintain a coherent policy of campaign finance regulation.

C. Plaintiffs Have Not Sufficiently Alleged Facts to Support the Bad Faith Prosecution Exception to the *Younger* Doctrine.

Plaintiffs' Complaint attempts to avoid mandatory abstention under *Younger* by suggesting that the defendants have "prosecuted" them in bad faith. An exception to *Younger* is recognized "in cases of proven harassment or prosecutions undertaken by state officials . . . without hope of obtaining a valid conviction." *Kugler v. Helfabt*, 421 U.S. 117, 124 (1975) (quoting *Perez v. Ledesma*, 401 U.S. 82, 85 (1971)). The Seventh Circuit has, in a trio of cases addressing the issue, erected a high bar for pleading prosecutorial bad faith or harassment. *See Pincham v. Illinois Judicial Inquiry Bd.*, 872 F.2d 1341 (7th Cir. 1989); *Collins v. County of Kendall*, 807 F.2d 95 (7th Cir. 1986); *Sekerez v. Supreme Court of Indiana*, 685 F.2d 202 (7th Cir. 1982). The *Collins* court explained as follows:

> A plaintiff asserting bad faith prosecution as an exception to *Younger* abstention must allege specific facts to support an inference of bad faith. The *Younger* rule . . . requires more than a mere allegation and more than a conclusory finding to bring a case within the harassment exception. This specific evidence must show that state prosecution was brought in bad faith for the purpose of retaliating for or deterring the exercise of constitutionally protected rights.

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807 F.2d at 98 (citations and quotations omitted). Notably, the Seventh Circuit apparently has never found that a party sufficiently alleged prosecutorial bad faith or harassment to meet the pleading requirement for the exception to *Younger*. Nor is the appropriate case to do so.

Setting aside, as is necessary, the rambling diatribe on Wisconsin politics from plaintiffs' point of view, as well as the wildly conclusory allegations that make no reference to any specific conduct by any specific actor, the allegations pertaining to defendants Chisholm, Landgraf, and Robles are very few. Those few allegations certainly do not rise to the level of specific facts supporting an inference of bad faith. *See Twombly*, 550 U.S. at 560 (pleading "requires more than labels and conclusions"); *Iqbal*, 556 U.S. at 679-80 (courts "are not bound to accept as true a legal conclusion couched as a factual assertion"). Plaintiffs allege that:

- District Attorney Chisholm is an elected official with a partisan affiliation. (Compl., ¶ 10.)
- Assistant District Attorney Landgraf prosecutes cases for Milwaukee County's Public Integrity Unit and is alleged to be "the principal member of that Office in charge of the investigation." (Compl., ¶ 11.)
- Attorney Landgraf is alleged to have been "involved in communications alongside Defendant Schmitz with others involved in the proceedings." (Id.)
- Attorney Landgraf is alleged to have filed the petition for the Milwaukee County John Doe proceeding. (Compl., ¶86.)
- Assistant District Attorney Robles is alleged to be a member of the Office of Public Integrity and in that capacity has been "heavily involved in the investigation, attending in-person meetings between the Special Prosecutor and other parties." (Compl., ¶12.)
- Prior to commencement of the Milwaukee John Doe proceeding, Attorney Robles filed an open records request with the State Department of Administration. (Compl., ¶ 84.)
- Plaintiffs allege, vaguely, that Attorneys Chisholm, Landgraf and Robles "continue to play an active and supervisory role in the investigation" and that Landgraf and Robles "have been involved with phone conferences with counsel in the various proceedings." (Compl., ¶ 92.)

At most, the Milwaukee County prosecutors are alleged to have collaborated with others in an ongoing matter related to their assignments in the Public Integrity Unit. The "facts" specific to these defendants—filing a pleading, participating in "phone conferences with counsel," etc.—fall well short of any plausible inference of bad faith. *Brooks v. Ross*, 578 F.3d 574, 582 (7th Cir. 2009) (allegations consistent with lawful conduct, even when characterized as unlawful or coupled with conclusory assertions of wrongdoing, fail to state a claim).

In *Collins*, the owners of an adult bookstore brought a 42 U.S.C. § 1983 action against various law enforcement personnel alleging that they "initiated state criminal obscenity charges, a civil nuisance suit, and searches and seizures of their bookstore in order to harass and annoy the plaintiffs with the purpose of forcing the bookstore to close." 807 F.2d at 96. Over a two year period, numerous search warrants were issued on the bookstore and 34 state prosecutions were commenced against its employees on misdemeanor obscenity charges. *Id.* At the time of the district court decision, only three of the cases had generated convictions. *Id.* at 97, 100.

The Seventh Circuit affirmed the district court's application of the *Younger* doctrine and agreed that the plaintiffs failed to meet their burden under the bad faith prosecution exception. The *Collins* court set forth several reasons as to why the plaintiffs failed to meet their burden. First, the court stated that the number of criminal prosecutions alone did not constitute bad faith and that, in any event, the prosecutions had yielded convictions. *Id.* at 99-100, 101. The successful prosecutions showed that officials were not "using or threatening to use prosecutions, **regardless of their outcome**, as instrumentalities for the suppression of speech." *Id.* at 101 (emphasis in original, citation omitted). The court further explained that such convictions rebutted any assertion that "the statute was enforced against them with no expectation of convictions but only to discourage exercise of protected rights." *Id.*

Second, the *Collins* court emphasized that "there was no concerted publicity campaign aimed at putting the plaintiffs out of business for exercising their first amendment rights." *Id.* Finally, the court explained that all of the searches conducted by state officials were performed "pursuant to judicially approved search warrants." *Id.* at 101. The *Collins* court concluded that plaintiffs' complaint did not contain sufficient allegations to support an exception to abstention.

Plaintiffs do not meet the steep burden for pleading prosecutorial bad faith as described in *Collins v. County of Kendall*. Like in *Collins*, the vast majority of the allegations in plaintiffs' Complaint here refer to a prior John Doe proceeding that was commenced in 2010 and resulted in six (6) convictions before it was closed in 2013. (Compl., ¶¶ 69, 173-179.) While defendants do not believe the Court should concern itself with allegations pertaining to a closed proceeding that did not even involve the plaintiffs, their suggestion that prior prosecutions were in bad faith is significantly undermined by the fact that convictions were obtained. Additionally, like in *Collins*, there is no allegation that defendants have waged a publicity campaign against plaintiffs; indeed, the use of the John Doe proceeding coupled with secrecy order reflects just the opposite.

More fundamentally, there is simply no bad faith for the plaintiffs to assert. The Court is allowed in this context of determining its jurisdiction to take judicial notice of the record made in the John Doe proceedings.[8] The record of the actual proceedings dispels any notion of partisanship motivation or bad faith. First, the "investigation" referred to in the complaint as having been initiated by the defendant District Attorney Chisholm to pursue political enemies is not, in fact, a single proceeding. Rather, the John Doe proceedings are five separate proceedings that were opened by five different district attorneys and chief judges based upon their own review of evidence of crimes within their counties. Some of those attorneys are Democrats;

[8] *See supra* footnote 1.

others are Republicans, (*see, e.g*, Leib Decl. 25, 26, Ex. W, X) The suggestion that the Milwaukee County prosecutors have bullied elected officials into commencing baseless legal proceedings is utterly beyond reason. (Compl., ¶¶ 90- 94.)

In addition to bipartisan prosecutorial support in their inception, the John Doe proceedings are supported by the GAB, a nonpartisan state agency that attempts to enforce Wisconsin's campaign finance laws. (*See* Leib Decl.,¶ 3 Ex. A, Kennedy Aff., ¶¶ 5-7). The GAB has worked closely with the special prosecutor throughout the investigation. Indeed, the very purpose of the proceedings is to enforce the GAB's view of state law. The GAB's Director and General Counsel believes that plaintiffs' success in these matters would severely undermine the GAB and could lead to a potential free-for-all where millions of dollars are directed to candidates with no limits or public accounting. (Id.) Clearly, the commencement of a proceeding that is intended to enforce the GAB's position cannot be deemed frivolous or mere harassment.

Ironically, the collective district attorneys tried their best to deflect the inevitable partisan attacks that they knew would follow for performing their duties. Knowing that extreme partisans such as these plaintiffs would label the proceedings a "witch hunt" (Compl., ¶ 94), they wrote a joint letter to Judge Kluka on August 23, 2013, signed by each of the five district attorneys, suggesting that she appoint a special prosecutor. Their joint letter is prescient:

> Moreover, and just as the Attorney General himself recognized, the partisan political affiliations of the undersigned elected District Attorneys will lead to public allegations of impropriety. ***Democratic prosecutors will be painted as conducting a partisan witch hunt and Republican prosecutors will be accused of "pulling punches."*** An independent Special Prosecutor having no partisan affiliation addresses the legitimate concerns about the appearance of impropriety.

(Leib Decl., ¶ 20, Ex. R) (emphasis added). Judge Kluka appointed Special Prosecutor Schmitz, yet he is now smeared with the same allegations of partisanship. Nothing short of ignoring evidence, it seems, will satisfy the plaintiffs that the proceedings are lawful.

Finally, plaintiffs ignore the role of the John Doe judge in directing proceedings under Wisconsin's statutes. Each subpoena, search warrant, or other evidence-collecting device used in the several proceedings was subject to the John Doe judge's discretion. *Wolke*, 129 N.W.2d at 844-45; *Washington*, 266 N.W.2d at 606 (noting judge's responsibility to ensure procedural fairness). Plaintiffs' suggestion that the proceedings are a sham is directly undermined by their allegations that Judge Peterson has independently evaluated the evidence and ruled in their favor. (Compl., ¶¶ 108, 128.) A showing of bad faith sufficient to break new legal ground in the Seventh Circuit is not present in this case.

D. Plaintiffs Do Not Assert a Pre-Enforcement Challenge to Any Law.

The plaintiffs do not set forth a pre-enforcement constitutional challenge to any Wisconsin statute. As a result, the plaintiffs cannot benefit from the "relaxed" justiciability standards described in the pre-enforcement line of cases. *See*, *e.g.*, *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139 (7th Cir. 2011), *related proceedings at Wis. Right to Life Comm., Inc. v. Myse*, 2010 U.S. Dist. LEXIS 105316 (E.D. Wis. 2010) & *Wis. Club for Growth v. Myse*, 2010 U.S. Dist. LEXIS 109131 (W.D. Wis. 2010).

II. THE MILWAUKEE COUNTY PROSECUTORS HAVE ABSOLUTE IMMUNITY OR, ALTERNATIVELY, QUALIFIED IMMUNITY AGAINST PLAINTIFFS' CLAIMS.

Although abstention disposes of plaintiffs' complaint in its entirety, defendants address additional reasons why plaintiffs claim cannot proceed. This first one resting on long-standing immunity principles for both states and governmental officials. Here, the plaintiffs have sued the Milwaukee County prosecutors in their "official" and "personal" capacities, seeking both

injunctive relief and civil damages. As an initial matter, plaintiffs cannot bring a federal suit against the Milwaukee County prosecutors in their "official capacity." This Court previously and specifically recognized that Milwaukee County district attorneys and their assistants are state employees, entitled to immunity from such federal suits under the Eleventh Amendment. *Omegbu v. Wis. Elections Bd.*, 2007 U.S. Dist. LEXIS 7878, *3-4, 2007 WL 419372 (E.D. Wis. 2007); *see also Brokaw v. Mercer County*, 235 F.3d 1000, 1009 (7th Cir. 2000) ("Federal suits against state officials in their official capacities are barred by the Eleventh Amendment."). Thus, all claims seeking against Milwaukee County prosecutors in their "official capacity" must be dismissed. Plaintiffs' remaining claims against the Milwaukee County prosecutors seeking civil damages in their "personal capacity" are barred by both absolute prosecutorial immunity and qualified immunity.

A. The Milwaukee County Prosecutors are Absolutely Immune.

Both federal and Wisconsin state law recognize absolute immunity for state prosecutors. *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Riedy v. Sperry*, 265 N.W.2d 475 (Wis. 1978). Not long ago, this Court applied absolute immunity to a plaintiff's claims against Milwaukee County prosecutors, noting that even if a prosecution is allegedly politically motivated, absolute immunity still applies. *Omegbu*, 2007 U.S. Dist. LEXIS 7878, *4 (citing *Bernard v. County of Suffolk*, 356 F.3d 495, 505 (2d Cir. 2004)).

Absolute immunity for prosecutors arises out of necessity. Prosecutors must be free of the "concern that harassment by unfounded litigation" could cause the prosecutor to "shade his decisions instead of exercising the independence of judgment required by his public trust." *Imbler*, 424 U.S. at 423. The court's concern that prosecutors not be harassed for their activities is magnified where, as here, prosecutors in one county are singled out despite related criminal proceedings in five counties and sued personally for money damages on the basis of a complaint

rooted in partisan complaints. It is difficult to imagine any elected district attorney ever being able to pursue criminal violations of campaign finance laws without being harassed by threats of political bias and related "free speech" lawsuits. Eliminating the fear of a personal monetary judgment through immunity when pursuing those potential campaign violations seems particularly important in the context presented here.

That said, a prosecutor does not enjoy absolute immunity just because he or she has the title of a prosecutor. Rather, immunity applies depending on the "function" of the prosecutor's conduct. *Burns v. Reed*, 500 U.S. 478, 486 (1991). Immunity attaches to any conduct "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 423. Thus, when functioning in the traditional role as an advocate for the state in a criminal proceeding, a prosecutor enjoys absolute immunity. *Buckley v. Fitzsimmons*, 509 U.S. 259, 270-71 (1993). On the other hand, "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer" are not a prosecutor's duties subject to absolute immunity. *Imbler*, 424 U.S. at 431.

In this case, plaintiffs make clear in their complaint that they believe the Milwaukee County prosecutors' conduct as part of the John Doe proceeding at issue falls into the latter category of investigatory conduct. Plaintiffs' complaint refers repeatedly to the John Doe proceeding here as a John Doe "investigation" rather than its proper category as a criminal *proceeding*. Indeed, the John Doe statute falls under Wisconsin statutes chapter 968, labeled "commencement of criminal proceedings," and the term "investigate," or any form of that term, never appears in the John Doe statute.

Although investigatory work is a part of a John Doe proceeding, the Seventh Circuit applies prosecutorial absolute immunity to acts conducted within John Doe proceedings. *See*

Harris v. Harvey, 605 F.2d 330, 336 (7th Cir. 1979). The United States Supreme Court has similarly recognized that immunity is not limited to the context of a classic criminal trial presided over by a judge; it extends also to a prosecutor's conduct within non-adversarial and probable cause proceedings such as a grand jury proceeding. *Burns*, 500 U.S. at 492 (applying absolute immunity to application of search warrant and probable cause hearing); *see also Hill v. City of New York*, 45 F.3d 653 (2d Cir. 1995) (applying absolute immunity to grand jury proceeding). Significantly, the Wisconsin John Doe proceeding is described as a "one-man grand jury" proceeding because it is a probable cause determination presided over by a judge rather than a jury. *In re Wisconsin Family Counseling Services, Inc.*, 291 N.W.2d 631, 635 (Wis. Ct. App. 1980). Again, the test of whether absolute immunity applies is based on the function of a prosecutors' conduct rather than any label.

Turning to plaintiffs' complaint and their allegations specific to the Milwaukee County prosecutors, the few specific allegations refer to activities that are clearly subject to absolute prosecutorial immunity. Although plaintiffs' complaint is replete with political vignettes, it is sparse on specific factual allegations serving as the basis for plaintiffs' claims that the Milwaukee County prosecutors have violated *their* First and Fourteenth Amendment rights. Most of the allegations, for example, discuss investigations into and prosecutions of Wisconsin Governor Scott Walker's former employees while he was a Milwaukee County executive. Plaintiffs were not those former employees. While those allegations, at best, pertain to the improper motives, they are irrelevant in absolute immunity analysis. *Omegbu*, 2007 U.S. Dist. LEXIS 7878, *4 (citing *Bernard*, 356 F.3d 495).

To the extent that plaintiffs' allegations actually pertain to the John Doe proceeding in which their rights are allegedly implicated, the allegations are largely vague and suggest routine

prosecutorial activities. Plaintiffs allege that the Milwaukee County prosecutors, along with the other defendants, "play an active and supervisory role" in the John Doe proceeding and that they "have been involved with phone conferences with counsel in the various proceedings." (Compl., ¶ 92.) Even less specific, plaintiffs allege weakly that "[u]pon information and belief, some of this information [regarding the John Doe proceeding] reached the public through direct or indirect selective leaks from the DA's office."[9] (Id., ¶ 157.) Plaintiffs also argue that, based on a "flawed" legal theory, the Milwaukee County prosecutors petitioned to commence the John Doe proceeding and "compelled disclosure" of evidence. (Id., ¶¶ 86, 95-103.)

Apart from any immunity issue, vague allegations of "direct or indirect leaks" from the "DA's office" fail to meet the required heightened pleading standards in this context. A district attorney's office is not a suable entity. *Omegbu*, 2007 U.S. Dist. LEXIS 7878, *2 (citing *Buchanan v. City of Kenosha,* 57 F. Supp. 2d 675, 679 (E.D. Wis. 1999)). Moreover, because this case concerns official immunity, plaintiffs' allegations are subject to a heightened pleading standard. *Cooney v. Rossiter*, 583 F. 3d 967, 971 (7th Cir. 2009) (citing *Smith v. Duffey,* 576 F.3d 336, 339-40 (7th Cir. 2009)). Yet, plaintiffs cannot meet that heightened standard by alleging only that some unidentified person in the "DA's office" somehow violated their rights by "indirectly or directly" leaking some unidentified "information" to some unidentified people (or person) in the public. That vague allegation fails "to plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 679 ("[W]here the well-pleaded facts do not permit the court

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[9] Ironically, plaintiffs' claim that their injury is enhanced because secrecy orders prevent them from defending themselves in the public arena (Compl., ¶ 159), yet they submit to the Court Mr. O'Keefe's discussion with *The Wall Street Journal*, (Rivkin Aff., Ex. A [ECF No. 7-2]), the only attributed public identification of O'Keefe as a "target."

to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—that the pleader is entitled to relief.").

With respect to plaintiffs' remaining allegations regarding the Milwaukee County prosecutors' conduct, the conduct is subject to absolute immunity. Significantly, plaintiffs' remaining claims here do not point to any *investigatory* acts or conduct of the prosecutors that violated plaintiffs' rights, such as claims that the prosecutors intentionally falsified evidence during any out-of-court investigation or that the prosecutors gave improper advice to police officers conducting the investigations. Rather, plaintiffs' remaining claims relate entirely to the alleged improper *legal theory* espoused by the Milwaukee County prosecutors as a basis to commence the John Doe proceedings (as well as the "compelled disclosure" of evidence through the alleged "overbroad" subpoenas).

Proffering a legal theory to commence a criminal proceeding, whether a John Doe or otherwise, and obtaining criminal subpoenas from a judge are acts of an advocate. Such conduct is not investigative or administrative in nature. Prosecutors are absolutely immune for such activities. Importantly, "in the case of a John Doe proceeding, the proceeding is lawfully authorized if the judge determines that the complainant makes a threshold showing sufficient to establish that the complainant has an objectively reasonable belief that a crime has been committed." *Custodian of Records for the Legislative Tech. Serv. Bureau v. State*, 689 N.W.2d 908, 909 (Wis. 2004). The chief judges and Judge Kluka made a determination in each instance that the threshold showing was met for the John Doe proceedings to exist. The Milwaukee County prosecutors cannot be held personally liable for pursuing enforcement of laws based upon a valid interpretation of Wisconsin's statutes, even if that legal theory is later held to be incorrect.

Even in declining to rule in their favor, Judge Peterson stated, "The State's theory is not frivolous. In fact, it is an arguable interpretation of the statutes. I simply happen to disagree. An appellate court may indeed agree with the State." (Rivkin Aff., Ex. 49 [ECF No. 7-2]). Plaintiffs' suggestion that the prosecutors' legal interpretation is so flawed as to suggest political bias is simply meritless. The prosecutors are entitled to immunity as a matter of law for their advocacy.

B. Alternatively, the Milwaukee County Prosecutors have Qualified Immunity.

To the extent that plaintiffs argue that the Milwaukee County prosecutors' conduct is not subject to absolute immunity, qualified immunity nevertheless bars plaintiffs' claims for civil damages. Qualified immunity shields prosecutors performing discretionary functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, unless plaintiffs here can show some "clearly established right" of theirs that the Milwaukee County prosecutors violated, plaintiffs cannot pursue civil damages against them. *See id.* at 819; *Humphries v. Milwaukee Cnty.*, 702 F.3d 1003, 1006 (7th Cir. 2012) (quoting *Pearson v. Callahan*, 555 U.S. 223 , 236 (2009)) ("[A] court may grant qualified immunity on the ground that a purported right was not 'clearly established' by prior case law without first resolving whether the purported right exists."). Here, plaintiffs' own pleadings fail to show any such clearly-established right.

Plaintiffs allege that their rights under the First and Fourteenth Amendments permit them to coordinate political expenditures so long as they do not engage in "express advocacy." (*See* Compl., ¶100.) Plaintiffs further allege that the Milwaukee County prosecutors violated those rights by commencing the John Doe proceeding regarding potential illegal campaign

coordination even where there was no evidence of "express advocacy."[10] (Id.) Stated differently, plaintiffs believe that the First and Fourteenth Amendments protect an unfettered right to coordinate their political expenditures with a candidate—free from any limitation or disclosure requirements (and, consequently, free from any criminal proceeding)—so long as their advocacy does not expressly advocate for the election or defeat of any candidate. (*See* id., ¶¶100, 102.)

Without needing to decide whether their alleged actions in this regard amount to a constitutional violation, the Milwaukee County prosecutors are entitled to qualified immunity because the law does not make clear that their actions were unconstitutional. *See Pearson*, 555 U.S. at 236. As noted previously, the GAB supports continuation of the John Doe proceedings, and the presiding judge found the state's position reasonable. [Kennedy; ORDER 1/27/14] There is simply no basis to suggest that the plaintiffs' rights in contravention of GAB policy were "clearly established."

In fact, at least two cases that have addressed plaintiffs' alleged "rights" have held the *exact opposite*, finding that the government has a compelling interest in preventing such coordinated expenditures. Drawing on the United States Supreme Court in *Buckley v. Valeo*, those cases rejected the naive view that "coordinated expenditures" should fall into the more constitutionally-protected category of an "independent expenditure," rather than a more regulated "contribution" category. The D.C. Circuit explained it best,

> [I]mporting "express advocacy" into [a] contribution prohibition would misread *Buckley* and collapse the distinction between contribution and expenditures in such a way as to give short shrift to the government's compelling interest in preventing real and perceived corruption that can flow from large campaign contributions. Were this standard adopted, it would open the door to unrestricted corporate or union underwriting of

[10] Of course, the Milwaukee County prosecutors did not and, per Wisconsin law on residency, Wis. Stat. § 11.62(2), could not initiate a John Doe proceeding against plaintiffs.

> numerous campaign-related communications that do not expressly advocate a candidate lection or defeat.

FEC v. Christian Coalition, 52 F. Supp. 2d 45, 87-88 (D.C. Cir. 1999). Closer to home, in a Wisconsin case that implicates these same campaign finance laws, the Wisconsin Court of Appeals affirmed the trial court's determination that the state's election board could investigate whether a corporation's mailing was coordinated with a candidate, potentially violating the applicable campaign finance law even though the mailing did not "expressly advocate" for the election of that candidate or the defeat of his opponent. *Wisconsin Coalition for Voter Participation, Inc.*, 605 N.W.2d at 662.

A "clearly established right" must be "beyond debate." *Humphries*, 702 F.3d at 1006. Given the cases cited above, plaintiffs simply cannot meet that standard. Neither the D.C. Circuit case nor the Wisconsin Court of Appeals case has been overruled or limited by any subsequent case relevant to the issues presented here. To the contrary, in the last couple of years the Seventh Circuit has repeatedly endorsed the reasoning of those cases, noting explicitly that expenditures that are "not truly independent" "would not qualify for the free-speech safe harbor for independent expenditures." *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 155 (7th Cir. 2011) (citing *Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001)) ("[C]oordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits."); *see also Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012) (interpreting Illinois state campaign finance law similar to Wisconsin's when finding constitutionally permissible state statute requiring disclosure of 501(c)(4)'s donors as well as registration of the organization as a "political committee" although, by its nature, the 501(c)(4) did not engage in express advocacy).

In short, plaintiffs cannot show any clearly established right. Qualified immunity bars any civil damages suit against the Milwaukee County prosecutors as to the legality of their alleged actions.

III. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED FOR LACK OF STANDING AND BECAUSE THEY ARE NOT RIPE FOR ADJUDICATION.

A case is justiciable only if the claimant has standing to bring his or her claims, and those claims are ripe for adjudication. Plaintiffs' complaint fails to satisfy either requirement.

A. Plaintiffs Do Not Have Standing Because the Subpoenas—the Only Source of Case or Controversy—Have Been Quashed.

Plaintiffs' claim of a subjective "chill" injury is inadequate to invoke the jurisdiction of a federal court. Under Article III, a party must demonstrate standing in order to satisfy the "case or controversy" requirement necessary to the exercise of judicial power. *Simmons v. I.C.C.*, 900 F.2d 1023, 1026 (7th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991). The standing inquiry demands a three-part showing: "(1) the party must personally have suffered an actual or threatened injury caused by the defendant's allegedly illegal conduct, (2) the injury must be fairly traceable to the defendant's challenged conduct, and (3) the injury must be one that is likely to be redressed through a favorable decision." *Id.* (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 472 (1982)).

To establish Article III standing, an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 130 S. Ct. 2743, 2752 (2010). "[T]hreatened injury must be '"certainly impending"' to constitute injury in fact," and "[a]llegations of possible future injury" are not sufficient. *Whitmore v. Arkansas,* 495 U.S. 149, 158 (1990). The Supreme Court has also noted that a plaintiff's alleged injury must be more than a generalized grievance. *Valley Forge,* 454 U.S. at 475. The complaint must describe a "distinct

and palpable" injury. *See Meese v. Keene,* 481 U.S. 465, 472 (1987); *Warth v. Seldin*, 422 U.S. 490, 490 (1975); *Frank Rosenberg, Inc. v. Tazewell County*, 882 F.2d 1165, 1168-69 (7th Cir. 1989); *see also Freedom from Religion Foundation, Inc. v. Zielke*, 845 F.2d 1463, 1467 (7th Cir. 1988). A plaintiff cannot allege harm which is merely "abstract" or "conjectural" or "hypothetical." *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

The plaintiff bears the burden of establishing that it meets the required elements of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Where standing is challenged as a factual matter, the plaintiff bears the burden of supporting the allegations necessary for standing with "competent proof." *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *NLFC, Inc. v. Devcom Mid-America, Inc.*, 45 F.3d 231, 237 (7th Cir. 1995), *cert. denied*, 515 U.S. 1104 (1995). "Competent proof" requires a showing by a preponderance of the evidence, or proof to a reasonable probability, that standing exists. *NLFC, Inc.*, 45 F.3d at 237.

Plaintiffs allege that defendants violated their rights of free speech and free association by conducting a John Doe proceeding of which they are allegedly "targets". (Compl., ¶¶ 6, 8). The injury that plaintiffs contend they have suffered is the "chilling effect on political speech and association in Wisconsin." (Compl., ¶ 2.) Even accepting this as a good faith assertion and assuming the factual statements are true, the plaintiffs' injury involves a purely speculative fear: that they will be charged as a result of an ongoing, secret proceeding by defendants. To date, plaintiffs only involvement with this John Doe proceeding is a subpoena served on O'Keefe which was subsequently quashed. (Compl., ¶¶ 121, 139.) Allegations such as this—of purely subjective chilled political speech and association based upon fears of being named in an

ongoing and secret John Doe proceeding—are a tenuous basis for proving the requisite concrete and actual injury.

The Supreme Court addressed alleged chilling of First Amendment rights by the mere existence of a government investigation in *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). Similar to this case, the plaintiffs in *Laird* were political activists and the speech being chilled was political speech. *Id.* at 2. The Court in that case determined that allegations of a subjective chill were "not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm[.]" *Id.* at 13–14. The Court further held that to allege a sufficient injury under the First Amendment, a plaintiff must establish that he or she is regulated, constrained, or compelled directly by the government's actions, instead of by his or her own subjective chill. *Id.* at 11.

Here, there are no allegations that plaintiffs are being regulated, constrained, or compelled by the government's actions. The only allegation of "action" taken by the defendants was the October 2013 subpoena which was subsequently quashed. (Compl., ¶¶ 121, 139). The self-imposed limits on activities—such as the canceling of advertising campaigns and conference calls—were not "regulated, constrained or compelled" by the defendants and therefore fall squarely within *Laird,* 408 U.S. at 13-14.

In fact, the allegations of injury here are even less concrete, actual, or immediate than the injury in *Laird.* In *Laird,* the Army was conducting "massive and comprehensive" surveillance of civilians, secretly and (apparently) without warrants. The *Laird* plaintiffs alleged that the Army surveillance program caused a chilling effect on their First Amendment rights in that they and others were reluctant to associate or communicate for fear of reprisal, stemming from their fear that the government would discover or had discovered them (and their activities) by way of the secret surveillance. *Id.* at 1-2. The harm alleged in the present case is no more substantial.

Plaintiffs allege a similar chilling effect on their First Amendment rights, speculating that their communications and associations have been limited. But, unlike the *Laird* plaintiffs, plaintiffs here do not assert that they personally anticipate or fear any direct reprisal by the government, or that the information being collected in the John Doe proceeding is being widely circulated or misused. Therefore, plaintiffs have failed to allege sufficiently concrete, actual, and imminent injury to entitle them to standing.

B. To the Extent Plaintiffs' Claims Are Based on Some Future Prosecution, Plaintiffs Do Not Assert Claims Ripe for Adjudication.

Plaintiffs are requesting relief related to the concern that they are "targets" of an ongoing John Doe investigation. (Compl., ¶¶ 6, 8). It is well-settled, however, that such claims, which are contingent on decisions of an ongoing proceeding, are not ripe for consideration and must be dismissed. Under Article III of the United States Constitution, federal courts may only adjudicate "cases or controversies" and may not render advisory opinions. *Wisconsin's Environmental Decade, Inc. v. State Bar of Wisconsin*, 747 F.2d 407, 410 (7th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985). The United States Supreme Court has announced two factors that determine whether an issue is ripe for judicial consideration. First, the issue on which review is sought must be fit for judicial decision. *Texas v. United States*, 523 U.S. 296, 300–01 (1998) (quoting *Abbott Labs.*, 387 U.S. at 149); *see also Hinrichs*, 975 F.2d at 1333. Second, courts must take into account any "hardship to the parties of withholding court consideration." *Texas*, 523 U.S. at 301 (quoting *Abbott Labs.*, 387 U.S. at 149); *see also Hinrichs*, 975 F.2d at 1333. In determining fitness of the issues, courts have held that "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Atlanta Gas Light Co. v. Federal Energy Regulatory Comm'n*, 140 F.3d 1392, 1404 (11th Cir. 1998) (quoting *Texas*, 523 U.S. at 300).

There are several reasons why plaintiffs' claims are not fit for judicial review. To start, it is impossible to determine at this time if plaintiffs will be charged as a result of any of the current John Doe proceedings, making this a claim that depends on contingent future events that may not occur as anticipated, or indeed may not occur at all. A recent federal decision with analogous facts confirms that plaintiffs' issue is not currently fit for judicial review. In *Beam v. Gonzales,* 548 F.Supp.2d 596 (N.D. Ill. 2008), the Beams brought action against United States Attorney General, Chairman of the Federal Election Commission, and certain unknown FBI agents, claiming they had been targeted for investigation based on their political activities. *Id.* at 599-600. The court held that whether the Beams had suffered an injury was "not yet a question ripe for adjudication." *Id* at 606. The court primarily based this ruling on the fact that the subject investigation was ongoing:

> Here, further factual development would undoubtedly illuminate the legal issues before the court. For example, the court does not yet know what, if any, charges may be brought against the Beams...For the courts to interfere in an ongoing agency investigation might hopelessly entangle the courts in areas that would prove to be unmanageable and would certainly throw great amounts of sand into the gears of the administrative process. This reflects a broad understanding that the decision to prosecute is particularly ill-suited to judicial review.

Id. (citations and quotations omitted).

Here, the future of any prosecution is even more uncertain. The John Doe judge has issued an order that he believes, if upheld, will result in termination of the John Doe proceedings. Similar to the investigation of the Beams, no charges have been brought against O'Keefe or WCFG. Further, the broad public policy expressed in *Beam* against judicial intervention of an ongoing investigation for fear of hindering the "effective administration of the agency's duties"

is wholly applicable. Whether plaintiffs have suffered an injury which the Court is empowered to remedy is not yet a question ripe for adjudication.

IV. Plaintiffs Have Failed to Join Indispensable Parties.

The Milwaukee County prosecutors also move for dismissal of plaintiffs' complaint pursuant to Rule 12(b)(7) and Rule 19 for failure to join indispensable parties. Specifically, plaintiffs have failed to name parties whose presence in the lawsuit is necessary in fairness to those parties and for the plaintiffs to obtain the relief they seek. Those missing parties are the district attorneys that commenced the John Doe proceedings relevant to these plaintiffs.

Attempting to color the proceedings as a political "witch hunt," plaintiffs focus their allegations on the Milwaukee District prosecutors. Wisconsin law requires, however, that criminal prosecutions for violations of campaign finance laws "be conducted by the district attorney for the county where the defendant resides." Wis. Stat. § 11.61(2). The Milwaukee prosecutors have not instituted proceedings against these plaintiffs, nor could they do so under state law limiting their jurisdiction to their county.

Plaintiffs allege that O'Keefe is a resident of Iowa County, Wisconsin. (Compl., ¶ 6.) By law, the district attorney of that county is the only prosecutor authorized to prosecute campaign finance law violations in that county. The district attorney for Iowa County did, in fact, petition the circuit court in that county to commence a John Doe proceeding based upon evidence of potential criminal activity there. (Leib Decl. ¶ 5, Ex. C.) That proceeding remains open. If O'Keefe were to be charged, the prosecution would not be at the direction of the Milwaukee County prosecutors. It would be at the direction of the Iowa County district attorney, who is not named in this suit.[11]

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[11] The same misunderstanding of Wisconsin law pervades plaintiffs' allegations of "selective prosecution." Plaintiffs allege that certain people engaged in similar conduct yet escaped prosecution. (Compl., at 42-47.) What they fail to

Significantly, plaintiffs did not name the district attorney statutorily responsible for the John Doe proceeding relevant to them, nor did they name any of the other three district attorneys responsible for the related John Doe proceedings which plaintiffs now seek to enjoin. While the Milwaukee County prosecutors cannot speculate about plaintiffs' motives, it appears that they were unwilling to spoil their narrative by naming as defendants any prosecutors outside of Milwaukee County, including Republicans, who likewise found evidence of criminal activity in their counties.

Regardless of the reason plaintiffs failed to name the relevant district attorneys, those other parties are indispensible, and plaintiffs' failure to name them in their action requires dismissal of their complaint. Rule 19 specifies the circumstances in which the joinder of a particular party is compulsory. Rule 19(a)(1) provides that the absent party is a required party if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

"As Rule 19(a) is stated in the disjunctive, if either subsection is satisfied, the absent party is a necessary party that should be joined if possible." *Koppers Co. v. Aetna Cas. & Sur. Co.*, 158 F.3d 170, 175 (3d Cir. 1998). Here, both subsections are satisfied.

Most obviously, plaintiffs seek complete exoneration from further cooperation with the ongoing John Doe proceedings. Yet, they cannot obtain that relief without enjoining the district

allege, however, is that the "similarly situated" persons are anything like O'Keefe's 501(c)(4) organization *and* subject to the Milwaukee County prosecutors' jurisdiction under Wis. Stat. § 11.62(2). The comparisons are baseless.

attorneys of their counties. Any order from Court directed at the Milwaukee County prosecutors, for instance, could not enjoin the Iowa County prosecutor from his statutory duty to pursue evidence of criminal activity in that jurisdiction. Plaintiffs' failure to name the relevant authority means that they cannot obtain the relief they seek.

In addition, the requested relief would so directly implicate the unnamed district attorneys' interests in their own John Doe proceedings that the matter should not be litigated without them. Specifically, plaintiffs' prayer for relief includes:

- Both preliminary and permanent injunctions restraining Defendants *and all those in privity, concert, or participation* with them from continuing the John Doe investigation, [and]
- An order mandating that Defendants immediately return all materials obtained in the John Doe investigation to their rightful owner *and destroy all copies of such materials*;

(Compl., at 61) (emphases added).

In short, the complaint is seeking specific relief that impacts non-party prosecutors. It is difficult to imagine how the Court could terminate proceedings started by those non-parties and order destruction of their evidence without affording the prosecutors the right to participate. Any disposition of the matter, short of dismissing plaintiffs' action, would "as a practical matter impair or impede the [other DAs'] ability to protect [their] interest." The Court should dismiss plaintiffs' complaint pursuant to Rule 12(b)(7) and Rule 19.

CONCLUSION

Based on the arguments set forth in the foregoing sections, defendants respectfully request that the Court grant their motion to dismiss plaintiffs' Complaint in its entirety, including any and all claims for injunctive relief and money damages.

Dated this 12th day of March, 2014.

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EXHIBIT 10

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

ERIC O'KEEFE and
WISCONSIN CLUB FOR GROWTH,
INC.,

Plaintiffs,

vs. Case No. 14-CV-139-RTR

FRANCIS SCHMITZ, in his official and
personal capacities, et al.,

Defendants.

DEFENDANTS CHISHOLM, LANDGRAF AND ROBLES' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

This lawsuit is an attempt to impede enforcement of Wisconsin's campaign finance laws by any means possible and at any expense. Plaintiffs' response is, therefore, predictably a full volume repetition of their conspiracy narrative. As unrestrained as the response is, however, it fails to justify this attempt to subvert the Rule of Law. Nowhere in the 52-page response is there an allegation of a warrantless search, fabrication of evidence, or any other specific unlawful act by Attorneys Chisholm, Landgraf or Robles. Plaintiffs do not even acknowledge that the proceedings they believe to be "politically motivated" were initiated in accordance with state criminal statutes, petitioned for by five Republican and Democrat district attorneys, supported by the non-partisan state accountability board, prosecuted by a non-partisan special prosecutor, and presided over by a state-appointed judge who is indeed addressing, to their benefit, plaintiffs' constitutional arguments as part of that state process.

Rightfully so, this type of conspiratorial spin—conveniently characterizing any lawful act as unlawful—has been rejected by the Seventh Circuit. *Brooks v. Ross*, 578 F.3d 574, 582 (allegations "so sketchy or implausible" that are consistent with lawful conduct, even when characterized as unlawful, fail to state a claim). The Rule of Law demands the same here. "Targets" of criminal investigation, if that is what Mr. O'Keefe and his group are, Compl., ¶ 1, should not be allowed to dictate the end to lawful proceedings. Prosecutors and law enforcement officials are duty-bound and need to do their jobs free of harassment by those who seek to undermine those proceedings. Plaintiffs' resort to this Court to circumvent the state process is fundamentally inconsistent with the Rule of Law. The Court should ignore their blog-worthy pleas of conspiracy and put an end to this lawsuit.

This reply is narrow in focus. To be sure, plaintiffs' response is rife with errors of both fact and law. Setting aside the factual disputes at this stage of litigation, defendants are compelled to address a few exceptionally flawed arguments, including plaintiffs' misapplication of Supreme Court case law, both in regard to abstention and absolute immunity, and improper use *Ex parte Young* against the Milwaukee defendants specifically.

I. *Sprint Communications v. Jacobs* did not address *Younger* abstention in the context of state criminal proceedings and does not alter the relevant analysis.

Plaintiffs' argument that the Supreme Court's decision in *Sprint Communications v. Jacobs,* 134 S. Ct. 584 (2013), "discarded" its *Younger* abstention analysis in *Middlesex County Ethics Committee v. Garden State Bar Association,* 457 U.S. 423 (1983), is misplaced. *See* Pl. Resp. Br. at 7-8. While the *Younger* abstention doctrine is traditionally reserved for ongoing state criminal and "quasi-criminal" proceedings, *Sprint* concerned the reach of *Younger* to an ongoing state *civil* proceeding—specifically, a private civil action before a utilities board pertaining to telecommunication fees. In differentiating that case from *Middlesex*, the Court in *Sprint* noted

explicitly that the ongoing state hearing relevant in *Middlesex* was "akin to a criminal proceeding" and therefore "unlike the [utilities board] proceeding here." 134 S. Ct. 593. And in declining to apply the *Middlesex* inquiry in the strictly civil context presented there, the Court stated, "Divorced from their quasi-criminal context, the three *Middlesex* conditions would extend *Younger* to virtually all parallel state and federal proceedings, at least where a party could identify a plausibly important state interest." *Id.* Contrary to plaintiffs' suggestion, the Court in no way "discarded" the *Middlesex* analysis as it pertains to ongoing state criminal proceedings or those proceedings that are "criminal in nature."

This case concerns, of course, five distinct and ongoing state *criminal* proceedings—the John Doe proceedings commenced *by the state* through five district attorneys for potential violations of *state criminal law*. The proceedings are ordered and presided over by a state-appointed judge, all pursuant to Chapter 968 of the Wisconsin Statutes, titled "Commencement of Criminal Proceedings." Accordingly, this case falls directly within the traditional application of the *Younger* abstention doctrine to criminal proceedings as discussed in *Middlesex*. Plaintiffs' attempt to undermine application of the sound doctrine by reference to the Court's analysis of its application to civil proceedings in *Sprint* is misleading and baseless.

II. Prosecutorial Immunity applies to conduct related to a John Doe Proceeding because a John Doe Proceeding, like a grand jury investigation, is part of the "judicial phase of the criminal process."

As predicted, plaintiffs seek to obscure the straightforward analysis of prosecutorial immunity by arguing labels rather than applying the "functional" approach required by federal precedent. In so doing, plaintiffs assert that because a John Doe proceeding is occasionally referred to as a John Doe "investigation," then all acts done as part of that criminal proceeding must be investigatory acts rather than advocative acts subject to immunity. Pointing to *Buckley v.*

Fitzsimmons, they argue that there can never be absolute immunity before a probable cause determination.

The bright-line probable cause test that plaintiffs seek to use is incorrect. Not only would such a test ignore the Supreme Court's "functional test," it would also be impossible to reconcile the many Supreme Court and federal court cases that recognize absolute immunity for conduct in probable cause proceedings, such as applications for search warrants and grand jury investigations. *E.g., Rehberg v. Paulk*, 132 S. Ct. 1497 (2012) (grand jury proceeding); *Burns v. Reed*, 500 U.S. 478 (application for search warrant and probable cause hearing); *Hill v. City of New York*, 45 F.3d 653 (2d Cir. 1995) (grand jury proceeding). Plaintiffs fail to recognize that the quote they rely on in *Buckley v. Fitzsimmons* for their bright-line rule was simply a nod to the preceding discussion of Supreme Court precedent—that the act subject to prosecutorial immunity must be "intimately associated with the *judicial phase of the criminal process*." 509 U.S. 259, 270 (1993) (citing *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)). Indeed, the other recent Seventh Circuit case the plaintiffs rely on, *Fields v. Wharrie*, states as much: "the act took place before there was probable cause to arrest [defendant]—that is, before the *judicial process began*." 740 F.3d 1107, 1117 (Sykes, J., dissenting) (emphasis added). Contrary to plaintiffs' thinking, the focus of the absolute immunity inquiry is, as it always has been, whether the conduct complained of is "intimately associated" with a "judicial process."

In addressing immunity as part of their opening brief here, the Milwaukee prosecutors examined in detail the plaintiffs' allegations concerning the conduct that supposedly gives rise to plaintiffs' claimed constitutional injuries. MKE Br., at 23-25, 31-32. That will not be repeated here. The issue here is plaintiffs' refusal to recognize the John Doe proceeding as a part of the "judicial phase of the criminal process." They acknowledge, as they must, that a grand jury

investigation encompasses prosecutorial immunity, but they indicate, and only in passing, that John Doe proceeding is something less than a "judicial process" compared to a grand jury proceeding. Pl. Resp. Br., at 33.

How so? Plaintiffs do not elaborate because their distinction is baseless. The John Doe proceeding is consistently equated with a grand jury proceeding, as both are criminal proceedings to determine probable cause. And, as explained at length in defendants' opening brief, it is even *more of a judicial proceeding* than a grand jury proceeding. MKE Br., at 5-6, 15-16. Unlike a grand jury proceeding, a John Doe is presided over by a judge, there is a right to counsel, and subjects may file motions asserting constitutional rights or petition the appellate courts for supervisory writs. Indeed, all these procedural measures have been and are currently being employed by the plaintiffs in the ongoing state John Doe criminal proceeding with respect to them. In short, prosecutorial immunity applies to a John Doe proceeding, as it does in a grand jury proceeding, and as it was applied long ago by the Seventh Circuit in *Harris v. Harvey,* 605 F.2d 330, 336 (7th Cir. 1979), which plaintiffs attempt only feebly to distinguish. Pl. Resp. Br., at 33, n.9.

Plaintiffs also suggest there is "tension" between defendants' argument for prosecutorial immunity and the fact (undisputed) that the Milwaukee prosecutors did not commence the John Doe against them. Pl. Resp. Br., at 34. There is no tension, but there is willful ignorance of this state's campaign law. As defendants have pointed out, and plaintiffs have failed to acknowledge, the Milwaukee defendants did not commence, and could not have commenced, the John Doe proceeding relevant to these plaintiffs. MKE Br., at 3-4, 26-27; Wis. Stat. § 11.61(2). It is revealing that, despite filing an oversized memorandum purporting to reference more than 140 authorities, plaintiffs fail to even mention Wis. Stat. § 11.61(2), the statute specific to campaign

law enforcement that provides that such actions cannot be prosecuted outside the potential defendant's county of residence. The statute refutes, indisputably and as a matter of law, plaintiffs' contention that they are the victims of any prosecution, selective or otherwise, by Milwaukee County authorities. Only the district attorneys of Dane County and Iowa County have legal capacity to prosecute the plaintiffs. MKE Br., at 1, n.1, 42-43. Nonetheless, defendants are compelled to address plaintiffs' allegations despite their complete lack of basis and merit.

III. Plaintiffs' attempt to invoke the *Ex Parte Young* exception to Sovereign Immunity is improper with respect to the Milwaukee defendants because the "prospective relief" that plaintiffs seek would serve only to declare alleged past actions in violation of federal law.

Plaintiffs argue, as some type of unassailable legal rule, that sovereign immunity is no defense to plaintiffs' claims for injunctive relief. First, it is not clear why plaintiffs address only defendant Schmitz in this context, because the Milwaukee prosecutors did indeed explicitly raise sovereign immunity as a defense to plaintiffs' "official capacity" claims against them as part of their opening brief.[1] MKE Br. at 28-29. That said, in their response brief, plaintiffs now attempt to salvage their "official capacity" claims based on some type of injunctive relief they seek related to their retaliation claim. Pl. Resp. Br., at 29. The fundamental problem with that argument with respect to the Milwaukee defendants is that the alleged conduct of those defendants relates only, and necessarily relates only, to past conduct for which injunctive relief, and therefore the *Ex Parte Young* exception, does not apply.

Plaintiffs fail to understand that immunity does not depend on labels. A complaint must "seek[] relief *properly* characterized as prospective." *Verizon Md., Inc. v. Public Serv. Comm'n of Md.,* 535 U.S. 635, 645 (2002) (emphasis added). As the law recognizes, though a plaintiff

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[1] Plaintiffs are similarly inaccurate in asserting that no defendant other than Mr. Nickel disputed the sufficiency of their pleading. Pl. Resp. Br., at 2. These defendants dispute the adequacy of the pleading repeatedly. *See, e.g.,* MKE Br., at 23-25, 32.

may frame the relief it seeks in prospective terms, if the effect of the relief sought is retrospective, the suit does not fall within the *Ex parte Young* exception and is barred by the Eleventh Amendment. *Ward v. Thomas,* 207 F.3d 114, 119 (2d Cir. 2000). Stated differently, if allegations pertain "entirely upon past acts, and not continuing conduct that, if stopped, would provide a remedy to them, it therefore does not come under the doctrine of *Ex Parte Young*." *Gean v. Hattaway*, 330 F.3d 758, 776 (6th Cir. 2003); *see also Tigrett v. Cooper*, 855 F. Supp. 2d 733, 744 (W.D. Tenn. 2012) ("Declaratory relief is not prospective as required by the *Ex Parte Young* doctrine when it would serve to declare only past actions in violation of federal law: retroactive declaratory relief cannot be properly characterized as prospective.")

Here, plaintiffs complain about John Doe proceedings arising from the alleged political animus of unspecified "defendants." They cite as evidence of "bad faith" only alleged injustices done to others, including six felony convictions resulting from jury verdicts or guilty pleas, and instances of alleged non-prosecution by district attorneys across the state, all of whom it is asserted are in conspiracy with the Milwaukee defendants. Plaintiffs utterly fail to face reality, which is that the only John Doe proceeding legally relevant to them was commenced by petition of a district attorney of another county (who is not party to this action), as well as the state judge who ordered the commencement. It was not commenced or ordered to be commenced by the Milwaukee prosecutors. MKE Br., at 1, n.1, 42-34. Again, they have no statutory power to do that, they did not do that, and, perhaps most importantly in the injunction context here, they do not have the statutory authority to either vacate the judge's order commencing the action or order the district attorney of another county to do anything. Wis. Stat. § 11.61(2).

So the plaintiffs here are left with nothing more than an unsupported and wildly conclusory claim that the Milwaukee defendants, out of political animus, "caused" the district

attorneys of plaintiffs' counties of residence to petition for a John Doe proceeding despite the lack of evidence for any such pleading and in derogation of those prosecutors' legal and ethical obligations to file only meritorious claims. Likewise, plaintiffs suppose that the chief judges of those counties similarly ignored their duties, as have the special prosecutor and appointed John Doe judges, in order to carry out these defendants' agenda. The claim is preposterous. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (allegations must be not only possible, but also plausible).

Even accepting as true (which it is not) the assertion that the Milwaukee defendants prompted the commencement of the actions, that activity pertains to petitions filed in 2013. As a matter of law, defendants have no legal capacity to prosecute the Dane County and Iowa County proceedings going forward. Wis. Stat. § 11.61(2). Plaintiffs' relief against these defendants is not prospective. There is no basis to circumvent Eleventh Amendment Immunity with regard to the Milwaukee defendants.

The recent case *Dye v. Office of Racing Commission* is instructive. 679 F. Supp. 2d 706 (E.D. Mich. 2010). In that case, the plaintiffs sued various state officials for First Amendment violations when they were terminated from their jobs at the state racing commission for allegedly supporting a certain gubernatorial candidate. One defendant, the deputy commissioner, was named in his official capacity. The plaintiffs sought an equitable order for the deputy commissioner in his official capacity to reinstate them to their positions. However, the court recognized that, by statute, only the current commissioner—not the deputy commissioner—had the power make such an employment action. *Id.*, at 711. That current commissioner, as the court further noted, was not a party to this lawsuit and the court could not issue an injunction that required the named defendant take an action when the defendant had no authority to take the

action. *Id.* The court concluded that the plaintiffs' claim for injunctive relief in the form of reinstatement was "not plausible on its face and does not survive Defendants' motion to dismiss" *Id.* (citing *Duncan v. Nighbert*, 2007 WL 2571649, *4 (E.D. Ky. Aug. 31, 2007) (holding that the plaintiff's "official capacity claims" against two defendants "for the injunctive relief of reinstatement must fail" because "[p]ursuant to Kansas statutory law," these two defendants "do not have the authority to reinstate Plaintiff to his previous position" and thus these two defendants "cannot provide the relief requested."). Moving to the plaintiffs' request for a judgment against that defendant in his official capacity declaring that his past actions of "limiting and terminating" the plaintiffs' employment violated their First Amendment rights, the court found that because the request for declaratory relief looked solely to the past, it was not properly characterized as prospective. *Id.*, at 712. Accordingly, the court dismissed the plaintiffs official capacity claim for declaratory relief because it did not fall within *Ex parte Young*. *Id.*

As in that case, here there is neither a plausible nor a proper claim subject to injunctive relief against any of the named defendants. Plaintiffs are not subject to any proceeding commenced by defendants because under Wisconsin's campaign finance law, the defendants cannot commence a criminal proceeding, John Doe or otherwise, against them as non-residents of Milwaukee County. Wis. Stat. § 11.61(2). As discussed in defendants' motion to dismiss, the district attorney who commenced the John Doe proceeding pertaining to plaintiffs is not even a party to this suit. For their part, the Milwaukee defendants have no statutory power to end the John Doe proceeding by vacating the judge's order commencing the action or ordering the district attorney of another county to stop the action commenced against the plaintiffs. Whatever injunctive relief the plaintiffs seek to circumvent Eleventh Amendment Immunity, the reality is

that with regard to the Milwaukee defendants, the plaintiffs have not sought relief plausibly or properly characterized as prospective.

CONCLUSION

Based on the arguments set forth here as well as in the defendants opening brief, defendants respectfully request that the Court grant their motion to dismiss plaintiffs' Complaint in its entirety, including any and all claims for injunctive relief and money damages.

Dated this 31th day of March, 2014.

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EXHIBIT 11

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ERIC O'KEEFE and
WISCONSIN CLUB FOR GROWTH,
INC.,

Plaintiffs,

vs. Case No. 14-CV-139-RTR

FRANCIS SCHMITZ, in his official and
personal capacities, et al.,

Defendants.

DEFENDANTS CHISHOLM, LANDGRAF, AND ROBLES' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR STAY PENDING APPEAL AND IN RESPONSE TO PLAINTIFFS' CROSS-MOTION TO CERTIFY APPEALS AS FRIVOLOUS

Defendants John Chisholm, Bruce Landgraf, and David Robles ("the Milwaukee County prosecutors"), by their attorneys, submit this reply memorandum in support of their Motion for Stay Pending Appeal and in response to Plaintiffs' Cross-Motion to Certify Appeals as Frivolous.

INTRODUCTION

Plaintiffs have mustered an 18-page response to a straightforward motion for stay. The response includes plaintiffs' usual grandstanding, falsely accusing defendants of seeking appeal as a delay tactic rather than a genuine attempt to vindicate their rights. Plaintiffs' arguments misrepresent defendants' filings and contrive sharp legal lines where none exist. The Milwaukee County prosecutors ask the Court to conclude that their governmental immunity arguments are not frivolous and stay this entire matter in accordance with *May v. Sheahan*, 226 F.3d 876 (7th Cir. 2000) and its progeny.

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ARGUMENT

I. THE MILWAUKEE COUNTY PROSECUTORS' APPEAL REGARDING ABSOLUTE, QUALIFIED, AND SOVEREIGN IMMUNITY IS NOT FRIVOLOUS.

A court cannot find that an appeal is frivolous merely because the appellee believes that the appellant will not prevail. *See Harris N.A. v. Hershey*, 711 F.3d 794, 801-02 (7th Cir. 2013). As the Seventh Circuit acknowledged: "Reasonable lawyers and parties often disagree on the application of law in a particular case, and this court's doors are open to consider those disagreements brought to us in good faith." *Id.* at 801 (citation omitted). Frivolousness means that the "result is obvious" or that appellant's argument is "wholly without merit." *Id.* at 802 (quoting *Spiegel v. Continental Illinois Nat'l Bank*, 790 F.2d 638, 650 (7th Cir. 1986). "Typically the courts have looked for some indication of the appellant's bad faith suggesting that the appeal was prosecuted with no reasonable expectation of altering the district court's judgment and for the purpose of delay or harassment or out of sheer obstinacy." *Ruderer v. Fines*, 614 F.2d 1128, 1132 (7th Cir. 1980). It is simply astounding that plaintiffs could accuse lifelong law enforcement professionals of intentional misconduct in office and then seek to deny them the opportunity to have those claims challenged by appeal.

The Milwaukee County prosecutors' appeal is not frivolous, and it is not a close call.[1] The conclusion that absolute and qualified prosecutorial immunities do not apply to Wisconsin John Doe proceedings, and the activities undertaken during those proceedings, is certainly not well-established. There is little case law directly addressing these issues in the context of a John

[1] Even though plaintiffs are plainly wrong, the Court and parties can rest assured that these defendants are not hastily preparing an 18-page brief alleging that plaintiffs' request violated Fed. R. Civ. P. 11. Defense counsel refuses to cavalierly accuse their adversaries of bad faith.

Doe proceeding, but the case law that exists on absolute immunity favors the Milwaukee County prosecutors. *See Harris v. Harvey*, 605 F.2d 330 (7th Cir. 1979). As to sovereign immunity, the Milwaukee County prosecutors argued that it applied to plaintiffs' official capacity claims, and the Court made a ruling based on those arguments. The Milwaukee County prosecutors respectfully assert that the Court erred in concluding that sovereign immunity does not apply. Obviously, the Court disagrees, but the position is not frivolous.

A. The Milwaukee County Prosecutors' Arguments Regarding Absolute Immunity are Not Frivolous.

The Milwaukee County prosecutors argued that absolute immunity applied because the plaintiffs' allegations specific to them involved non-investigative acts conducted within the Wisconsin John Doe proceeding and, therefore, the acts were inseparable from the judicial process. (Milwaukee Defs.' Mot. Dismiss Br. at 30-31, 3/13/14, dkt. doc. no. 60.) That is, plaintiffs' allegations specific to these defendants implicate their role as advocates for the State of Wisconsin and not as mere investigators or administrators. (Id.) The Seventh Circuit in *Harris v. Harvey*, 605 F.2d 330, 336 (7th Cir. 1979)—the only published case addressing absolute prosecutorial immunity in the context of John Doe proceedings—stated that the trial court properly recognized absolute immunity for the appellant's acts conducted within a John Doe proceeding. In response, plaintiffs addressed *Harris* only in a footnote. This Court did not address the case at all. Respectfully, an appeal cannot be deemed frivolous where the only appellate court authority addressing the issue is supportive of the appellant's position. At a minimum, defendants are entitled to assert their immunity, as they have, under the authority of *Harris* and have the appellate court consider their argument. They should not be foreclosed of any meaningful opportunity to appeal where a plausible basis for appeal exists.

Additionally, plaintiffs' arguments ignore the abundance of federal case law holding that grand jury proceedings and search warrant applications—*i.e.*, judicial proceedings prior to the establishment of probable cause like a John Doe proceeding—are subject to absolute prosecutorial immunity. (Milwaukee Defs.' Mot. Dismiss Reply Br. at 4-5 (citing *Rehberg v. Paulk*, 132 S. Ct. 1497 (2012); *Burns v. Reed*, 500 U.S. 478 (1991); *Hill v. City of New York*, 45 F.3d 653 (2d Cir. 1995)), 4/9/14, dkt. doc. no. 87.) Again, plaintiffs' specific allegations against the Milwaukee County prosecutors implicate only conduct associated with the John Doe proceeding and are, like grand jury proceedings and search warrant applications, subject to absolute prosecutorial immunity.

The Court disagreed with defendants' arguments and denied their motion to dismiss on absolute immunity. (Decision and Order at 14-16, 4/8/14, dkt. doc. no. 83.) Without addressing plaintiffs' specific allegations with regard to the Milwaukee County prosecutors,[2] the Court concluded that prosecutors are at all times "investigators" within a John Doe proceeding. (Id. at 15.) The Court did not explain why a John Doe proceeding is not a judicial proceeding despite

[2] Citing to the Supreme Court *Burns v. Reed*, the Court did summarize plaintiffs' allegations as not challenging the prosecutors' "participation" in the John Doe proceeding, but rather challenging *why* the prosecutors "pursu[ed]" the John Doe proceeding "in the first instance." (Decision and Order at 16.) In doing so, this Court mistook the *Burns* Court's framing of the issue on appeal as an implicit exception to absolute immunity. In fact, not only has this Court's newly-found exception involving a prosecutor's motivation never been adopted in any immunity case, it has been flatly rejected. *Bernard v. County of Suffolk*, 356 F.3d 495, 504 (2d Cir. 2004) ("[T]he fact that improper motives may influence his authorized discretion cannot deprive him of absolute immunity"); *Kulwicki v. Dawson*, 969 F.2d 1454, 1464 (3d Cir. 1992) ("Consideration of personal motives is directly at odds with the Supreme Court's simple functional analysis of prosecutorial immunity."); *see also Buckley v. Fitzsimmons*, 509 U.S. 259, 274, n. 5 (1993) (indicating that the Court's conclusion that absolute immunity protects a prosecutor against §1983 claims in the nature of malicious prosecution was based in part on the "common-law tradition of immunity for a prosecutor's decision to bring an indictment, whether he has probable cause or not"). Otherwise, a plaintiff could always plead around the immunity defense by simply challenging *why* certain conduct was pursued rather than challenging the conduct itself.

oversight by a judge, issuance of orders, and the availability of motions and appeals as part of the proceeding, or why it is different than a grand jury proceeding for which absolute immunity applies. While the Milwaukee County prosecutors respect the Court's Decision and Order, these are fairly debatable issues that are not so ,lacking in merit that even considering an appeal should be foreclosed.

B. The Milwaukee County Prosecutors' Arguments Regarding Qualified Immunity are Not Frivolous.

The Milwaukee County prosecutors argued that qualified immunity applied because plaintiffs failed to show a clearly-established right. (Milwaukee Defs.' Mot. Dismiss Br. at 34-37.) They argued that plaintiffs do not have a clearly-established First Amendment right precluding a criminal proceeding regarding their campaign finance activities. (Id.) In fact, plaintiffs explicitly alleged in their complaint that they did have such a right. (Id. at 34-35 (citing Compl., ¶¶ 100, 102).) The federal case law, explained the Milwaukee County prosecutors, did not support plaintiffs' contention and, regardless, did not reflect any clearly-established right. (Id. at 35-37.)

The Court's Decision and Order did not address the Milwaukee County prosecutors' arguments, instead resolving the immunity question on "the right to express political opinions without fear of government retaliation." (Decision and Order at 17.) The Court quoted *Bennett v. Hendrix*, 423 F.3d 1247, 1255 (11th Cir. 2005) for the general proposition that "[t]his Court and the Supreme Court have long held that state officials may not retaliate against private citizens because of the exercise of their First Amendment rights." (Id.) Respectfully, defendants seek review of the Court's decision for three primary reasons. First, the United States Supreme Court has instructed that an immunity analysis should not rely only on a general right. *Anderson v.*

Creighton, 483 U.S. 635, 639-41 (1987). Second, this Court considered only plaintiffs' allegations regarding the defendants' *subjective motivation* for commencing the John Doe proceeding without considering the *objective reasonableness* of their actions within the John Doe proceeding. *See Kulwicki v. Dawson*, 969 F.2d 1454, 1464 n.12 (3d Cir. 1992) (citing *Anderson,* 483 U.S. at 641) ("Notably, motive is also irrelevant in the qualified immunity analysis. There the emphasis is on the objective reasonableness of the official's behavior."). Finally, and just as critical, the Court's conclusion begs the question originally posited by the Milwaukee County prosecutors: do plaintiffs' clearly-established First Amendment rights include a right to be free from a proceeding regarding potentially criminal campaign finance activity? *See Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 155 (7th Cir. 2011) (citing *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001) ("coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits.")). The Court did not address this question, and defendants deserve the opportunity to bring it before the court of appeals.

C. The Milwaukee County Prosecutors Argued that Sovereign Immunity Barred Plaintiffs' Official Capacity Claims, and Such Arguments Were Not Frivolous.

Plaintiffs' contention that the Milwaukee County prosecutors did not raise sovereign immunity is most perplexing and yet another example of plaintiffs' tendency to argue their position by flatly misstating defendants'. The Milwaukee County prosecutors' moving brief states in relevant part:

> As an initial matter, plaintiffs cannot bring a federal suit against the Milwaukee County prosecutors in their "official capacity." This Court previously and specifically recognized that Milwaukee County district attorneys and their assistants are state employees, entitled to immunity

> from such federal suits under the Eleventh Amendment. *Omegbu v. Wis. Elections Bd.*, 2007 U.S. Dist. LEXIS 7878, *3-4, 2007 WL 419372 (E.D. Wis. 2007); *see also Brokaw v. Mercer County*, 235 F.3d 1000, 1009 (7th Cir. 2000) ("Federal suits against state officials in their official capacities are barred by the Eleventh Amendment."). Thus, all claims seeking against Milwaukee County prosecutors in their "official capacity" must be dismissed.

(Milwaukee Defs.' Mot. Dismiss Br. at 29.)[3] Plaintiffs simply ignored the Milwaukee County prosecutors' sovereign immunity arguments in their responsive brief. (Pls.' Mot. Dismiss Resp. Br. at 28-29, 4/8/14, dkt. doc. no. 84.) Nonetheless, the Milwaukee County prosecutors replied to plaintiffs' arguments that sovereign immunity did not apply. (Milwaukee Defs.' Mot. Dismiss Reply Br. at 6-10.) The Court, in rendering its Decision and Order, stated that "[t]he prosecutor-defendants (i.e., the Milwaukee Defendants plus Schmitz) argue that they are entitled to sovereign immunity under the Eleventh Amendment to the extent that O'Keefe seeks injunctive relief against them in their official capacity." (Decision and Order at 13.) Plaintiffs' argument that defendants did not raise sovereign immunity is simply disingenuous.

Although the Milwaukee County prosecutors cited Fed. R. Civ. P. 12(b)(6) and explained the basis for sovereign immunity in their moving brief, plaintiffs suggest waiver because they did not state the words "sovereign immunity" in their motion document.[4] Plaintiffs cite to no case law whatsoever to support this. Plaintiffs were clearly not prejudiced by the omission of those

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[3] Additionally, when briefing the defendants' Motion to Stay the Preliminary Injunction, the Milwaukee County prosecutors noted that this Court should first resolve the sovereign immunity issues with respect to them before requiring briefing on the preliminary injunction. (*See* Defs.' Stay Br. at 3-5, 3/18/14, dkt. doc. no. 55.) Briefing on that stay motion was filed before plaintiffs' response to the defendants' motions to dismiss was due.

[4] Ironically, plaintiffs' present brief requests that the Court certify as frivolous defendants' appeals on the bases of absolute, qualified, and sovereign immunities while plaintiffs' cross-motion for certification mentions only sovereign immunity. (*Compare* Pls.' Br. at 10-12, 4/28/14, dkt. doc. no. 157 *with* Pls.' Mot. Cert., 4/25/14, dkt. doc. no. 155.)

words, and they do not argue that they were prejudiced. The Court obviously construed the Milwaukee County prosecutors' arguments to raise sovereign immunity. Even if there was some merit to plaintiffs' argument, the mere fact that the Court concluded that the Milwaukee County prosecutors were not entitled to sovereign immunity undermines any argument that their appeal is *frivolous* on this basis.

Plaintiffs also argue that the Milwaukee County prosecutors' appeal on sovereign immunity is frivolous because the Court concluded that the Milwaukee County prosecutors' arguments were "simply wrong." (Decision and Order at 13.) The Court further stated that "O'Keefe's complaint rather easily states a claim under *Ex parte Young*." (Id.) However, while the Court cited the method by which courts analyze sovereign immunity, (Id. at 13-14 (citing *McDonough Assoc., Inc. v. Grunloh*, 722 F.3d 1043, 1051 (7th Cir. 2013)), the Court never actually undertook such an analysis with respect to the specific allegations against the Milwaukee prosecutors. There is a conclusion, utilizing words like "simply" and "easily," and nothing more.

The Milwaukee County prosecutors are entitled to an explanation as to how plaintiffs' complaint seeks relief that is properly-characterized as prospective with respect to them specifically. The Milwaukee County prosecutors have neither received an explanation to date nor believe that one exists which sufficiently overcomes sovereign immunity. Consequently, they will now ask the court of appeals to determine whether plaintiffs' allegations can support the Court's conclusion that the complaint requests prospective relief against them. Simply put, this is not an appeal premised on frivolous arguments.

II. BECAUSE DEFENDANTS' APPEALS ARE NOT FRIVOLOUS, THE COURT MUST STAY THE ENTIRE PROCEEDING.

Plaintiffs do not disagree, as they cannot, that if defendants' appeals on the issues of absolute, qualified, and sovereign immunities are not frivolous, then the Court must stay all proceedings. The law is clear: such appeals "relate[] to the entire action and, therefore, [they] divest[] the district court of jurisdiction to proceed with any part of the action against an appealing defendant." *May v. Sheahan*, 226 F.3d 876, 881 (7th Cir. 2000); *see also Goshtasby v. Board of Trustees of the Univ. of Ill.*, 123 F.3d 427 (7th Cir. 1997); *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir. 1989). As a result, the Court should stay this entire proceeding while defendants seek an order from the court of appeals that they are immune.

However, even in the unlikely event that the Court decides that defendants' sovereign immunity arguments are frivolous, the Court must still order a stay of all proceedings. While plaintiffs argue that there is a meaningful distinction between personal-capacity and official-capacity claims on appeal, plaintiffs cannot cite any case law which supports such a distinction with respect to stays in the district court pending appeals on governmental immunity. (Pls.' Br. at 2-4, 4/28/14, dkt. doc. no. 157.) As *all* of plaintiffs' citations demonstrate, this distinction has meaning only when the court of appeals determines jurisdiction on appellate review. (Id.) None of the cited cases dealt with stays in the district court. Just as the case law on such stays pays no regard for the distinction between requests for injunctive relief and monetary relief, the case law does not direct district courts to parse plaintiffs' claims in the manner suggested by plaintiffs. Contrary to plaintiffs' tenuous arguments, *May v. Sheahan*, *Goshtasby v. Board of Trustees of the Univ. of Ill.*, and *Apostol v. Gallion* all stand for the proposition that a litigant's appeal on *any*

theory of governmental immunity stays the entire proceeding against that litigant in the district court.

III. THE COURT SHOULD CERTIFY THE ABSTENTION QUESTIONS FOR INTERLOCUTORY APPEAL AND ORDER A DISCRETIONARY STAY.

If the Court certifies its order denying defendants' abstention arguments for interlocutory appeal, then the Court should order a discretionary stay prior to the preliminary injunction hearing. Abstention relates to the Court's subject matter jurisdiction and raises questions of comity and federalism between the federal and state forums. Because the case law on abstention as it applies in the context of John Doe proceedings is unclear, the prudent approach would be to avoid any adjudication, including the extraordinary relief provided by a preliminary injunction, until the abstention issues are clarified on appeal. Defendants' arguments on both *Younger* and *Pullman* abstention mention the real risk that this Court's decisions on relief may directly contradict the Wisconsin appellate courts' orders on substantially similar arguments in the ongoing John Doe proceedings. For example, if the Court granted plaintiffs' request for a preliminary injunction, and the Wisconsin courts reversed Judge Peterson's decisions and remanded for further proceedings, then a serious, perhaps unprecedented, federalism question would arise. This is an untenable outcome, and the Court should order a discretionary stay upon granting defendants' motion for certification.

CONCLUSION

For the foregoing reasons, the Milwaukee County prosecutors respectfully request that the Court grant their motion for stay pending appeal and deny plaintiffs' motion to certify defendants' appeals as frivolous.

Dated this 29th day of April, 2014.

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