No. 14-1822

Consolidated with Nos. 14-1888, 14-1899, 14-2006, 14-2012, 14-2023

In the United States Court of Appeals for the Seventh Circuit

ERIC O'KEEFE, et al.,

Plaintiffs–Appellees

v.

JOHN T. CHISHOLM, et al.,

Defendants–Appellants.

On Appeal from the United States District Court for the
Eastern District of Wisconsin
No. 2:14-cv-00139
The Honorable Rudolph T. Randa

Appellees' Petition for Rehearing, with Suggestion for Rehearing *En Banc*

DAVID B. RIVKIN, JR.
Counsel of Record
LEE A. CASEY
MARK W. DELAQUIL
ANDREW M. GROSSMAN
RICHARD B. RAILE
BAKERHOSTETLER
1050 Connecticut Ave., N.W.,
Suite 1100
Washington, D.C. 20036
(202) 861-1731
drivkin@bakerlaw.com

Attorneys for Appellees

Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the undersigned counsel of record for appellees Eric O'Keefe and Wisconsin Club for Growth, Inc. ("Plaintiffs"), hereby certifies that Baker & Hostetler LLP is the only law firm whose attorneys have appeared for Plaintiffs in this case, that the Wisconsin Club for Growth, Inc., has no parent corporation, and that no publicly held company owns 10 percent or more of its stock.

Dated: October 8, 2014

/s/ David B. Rivkin, Jr.

DAVID B. RIVKIN, JR.
BAKERHOSTETLER
1050 Connecticut Ave., N.W., Suite 1100
Washington, D.C. 20036
(202) 861-1731
drivkin@bakerlaw.com

Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the undersigned counsel of record for appellees Eric O'Keefe and Wisconsin Club for Growth, Inc. ("Plaintiffs"), hereby certifies that Baker & Hostetler LLP is the only law firm whose attorneys have appeared for Plaintiffs in this case, that the Wisconsin Club for Growth, Inc., has no parent corporation, and that no publicly held company owns 10 percent or more of its stock.

Dated: October 8, 2014

/s/ Lee A. Casey
LEE A. CASEY
BAKERHOSTETLER
1050 Connecticut Ave., N.W., Suite 1100
Washington, D.C. 20036
(202) 861-1730
lcasey@bakerlaw.com

Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the undersigned counsel of record for appellees Eric O'Keefe and Wisconsin Club for Growth, Inc. ("Plaintiffs"), hereby certifies that Baker & Hostetler LLP is the only law firm whose attorneys have appeared for Plaintiffs in this case, that the Wisconsin Club for Growth, Inc., has no parent corporation, and that no publicly held company owns 10 percent or more of its stock.

Dated: October 8, 2014

/s/ Mark W. DeLaquil
MARK W. DELAQUIL
BAKERHOSTETLER
1050 Connecticut Ave., N.W., Suite 1100
Washington, D.C. 20036
(202) 861-1527
mdelaquil@bakerlaw.com

Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the undersigned counsel of record for appellees Eric O'Keefe and Wisconsin Club for Growth, Inc. ("Plaintiffs"), hereby certifies that Baker & Hostetler LLP is the only law firm whose attorneys have appeared for Plaintiffs in this case, that the Wisconsin Club for Growth, Inc., has no parent corporation, and that no publicly held company owns 10 percent or more of its stock.

Dated: October 8, 2014

/s/ Andrew M. Grossman
ANDREW M. GROSSMAN
BAKERHOSTETLER
1050 Connecticut Ave., N.W., Suite 1100
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the undersigned counsel of record for appellees Eric O'Keefe and Wisconsin Club for Growth, Inc. ("Plaintiffs"), hereby certifies that Baker & Hostetler LLP is the only law firm whose attorneys have appeared for Plaintiffs in this case, that the Wisconsin Club for Growth, Inc., has no parent corporation, and that no publicly held company owns 10 percent or more of its stock.

Dated: October 8, 2014

/s/ Richard B. Raile

RICHARD B. RAILE
BAKERHOSTETLER
1050 Connecticut Ave., N.W., Suite 1100
Washington, D.C. 20036
(202) 861-1711
rraile@bakerlaw.com

Table of Contents

Table of Authorities

Cases

Statement Respecting Rehearing *En Banc*

Rehearing *en banc* is warranted in this case for two reasons:

1. The panel decision conflicts with the Supreme Court's decisions in *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584 (2014), and *Dombrowski v. Pfister*, 380 U.S. 479 (1965), and decisions of this Court regarding abstention in deference to state-court proceedings.
2. This case presents a question of exceptional importance: Whether federal courts may abstain from exercise of their jurisdiction to enforce federal rights in deference to state-court proceedings that are not eligible for abstention under *Younger v. Harris*, 401 U.S. 37 (1971), and offer no opportunity for enforcement of those federal rights.

Introduction

The panel decision holds that individuals targeted for retaliatory investigation by state law-enforcement officers on the basis of their political beliefs can obtain no relief in federal court due to "principles of equity, comity, and federalism." App. 6. That decision breaks with the fifty-year line of jurisprudence beginning with *Dombrowski v. Pfister*, 380 U.S. 479 (1965), which held that enforcement of state law "in bad faith to impose continuing harassment in order to discourage" the exercise of federal rights states a proper civil-rights claim that a federal court is duty-bound to resolve. Instead, according to the panel, Plaintiffs' ability to persuade a state court to quash a single subpoena conclusively demonstrates that there is no need for a federal injunction.

If only that were so. But the gravamen of Plaintiffs' claim, and the source of their injuries, is not that they were subjected to a single state-court proceeding premised on Defendants' misapprehension of Wisconsin campaign-finance law. Instead, the claim they brought was for viewpoint-based retaliation, challenging a course of bad-faith conduct that extends far beyond a single subpoena. Their complaint describes at length—in allegations whose plausibility has been upheld by the district court—how a team of state law-

enforcement officers, led by Milwaukee County District Attorney John Chisholm, targeted Plaintiffs and scores of other conservatives for harassment based on their political beliefs and activism through a four-year-long secret criminal investigation aimed at bringing down Governor Scott Walker and reversing his policies. That investigation has involved no fewer than six separate John Doe proceedings that were repeatedly expanded in scope, numerous acts outside of any John Doe proceeding, and a variety of different theories of criminal liability. In short, Defendants have launched a permanent campaign of intimidation and harassment against Wisconsin conservatives—*because they are conservatives*—and the resulting First Amendment injury is one that no pending state-court proceeding can possibly remedy.

The panel decision makes three central errors that require rehearing. First, it misstates Plaintiffs' First Amendment retaliation claim by treating it as equivalent to a direct challenge to Wisconsin campaign-finance law and ignoring Plaintiffs' detailed allegations and specific evidence that Defendants' conduct against them was motivated by animus toward Plaintiffs' conservative viewpoints and support of Governor Walker's economic policies. The claim ordered dismissed by the panel is not the one that Plaintiffs brought.

Second, the panel dismisses two claims that were not even before the Court. Count 4 challenges Defendants' actions to compel disclosure of Plaintiffs' political affiliations and activities in violation of their First Amendment associational rights, and Count 5 challenges the gag order entered by the John Doe judge (which Judge Easterbook characterized at oral argument as "screamingly unconstitutional") as violating Plaintiffs' speech rights. Neither of these claims was a subject of Plaintiffs' preliminary-injunction motion, and Defendants did not seek their dismissal on appeal. The panel's order that these claims be dismissed, without briefing or either party advocating that result, is inappropriate and unsupportable.

Third, the panel decision disregards federal courts' "virtually unflagging" obligation to hear and decide cases within their jurisdiction, particularly when federal rights are at stake. The Supreme Court's 2013 *Sprint* decision held that this obligation persists even in the face of parallel state proceedings, except for a narrow class of actions like criminal prosecu-

tions that is not implicated here because, as Wisconsin law holds, a John Doe proceeding is purely investigatory and not a criminal prosecution. The panel decision conflicts with *Sprint*, as well as cases like *Dombrowski* that recognize a "bad faith" exception to abstention where it might otherwise be appropriate. Those conflicts will only sow confusion in civil-rights actions involving related state proceedings, an area already fraught with complication. Proper resolution of this issue is exceptionally important, going to the heart of federal courts' power to enforce federal civil rights against infringing state action. *En banc* review is necessary.

Argument

I. The Panel Decision Misstates Plaintiffs' Viewpoint-Based Retaliation Claim

"[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006). Plaintiffs here brought such a claim, alleging that Defendants' four-year-long campaign of harassment and abuse against Wisconsin conservatives and allies of Governor Scott Walker, including Plaintiffs, was undertaken in retaliation for their advocacy based on its viewpoint.

Rather than address that claim, the panel dismissed it without consideration, on the basis that Plaintiffs sought to prove retaliation, in part, by challenging one of Defendants' theories of criminal liability that happens to involve regulation of speech. App. 10. In the panel's view, Plaintiffs' retaliation claim was just another way of saying that their allegedly coordinated issue advocacy could not be regulated consistent with the First Amendment. *Id.* But the panel misapprehended both the grounds and the scope of Plaintiffs' First Amendment retaliation claim, which concerned Defendants' long-running campaign of viewpoint-based retaliation against Plaintiffs and other conservatives across a number of different proceedings, actions, and legal theories.

First, as to the conduct at issue, Plaintiffs' retaliation claim stands on its own, apart from any challenge to Wisconsin campaign-finance law. A retaliation claim will lie where

"(1) [plaintiffs] engaged in activity protected by the First Amendment; (2) they suffered a deprivation that would likely deter First Amendment activity; and (3) the First Amendment activity was at least a motivating factor in the [state] officer's decision." *Thayer v. Chiczewski*, 705 F.3d 237, 251 (7th Cir. 2012). Count 1 of the complaint alleges that Defendants' conduct in fact deterred Plaintiffs' and their associates' activism, and that Plaintiffs' prior speech, "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." R.1 ¶ 199.

In support of that claim, the complaint set forth detailed allegations supporting Defendants' retaliatory motive. It described how Defendants launched their initial John Doe proceeding on the pretext of seeking the "origin" of missing charitable funds and then, almost immediately, pivoted to target Scott Walker, who was then a leading candidate for governor, and his associates. *Id.* ¶¶ 64–74. It described how that initial proceeding was quickly expanded at least 18 times until all things Walker were within its ambit, from campaign contributors to his ideological and policy allies, including Plaintiffs. *Id.* ¶¶ 75–83. It described how, shortly after Walker's recall-election victory, Defendants launched a string of new John Doe proceedings to continue the existing investigation by targeting nearly every major conservative activist group in Wisconsin, with their ideology and support for Walker's policies as the only common denominators. *Id.* ¶¶ 84–94. It described how, in all phases of the investigation, Defendants' employed unusual measures designed to intimidate their targets, from arresting witnesses unable to provide information against Walker and his allies, to raiding the homes of targets, to blanketing conservatives with kitchen-sink subpoenas. *Id.* ¶¶ 114–39. It described how key events in the investigation—including home and office raids, as well as leaks to the media—were timed to coincide with important political events, like elections. *Id.* ¶¶ 157–72. And it described how Defendants had consistently turned a blind eye to credible allegations of misconduct against Democrats and left-of-center

groups, including allegations indistinguishable from those they vigorously pursued against Republicans and conservatives. *Id*. ¶¶ 140–56.

Plaintiffs not only alleged these things, but also supported them at the preliminary-injunction stage—prior to any discovery—with detailed evidence that Defendants did not attempt to challenge or rebut. R.7 at 18–27, 36–40 (reciting evidence of Defendants' retaliatory purpose apart from their allegedly pretextual theory of criminal liability). *See also* ECF No. 131 at 10–21 (appellate briefing reciting same evidence). Moreover, on the same day that this appeal was set for argument, award-winning journalist and Brookings Institution fellow Stuart Taylor reported allegations by a whistleblower who had served in the Milwaukee District Attorney's office that District Attorney Chisholm was in fact motivated by animus against Walker and supporters of his economic policies.[1] This disclosure demonstrates that discovery is likely to provide substantial support for Plaintiffs' First Amendment retaliation claim.

True, the complaint also alleged that Defendants' latest theory of liability involving campaign-finance law was a pretext adopted with no possibility of securing a valid conviction. *See* R.1. ¶¶ 95–107. But that allegation did not, as the panel concluded, "just restate[] the point that campaign-finance regulation concerns speech"—i.e., duplicate a direct challenge to Wisconsin's regulation of "coordinated" issue advocacy. App. 10. For one thing, Plaintiffs did not specifically plead a direct challenge to Wisconsin campaign-finance law in the complaint that is on appeal. More to the point, this allegation served to provide additional support for Defendants' retaliatory motive by showing that they threatened law enforcement action "with no hope of a valid conviction." *Wilson v. Thompson*, 593 F.2d 1375, 1387 n.22 (5th Cir. 1979). But even if Defendants' interpretation of Wisconsin law were cor-

[1] Stuart Taylor, District attorney's wife drove case against Wis. Gov. Walker, insider says, Legal Newsline, Sep. 8, 2014, http://legalnewsline.com/news/251647-district-attorneys-wife-drove-case-against-wis-gov-walker-insider-says.

rect and defensible, that would not somehow vitiate Plaintiffs' other allegations and evidence of Defendants' retaliatory purpose.

In other words, Plaintiffs can still prevail on their retaliation claim even if a court ultimately rejects their contention that Defendants' theory of liability is a sham. After all, it is *the retaliation itself* that violates federal law, irrespective of whether a threatened law enforcement action is viable or not. *See Thayer*, 705 F.3d at 251; *Greene v. Doruff*, 660 F.3d 975, 980 (7th Cir. 2011). At most, the viability of a threatened law-enforcement action may be relevant to satisfying the defendant's burden of showing that the injurious conduct "would have occurred anyway," absent his retaliatory motivation. *Thayer*, 705 F.3d at 251–52. But this is not the same thing as a challenge to Wisconsin campaign-finance law itself.

Second, as to scope, Plaintiffs' retaliation claim attacks not just a single subpoena issued in a single John Doe proceeding, as the panel appears to believe, but the entire course of Defendants' retaliation, which has involved numerous proceedings, legal theories, and actions, many outside of any formal proceeding. *See* App. 6. Enjoining a single aspect of this overall course of retaliatory conduct could not have brought Plaintiffs any real relief, due to Defendants' single-minded pursuit of Wisconsin conservatives over a period of years and ability to take additional retaliatory actions at will. Indeed, Defendants had been prying into Plaintiffs' affairs—and had already obtained some of the Club's internal email and records—more than a year before commencing the current John Doe proceedings, well before they had settled on their current legal theory or sought to subpoena Mr. O'Keefe. Moreover, Defendants conducted many aspects of their investigation outside of those proceedings, including witness interviews, witness intimidation, and leaks to the media. *See e.g.*, R.1 ¶¶ 84–85, 157–58, 163; R.7 Ex. A. Exs. 13 at 6–13; 16 at 9, 11–12. Accordingly, Plaintiffs' requested relief was not to enjoin a single subpoena, a single legal theory, or a single proceeding; they sought to enjoin the entirety of the retaliatory "investigation," R.4 at 6–7, whatever its breadth and scope, and thereby restore their constitutionally guaranteed right to engage in advocacy—including advocacy that is not even arguably coordinated with any political

candidate and so would not be subject to Defendants' theory of criminal liability—without fear of official retribution.

The panel's erroneous view of the grounds and scope of Plaintiffs' First Amendment retaliation claim also infects its consideration of the equities. *See* App. 6. Plaintiffs' irreparable injury was not merely being confronted with a vastly overbroad theory of illegal "coordination" that restricted their ability to speak, but the reasonable fear that they and their supporters and other associates would face further official retaliation for all of their advocacy—including independent advocacy that is absolutely protected by the First Amendment.[2] *Citizens United v. FEC*, 558 U.S. 310, 365–66 (2010). And Plaintiffs' First Amendment injuries, including their inability to raise funds for independent advocacy, could not have been remedied had the district judge allowed any state court proceeding "to take its course," App. 6, because no state proceeding concerns Defendants' viewpoint-based retaliation against Plaintiffs. Likewise, the fact that the John Doe judge "entertained and granted the motion to quash" does not demonstrate that Plaintiffs have "adequate remedies at law (which is to say, without the need for an injunction)," App. 6, because that proceeding offers no prospect of relief from Defendants' retaliation, only (at most) a single expression of it.

In sum, if the panel found that the district court's legal analysis was wrong or that it did not make findings adequate to support its entry of an injunction, it could have vacated the preliminary injunction. But it was error to order dismissal of Plaintiffs' retaliation claim based entirely on its evaluation of the district court's injunction order, while ignoring the claim that Plaintiffs actually pleaded and prosecuted. The panel should correct its error and reinstate Plaintiffs' retaliation claim. After all, "[a]bstention serves no legitimate purpose

[2] Mr. O'Keefe's testimony specifically identifies "concern about facing further harassment or retribution from [Defendants] in response to further advocacy" as the leading cause of the Club's inability to raise funds and engage in advocacy. R.7 Ex. B ¶ 51. *See also id.* ¶¶ 47, 50 (describing chilling impact of Defendants' retaliation).

where…the constitutional claims raised in the federal complaint cannot be resolved in the state proceedings." *Bickham v. Lashof*, 620 F.2d 1238, 1245 (7th Cir. 1980).

II. The Panel Ordered Dismissed Claims That Were Not Even Before It

In ordering dismissal of the entire case, the panel decision similarly overlooks that Plaintiffs asserted two additional and distinct claims that were not before the Court.

Count 5 alleges that the gag order imposed by the John Doe judge—which purports to prohibit Mr. O'Keefe from disclosing anything relating to the John Doe proceeding, including the fact that he received a subpoena—"unconstitutionally deprives Plaintiffs of their free speech rights under the First Amendment." R.1 ¶ 224. At oral argument, Judge Easterbrook was struck by the novelty of this restriction, stating that it was "screamingly unconstitutional" and the "kind of thing the Supreme Court has reversed in one-paragraph summary opinions."[3] Count 5, however, was not before the Court, because Plaintiffs did not raise it in their preliminary-injunction motion, *see* R.4, R.7; the Court dismissed Defendants' appeal of denial of their motions to dismiss Plaintiffs' official-capacity claims, ECF No. 43; and the only two Defendants who did seek its dismissal abandoned that argument on appeal.[4] *Williams v. REP Corp.*, 302 F.3d 660, 666 (7th Cir. 2002) ("A party waives any argument that it does not raise before the district court or, if raised in the district court, it fails to develop on appeal."). So while the panel decision reasonably did not address the propriety of the gag order, its belief that "no one has challenged that order," App. 14, was incorrect, and its instruction to dismiss that challenge was based on that incorrect premise.

Moreover, dismissal of Count 5 is not supported by the panel's reasoning because Plaintiffs have no possibility of obtaining relief from the gag order in state court. Plaintiffs

[3] Oral Argument, *O'Keefe v. Chisholm*, No. 14-1822, Sep. 9, 2014, available at http://media.ca7.uscourts.gov/sound/external/lj.14-1822.14-1822_09_09_2014.mp3.

[4] In the district court, only Nickel and Schmitz only sought dismissal of Count 5, on the basis that they personally did not enter or enforce the gag order. R.44 at 16; R.54 at 24. The John Doe judge, Gregory Peterson, was named as a defendant specifically to obtain relief under Count 5, R.1 ¶ 14, but did not move to dismiss it and is not a party to this appeal.

moved the John Doe judge to lift the gag order, and that request was denied in a December 17, 2013 order. Under Wisconsin law, Plaintiffs have no right of appeal to seek reversal of that order. *In re John Doe Proceeding*, 660 N.W.2d 260, 273 (Wis. 2003). Accordingly, only this federal-court proceeding offers the prospect of vindicating Plaintiffs' First Amendment rights against the gag order, and unless and until this claim is acted upon, Plaintiffs will suffer a blatantly unconstitutional prior restraint on their speech. *See Butterworth v. Smith*, 494 U.S. 624, 632 (1990); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103–04 (1979).

Count 4 alleges that Defendants compelled disclosure (through subpoenas and seizures) of Plaintiffs' political associations, internal communications, and strategies in violation of Plaintiffs' First Amendment associational rights. "The Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation." *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003) (citing *Buckley v. Valeo*, 424 U.S. 1, 64–68 (1976); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462–63 (1958)). Thus courts have recognized a First Amendment-based right of organizations against disclosures that "will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir. 2009). "Disclosures of political affiliations and activities that have a deterrent effect on the exercise of First Amendment rights are therefore subject to...exacting scrutiny." *Id.* at 1139–40 (quotation marks omitted). Here, Plaintiffs challenge Defendants' seizure and potential public disclosure of materials Defendants obtained through several John Doe proceedings and perhaps through other means.

Once again, this claim was not before the Court because Plaintiffs did not raise it in their preliminary-injunction motion; the Court dismissed Defendants' appeal of denial of their motions to dismiss Plaintiffs' official-capacity claims, ECF No. 43; and the only two

Defendants who did seek to dismiss it abandoned that argument on appeal.[5] Plaintiffs also lack the ability to obtain complete relief in state court, because Defendants obtained Plaintiffs' confidential materials by a variety of means other than the subpoena that the John Doe judge quashed, including raids on the homes of persons in possession of the Club's records and a barrage of subpoenas directed at Plaintiffs' vendors, email and telecommunications providers, financial institutions, etc. These collections extend far beyond any subpoena that Plaintiffs have the ability to challenge before the John Doe judge. Accordingly, only this federal court proceeding offers the prospect of vindicating Plaintiffs' right against compelled disclosure in violation of their First Amendment associational rights.

III. The Panel Decision Disregards Federal Courts' "Virtually Unflagging" Obligation To Enforce Federal Rights, in Conflict with Decisions of the Supreme Court and This Court

A. The Panel Decision Conflicts with *Sprint* and Circuit Precedent

The panel dismissed Plaintiffs' federal-law claims based on the kind of open-ended consideration of "equity, comity, and federalism," App. 6, that the Supreme Court specifically and unanimously rejected last year in *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584 (2013).

"[F]ederal courts ordinarily should entertain and resolve on the merits an action within the scope of a jurisdictional grant, and should not 'refus[e] to decide a case in deference to the States.'" *Id*. at 588 (quoting *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989)). Abstention in the face of parallel state proceedings is appropriate in only three "exceptional" circumstances: "state criminal prosecutions, civil enforcement proceedings, and civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id*. (quotation marks omitted). Outside of those circumstances, *Sprint* holds, "the general rule governs: The

[5] Again, only Defendants Nickel and Schmitz moved to dismiss this claim before the district court. R.44 at 15; R.54 at 24.

pendency of an action in a state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Id*. (alterations and quotation marks omitted).

The general rule governs here. A John Doe proceeding is entirely investigative—state law describes it as an "inquest for the discovery of crime," *State v. Washington*, 266 N.W.2d 597, 604 (Wis. 1978), and insists that it is not a "criminal proceeding," *State v. Cummings*, 546 N.W.2d 406, 413 (Wis. 1996). A John Doe proceeding does not even encompass issuance of a criminal complaint, which commences an entirely separate proceeding. *Id*. at 415 (citing *State v. O'Connor*, 252 N.W.2d 671, 676 (1977)). It is therefore not a "state criminal prosecution" or anything of the sort. Instead, it is an investigatory device that a Wisconsin prosecutor may choose to employ as an alternative to a piecemeal investigation comprised of individual requests for warrants and subpoenas.

Under *Sprint*, a prosecutor's choice to employ that device does not absolve a federal court of its duty to decide a case challenging that prosecutor's misconduct in violation of his target's federal rights. The panel decision therefore conflicts with *Sprint* and this Court's first decision applying *Sprint*, *Mulholland v. Marion County Election Board*, 746 F.3d 811, 816 (7th Cir. 2014), which held that a state investigatory proceeding that "may lead to a future prosecution of the federal plaintiff" is "not enough" to trigger abstention. The panel decision also conflicts with the Court's earlier decisions that, consistent with *Sprint*, limit abstention in deference to state-court proceedings to those where "'the state is seeking *to enforce* [a] contested law'" against the federal plaintiff. *ACLU v. Alvarez*, 679 F.3d 583, 594 (7th Cir. 2012) (quoting *Forty One News, Inc. v. Cnty. of Lake*, 491 F.3d 662, 665 (7th Cir. 2007)) (emphasis added).

The panel decision acknowledges *Sprint* only insofar as it declines to label its approach as abstention pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), which *Sprint* specifically addressed and rejected in these circumstances. 134 S. Ct. at 588. But the panel resurrected in all but name the old, open-ended view of *Younger* that prevailed (in some circuits) prior to *Sprint* when it held that a federal injunction action is unavailable where there is an

ongoing state proceeding, App. 6; that proceeding implicates important state interests (e.g., it is "criminal in nature"), App. 7; and Plaintiffs may be able to raise their claims in that proceeding and obtain relief, App. 7.[6] This inquiry is basically identical to the multifactor approach to *Younger* abstention of *Middlesex County Ethics Commitee v. Garden State Bar Association*, 457 U.S. 423, 432 (1982), which held that abstention is appropriate where (1) there is "an ongoing state judicial proceeding," (2) the proceedings "implicate important state interests," and (3) there "is there an adequate opportunity in the state proceedings to raise constitutional challenges." But *Sprint* clarified that these are "*additional* factors appropriately considered by the federal court" once it is established that a case fits into one of the three categories of cases where abstention in deference to state proceedings is available at all. 134 S. Ct. at 593.

The panel's approach raises the same issues that led the Supreme Court in *Sprint* to clarify its approach to abstention in deference to state proceedings. It substitutes an amorphous multi-pronged balancing standard for *Sprint's* bright-line rule. It fosters confusion over the availability of federal-court remedies that will now have to be addressed by litigants and the lower courts in every case involving parallel state proceedings. And in some cases, as here, it will deny federal-court remedies to parties who have no other realistic and timely means of securing their federal rights against abusive state action. In short, it is an improvident abdication of the Court's "virtually unflagging" obligation to enforce federal rights.

---

[6] The panel decision identifies one additional factor, "the rule against unnecessary constitutional adjudication." App. 6 (citing *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 582 (1979)). But that rule simply requires that, "[b]efore deciding the constitutional question," a federal court "consider whether the statutory grounds might be dispositive." *Beazer*, 440 U.S. at 582. Where state law is at issue, a potentially dispositive statutory question might weigh in favor of abstention under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). But *Pullman* only allows a federal court to postpone consideration of federal claims, not to dismiss them outright, *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 416 (1964), and does not prevent a district court from entering a preliminary injunction to safeguard federal rights during the period of abeyance, *e.g., Rivera-Feliciano v. Acevedo-Vila*, 438 F.3d 50, 63–64 (1st Cir. 2006).

Sprint, 134 S. Ct. at 591. Rehearing is required to conform the Court's case law with governing precedent and to prevent mass confusion and unwarranted denial of relief in cases raising abstention issues.

B. The Panel Decision Conflicts with *Dombrowski* and Other Cases Applying the "Bad Faith" Exception to Abstention

The panel decision also overlooks the longstanding rule that federal courts will not abstain from enjoining the enforcement of state law "in bad faith to impose continuing harassment in order to discourage" the exercise of federal rights. *Dombrowski v. Pfister*, 380 U.S. 479, 490 (1965).

Dombrowski acted to enjoin state officials from prosecuting or threatening to prosecute a civil-rights group and its leaders as part of "a plan to employ arrests, seizures, and threats of prosecution under color of [various] statutes to harass appellants and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana." *Id*. at 482. These actions were undertaken specifically to impose a "chilling effect on free expression" by "frighten[ing] off potential members and contributors"; seizing "documents and records" so as to "paralyze[] operations and threaten[] exposure of the identity of adherents to a locally unpopular cause"; and threatening "further arrests and seizures, some of which may be upheld and all of which will cause the organization inconvenience or worse." *Id*. at 487–89. For that reason, the Court held that abstention was not appropriate: "the allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss of or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination." *Id*. at 485–86. In other words, the process was the punishment.

Defendants here have embraced the same *modus operandi* for the same reason as did the state officials in *Dombrowski*: to chill political activism because they disapprove of its

viewpoint. Plaintiffs pleaded as much, alleging that Defendants' pattern of intimidation was undertaken in bad faith for the purpose of discouraging the exercise of First Amendment rights of advocacy and association by Plaintiffs and other Wisconsin conservatives. *See supra* § I (describing allegations and evidence of bad faith). The district court denied Defendants' requests to abstain on that basis, finding that Plaintiffs' complaint "precisely alleg[es] that the defendants have used the John Doe proceeding as a pretext to target conservative groups across the state."[7] R.83 at 6.

The panel decision reverses that holding on the basis that campaign-finance law is complicated and sometimes uncertain, rendering it difficult to demonstrate "objective[]" bad faith—i.e., "that no reasonable person could have believed that the John Doe proceeding could lead to a valid conviction." App. 8–10. In so doing, the decision treats as irrelevant Plaintiffs' detailed allegations and specific evidence of Defendants' subjective bad faith, all showing that Defendants' very purpose in persecuting Plaintiffs and other conservatives was to chill their advocacy in support of conservative policies. That cannot be squared with *Dombrowski* or the cases following it. *E.g., Younger v. Harris*, 401 U.S. 37, 53 (1971); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 602, 611 (1975). In particular, it also conflicts with this Court's decision in *Collins v. Kendal County, Illinois*, 807 F.2d 95, 97–98 (7th Cir. 1986) (plaintiff's burden is to show that state action "was brought in bad faith for the purpose of retaliating for or deterring the exercise of constitutionally protected rights") (quoting *Wilson v. Thompson*, 593 F.2d 1375, 1383 (5th Cir. 1979)). Rehearing is warranted to resolve this conflict with controlling precedent.

Rehearing is also warranted due to the exceptional importance of this issue. The bad-faith abuse of state law-enforcement proceedings is thankfully a rare occurrence, but enforc-

[7] Contrary to the panel decision's assertion, the district court did not premise its finding of bad faith on the view that the Supreme Court may soon overturn *Buckley v. Valeo*, 424 U.S. 1 (1976). *See* App. 10. *Buckley* is not even cited in the district court's relevant order, because it addressed Plaintiffs' primary claim as one for First Amendment retaliation, not as a campaign-finance challenge. R.83.

ing federal rights in the face of such abuse is among the federal courts' highest callings. The Fourteenth Amendment cemented "the role of the Federal Government as a guarantor of basic federal rights against state power," and "Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum v. Foster*, 407 U.S. 225, 239 (1972). When state police power is abused to deprive citizens of their federal rights, the very criminal procedures meant to protect them become the punishment, reasonably deterring citizens from exercise of their right to speak out and criticize government, truly a "fragile liberty." *Power v. Summers*, 226 F.3d 815, 820 (7th Cir. 2000). The panel decision would leave those targeted for harassment and abuse by state officials because of their viewpoints at the mercy of their abusers, delaying any real relief indefinitely and perhaps forever, particularly where (as here, to date) no criminal charges are ever brought. But these are the circumstances where federal courts are most needed. They cannot shirk that duty.

Again, if the panel found that the district court did not make adequate findings that Defendants' bad faith abuse of their power serves to deprive Plaintiffs of their federal rights, it could have vacated the preliminary injunction and remanded with instructions for the district court to make the appropriate findings. But it was error to order abstention in the face of Plaintiffs' allegations and specific evidence showing that Defendants' invasive and long-running investigation amounts to a campaign of retribution against Plaintiffs and other conservatives, depriving them of any ability to vindicate their federal rights.

Conclusion

For the foregoing reasons, Appellees request that this Court grant rehearing or rehearing *en banc*.

Dated: October 8, 2014

Respectfully submitted,

/s/ David B. Rivkin, Jr.
DAVID B. RIVKIN, JR.
LEE A. CASEY
MARK W. DELAQUIL
ANDREW M. GROSSMAN
RICHARD B. RAILE
BAKERHOSTETLER
1050 Connecticut Ave., N.W., Suite 1100
Washington, D.C. 20036
(202) 861-1731
drivkin@bakerlaw.com

Attorneys for Appellees

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served on October 8, 2014, upon the following counsel of record in this appeal by the U.S. Appeals Court's ECF system:

Douglas Knott
Wilson, Elser, Mostowitz, Edelman
& Dicker, LLP
740 N. Plankinton Ave., Ste. 600
Milwaukee, WI 53203

Samuel J. Leib
Leib & Katt
740 N. Plankinton Ave., Ste. 600
Milwaukee, WI 53203

Joseph M. Russell
Patrick C. Greeley
Von Briesen & Roper, S.C.
411 E. Wisconsin Avenue, Suite 1000
Milwaukee, WI 53202-3262

Timothy M. Barber
Axley Brynelson, LLP
2 East Mifflin Street, PO Box 1767
Madison, WI 53701-1767

Paul W. Schwarzenbart
One West Main Street, Suite 700
Madison, WI 53703-3327

Paul M. Smith
Jenner and Block
1099 New York Avenue, NW, Suite 900
Washington, D.C. 20001-4412

Daniel F. Kolb, Attorney
Davis, Polk & Wardwell
450 Lexington Avenue
New York, NY 10017-0000

Richard M. Esenberg
Wisconsin Institute for Law and Liberty
1139 E. Knapp Street
Milwaukee, WI 53202

Michael D. Dean
7035 W. Wisconsin Ave.
Brookfield, WI 53005

Adam J. White
Boyden Gray & Associates
1627 I Street N.W., Suite 950
Washington, DC 20006

/s/ David B. Rivkin, Jr.
David B. Rivkin, Jr.

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 14-1822, 14-1888, 14-1899, 14-2006, 14-2012, 14-2023 & 14-2585

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

v.

JOHN T. CHISHOLM, *et al.*,
Defendants-Appellants.

FRANCIS SCHMITZ,
Defendant-Appellant / Cross-Appellee.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,
Intervenors-Appellants.

UNNAMED INTERVENORS NO. 1 AND NO. 2,
Intervenors-Appellees.

Appeals from the United States District Court
for the Eastern District of Wisconsin.
No. 14-C-139 — **Rudolph T. Randa**, *Judge*.

ARGUED SEPTEMBER 9, 2014 — DECIDED SEPTEMBER 24, 2014

Before WOOD, *Chief Judge*, and BAUER and EASTERBROOK, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. A federal district judge issued an injunction that blocks the State of Wisconsin from conducting a judicially supervised criminal investigation into the question whether certain persons have violated the state's campaign-finance laws. The court did this despite 28 U.S.C. §2283, the Anti-Injunction Act, which provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." *Mitchum v. Foster*, 407 U.S. 225 (1972), holds that 42 U.S.C. §1983 authorizes anti-suit injunctions but adds that principles of "equity, comity, and federalism" (407 U.S. at 243) determine whether they are appropriate. Cf. *Younger v. Harris*, 401 U.S. 37 (1971). We hold that this case does not present a situation in which state proceedings may be displaced.

The ongoing criminal investigation is being supervised by a judge, in lieu of a grand jury. Wis. Stat. §968.26. Prosecutors in Wisconsin can ask the state's courts to conduct these inquiries, which go by the name "John Doe proceedings" because they may begin without any particular target. The District Attorney for Milwaukee County made such a request after concluding that the campaign committee for a political official may have been coordinating fund-raising and expenditures with an "independent" group that was raising and spending money to speak about particular issues. (We put "independent" in quotation marks, which we drop from now on, because the prosecutor suspected that the group's independence is ostensible rather than real.

Whether, and if so how, this group and the campaign committee have coordinated their activities is a subject we need not consider.) Wisconsin's Government Accountability Board, which supervises campaigns and conducts elections, likewise called for an investigation. District Attorneys in four other counties made similar requests. Eventually a single John Doe proceeding was established, with Gregory Peterson as the judge and Francis Schmitz as the special prosecutor. Judge Peterson has been recalled to service following his retirement from a post on the state's court of appeals; Schmitz, an attorney in private practice, used to be an Assistant United States Attorney in Milwaukee.

At the behest of special prosecutor Schmitz, the court issued subpoenas requiring their recipients to produce documents. One came to Eric O'Keefe, who manages Wisconsin Club for Growth, Inc., an advocacy group that raises money and engages in speech on issues such as whether Wisconsin should limit collective bargaining in public employment, a subject that has received considerable legislative attention and sparked a recall election for the Governor. (Both the Supreme Court of Wisconsin and this court have held that the legislation promoted by the Club for Growth is valid. *Madison Teachers, Inc. v. Walker*, 2014 WI 99 (July 31, 2014); *Laborers Local 236 v. Walker*, 749 F.3d 628 (7th Cir. 2014).) The subpoena issued to O'Keefe is extraordinarily broad, covering essentially all of the group's records for several years—including records of contributors that O'Keefe believes are covered by a constitutional right of anonymity.

O'Keefe moved to quash the subpoena, which he maintains is designed to punish his, and the Club's, support for controversial legislation, rather than to investigate a viola-

tion of state law. He contended that revealing to the state lists of contributors would harm the organization's ability to raise funds—and this even though all information is covered by a broad secrecy order. Judge Peterson quashed the subpoena, ruling that the evidence is not necessary to the investigation. One of his reasons is that Schmitz has not established any solid reason to believe that a violation of state law has occurred.

That was in January 2014. Schmitz asked the Wisconsin Court of Appeals for a supervisory writ. Two other people involved in the investigation asked the Supreme Court of Wisconsin to grant review, bypassing the Court of Appeals. Before either the Court of Appeals or the Supreme Court could act, however, O'Keefe and the Club filed this federal suit, asking for an injunction that would halt the investigation permanently, whether or not the prosecutor could establish a violation of Wisconsin law. O'Keefe also requested damages against five defendants: Schmitz plus the District Attorney for Milwaukee County, two of his assistants, and an investigator. (Judge Peterson is the sixth defendant.)

The district court held that the First Amendment to the Constitution (applied to the states through the Fourteenth) forbids not only penalties for coordination between political committees and groups that engage in issue advocacy, but also any attempt by the state to learn just what kind of coordination has occurred. 2014 U.S. Dist. LEXIS 63066 (E.D. Wis. May 6, 2014). It issued this injunction:

> 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.

Id. at *36–37. The court scheduled proceedings on plaintiffs' request for damages and rejected defendants' argument that they enjoy qualified, if not absolute, immunity. We immediately stayed the portion of the injunction requiring documents to be returned or destroyed and set the case for expedited briefing and argument.

The issuance of injunctive relief directly against Judge Peterson is hard to justify in light of the Anti-Injunction Act, and the district court did not try to do so. The Anti-Injunction Act embodies a fundamental principle of federalism: state courts are free to conduct their own litigation, without ongoing supervision by federal judges, let alone threats by federal judges to hold state judges in contempt. The scope given to state litigation is especially great in the realm of criminal investigations and prosecutions, a principle that led to *Younger*, which requires a federal court to abstain even if an injunction would be justified under normal principles, except in rare situations. See *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584 (2013), which discusses the current state of *Younger*'s abstention doctrine.

Courts of appeals have disagreed about the extent to which *Younger* compels abstention when states are conducting grand-jury investigations (which John Doe proceedings are like). Compare *Craig v. Barney*, 678 F.2d 1200, 1202 (4th Cir. 1982), and *Texas Association of Business v. Earle*, 388 F.3d 515, 519–20 (5th Cir. 2004), with *Monaghan v. Deakins*, 798 F.2d 632, 637–38 (3d Cir. 1986), vacated in part on other grounds, 484 U.S. 193 (1988), and with *Kaylor v. Fields*, 661

F.2d 1177, 1182 (8th Cir. 1981). We need not take sides, because principles of equity, comity, and federalism (*Mitchum*, 407 U.S. at 243) counsel against a federal role here. See also *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008) (standards for preliminary injunction).

One important question is whether the plaintiff suffers irreparable injury. O'Keefe and the Club say yes, because donations have dried up, but that's not the right temporal perspective. We must ask whether the injury would be irreparable if the federal court were to stay its hand. And it is hard to see that kind of injury, because plaintiffs obtained effective relief from Judge Peterson *before* the federal judge acted—indeed, before filing this suit. True, uncertainty will continue pending appellate review within the Wisconsin judiciary, and this may well affect donations, but the commencement of this federal suit also produces uncertainty, because it entails review by a district judge, three or more appellate judges, and potentially the Supreme Court of the United States. The state case might be over today had the district judge allowed it to take its course.

A second important question is whether the plaintiff has adequate remedies at law (which is to say, without the need for an injunction). That Judge Peterson entertained and granted the motion to quash shows that the answer is yes.

A third important question is whether federal relief is appropriate in light of normal jurisprudential principles, such as the rule against unnecessary constitutional adjudication. Courts must strive to resolve cases on statutory rather than constitutional grounds. See, e.g., *New York City Transit Authority v. Beazer*, 440 U.S. 568, 582 (1979). Yet the district court waded into a vexed field of constitutional law need-

lessly. Judge Peterson had already concluded that the investigation should end as a matter of state law, because prosecutor Schmitz lacks evidence that state law has been violated. The result is an injunction unnecessary at best, advisory at worst.

Declaring "X violates the Constitution" is advisory if the state does not use rule X to begin with. The Supreme Court of Wisconsin may disagree with Judge Peterson, and prosecutor Schmitz argues that state law is on his side, see *Wisconsin Coalition for Voter Participation, Inc. v. Wisconsin Elections Board*, 231 Wis. 2d 670 (Wis. App. 1999), so we cannot yet know whether the federal injunction is advisory, but we are confident that it is imprudent. Sometimes district judges must abstain to allow state courts to resolve issues of state law, see *Texas Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), but as with *Younger* we are not invoking a mandatory-abstention command but instead are asking whether normal principles of equity support the district court's approach.

Younger and its successors, including *Sprint Communications*, do show, however, that the policy against federal interference in state litigation is especially strong when the state proceedings are criminal in nature. That's a fourth important subject militating against a federal injunction.

Mitchum held that a judge may use §1983 to support an anti-suit injunction, notwithstanding §2283, only when justified in light of "the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." 407 U.S. at 243. Yet the district court gave those principles no weight. The court did say that an injunction is appropriate because the defendants have acted

"in bad faith" but did not hold a hearing, so that the court must have meant bad faith objectively rather than subjectively—in other words, the federal judge must have thought that no reasonable person could have believed that the John Doe proceeding could lead to a valid conviction. See *Mitchum*, 407 U.S. at 230–31, relying on *Younger*, 401 U.S. at 53, and *Perez v. Ledesma*, 401 U.S. 82, 85 (1971).

One version of objective bad faith was the one on which we relied in *Mulholland v. Marion County Election Board*, 746 F.3d 811 (7th Cir. 2014), when holding that a district judge properly issued an injunction to prevent state law-enforcement personnel from prosecuting a supposed violation of Indiana's election laws. No reasonable person could have thought that the proceeding would lead to a valid conviction, because the defendants were prohibited by a federal injunction, issued a decade earlier, from penalizing those very tactics. That injunction had been issued when no state prosecution was pending; that's the right time for federal courts to determine the validity of state campaign regulations. See, e.g., *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014); *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014); *Center for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012). We held that defendants could not shelter behind *Younger* to avoid an outstanding federal resolution. Nothing of the kind happened in this investigation; until the district court's opinion in this case, neither a state nor a federal court had held that Wisconsin's (or any other state's) regulation of coordinated fund-raising and issue advocacy violates the First Amendment.

Starting with *Buckley v. Valeo*, 424 U.S. 1, 46–47, 78 (1976), the Supreme Court has stated repeatedly that, although the

First Amendment protects truly independent expenditures for political speech, the government is entitled to regulate coordination between candidates' campaigns and purportedly independent groups. See also, e.g., *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 447 (2001); *McConnell v. FEC*, 540 U.S. 93, 202–03, 219–23 (2003), overruled in part on other grounds by *Citizens United v. FEC*, 558 U.S. 310 (2010). This is so because *Buckley* held that the Constitution allows limits on how much one person can contribute to a politician's campaign. If campaigns tell potential contributors to divert money to nominally independent groups that have agreed to do the campaigns' bidding, these contribution limits become porous, and the requirement that politicians' campaign committees disclose the donors and amounts becomes useless.

The Supreme Court has yet to determine what "coordination" means. Is the scope of permissible regulation limited to groups that advocate the election of particular candidates, or can government also regulate coordination of contributions and speech about political issues, when the speakers do not expressly advocate any person's election? What if the speech implies, rather than expresses, a preference for a particular candidate's election? If regulation of coordination about pure issue advocacy is permissible, how tight must the link be between the politician's committee and the advocacy group? Uncertainty is a powerful reason to leave this litigation in state court, where it may meet its end as a matter of state law without any need to resolve these constitutional questions.

The district court thought that the Supreme Court will overrule what remains of *Buckley*, as some Justices have pro-

posed. See, e.g., *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 635–40 (1996) (Thomas, J., dissenting in part). If the Constitution forbids all regulation of campaign contributions, there is no basis for regulating coordination either. After all, the rationale for regulating coordination has been to prevent evasion of contribution limits and ensure the public identification of persons who contribute to politicians' war chests. Yet although the Court's views about the proper limits of campaign-finance regulation continue to change, see *Citizens United* (overruling part of *McConnell*) and *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (overruling a portion of *Buckley* that dealt with aggregate contribution limits across multiple candidates), it has yet to disapprove the portion of *Buckley* holding that some regulation of contributions to candidates is permissible. Justice Thomas wrote separately in *McCutcheon*, 134 S. Ct. at 1462–65 (concurring in the judgment), precisely because a majority was unwilling to revisit that aspect of *Buckley*.

The district court's belief that a majority of the Court eventually will see things Justice Thomas's way may or may not prove correct, but as the Supreme Court's doctrine stands it is not possible to treat as "bad faith" a criminal investigation that reflects *Buckley*'s interpretation of the First Amendment. Nor does it help plaintiffs to accuse defendants of "retaliation". That just restates the point that campaign-finance regulation concerns speech; it does not help to decide whether a particular kind of regulation is forbidden. Cf. *Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009).

What we have said shows not only that an injunction was an abuse of discretion but also that all defendants possess qualified immunity from liability in damages. Public officials

can be held liable for violating clearly established law, but not for choosing sides on a debatable issue. See, e.g., *Wilson v. Layne*, 526 U.S. 603, 618 (1999) ("If judges … disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."). The district court thought the law clearly established because, after all, the First Amendment has been with us since 1791. But the right question is what the Constitution means, *concretely*, applied to a dispute such as this. The Justices forbid the use of a high level of generality and insist that law is not "clearly established" until "existing precedent [has] placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011). See also, e.g., *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014); *Wood v. Moss*, 134 S. Ct. 2056 (2014).

Plaintiffs' claim to constitutional protection for raising funds to engage in issue advocacy coordinated with a politician's campaign committee has not been established "beyond debate." To the contrary, there is a lively debate among judges and academic analysts. The Supreme Court regularly decides campaign-finance issues by closely divided votes. No opinion issued by the Supreme Court, or by any court of appeals, establishes ("clearly" or otherwise) that the First Amendment forbids regulation of coordination between campaign committees and issue-advocacy groups—let alone that the First Amendment forbids even an *inquiry* into that topic. The district court broke new ground. Its views may be vindicated, but until that day public officials enjoy the benefit of qualified immunity from liability in damages. This makes it unnecessary for us to consider whether any defendant also enjoys the benefit of absolute prosecutorial immunity, which depends on the capacities in which they may

have acted at different times. See *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

Finally, we must address a dispute between the litigants and several intervenors, who asked the district judge to disclose (the Reporters Committee for Freedom of the Press, among others) or conceal (Unnamed Intervenors No. 1 and No. 2) documents that have been gathered during the John Doe proceeding and filed in federal court. The district judge ordered eight particular documents to remain under seal and reserved decision on others. 2014 U.S. Dist. LEXIS 83456 (E.D. Wis. June 19, 2014). The Reporters Committee appealed. Our jurisdiction, based on the collateral-order doctrine, see *United States v. Blagojevich*, 612 F.3d 558, 560 (7th Cir. 2010); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 895–96 (7th Cir. 1994), is limited to those eight documents.

The Reporters Committee invokes the presumption of public access to all documents that may have influenced a federal court's decision. See, e.g., *Greenville v. Syngenta Crop Protection, LLC*, No. 13-1626 (7th Cir. Aug. 20, 2014); *Baxter International, Inc. v. Abbott Laboratories*, 297 F.3d 544 (7th Cir. 2002). The Unnamed Intervenors, who are subjects of the John Doe inquiry, invoke the presumption that documents gathered as part of a grand jury investigation remain confidential, see *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983); *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211 (1979), and with good reason they treat a John Doe proceeding as functionally equivalent to a federal grand jury investigation. Plaintiffs O'Keefe and Club for Growth invoke the rule that private advocacy organizations and their contributors often are entitled to anonymity, lest public

disfavor unduly raise the cost of speech. See *NAACP v. Alabama*, 357 U.S. 449, 462–63 (1958); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir. 2009).

The analogy to grand jury proceedings is the strongest of these three. The Supreme Court wrote in *Sells Engineering*: "We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings. … [I]f preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution." 463 U.S. at 424, quoting from *Douglas Oil*. But we do not think that any of the three analogies is dispositive.

Once again, federalism supplies the reason. The documents that the litigants want to disclose, or conceal, were gathered as part of a state proceeding. Wisconsin, not the federal judiciary, should determine whether, and to what extent, documents gathered in a John Doe proceeding are disclosed to the public. See *Socialist Workers Party v. Grubisic*, 619 F.2d 641, 643 (7th Cir. 1980) ("federal common law … accords at least a qualified privilege to the records of state grand jury proceedings"). Otherwise the very fact that someone chose to complain, in federal court, about the conduct of an ongoing state investigation would defeat the state interest in secrecy, even if the federal court concludes—as we have done in this opinion—that the controversy does not belong in federal court. It is easy to file complaints and drop documents into the federal record, but overcoming a state-

law privilege for investigative documents requires more than that. Otherwise state rules would be at every litigant's mercy.

The state court entered a comprehensive order regulating disclosure of documents in the John Doe proceeding. (It also issued a gag order, forbidding subpoenaed parties to talk about what was happening, but no one has challenged that order, and we do not address its propriety.) Wisconsin's judiciary must decide whether particular documents gathered in the investigation should be disclosed. The district court should ensure that sealed documents in the federal record stay sealed, as long as documents containing the same information remain sealed in the state-court record.

The injunction is reversed. The district court's order rejecting the immunity defense is reversed. The district court's order maintaining eight documents under seal is affirmed. The case is remanded with instructions to dismiss the suit, leaving all further proceedings to the courts of Wisconsin.