No. 14-872

IN THE

Supreme Court of the United States

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

Petitioners,

v.

JOHN T. CHISHOLM, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

This Court should grant certiorari because the petition squarely presents two errors of law concerning the right of Americans to speak out on the issues free from official retaliation. First, citing "equity, comity, and federalism" penumbras of the Anti-Injunction Act, the court below abstained from adjudicating Petitioners' official-capacity retaliation claim in circumstances where *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584 (2013), states that abstention is unavailable. Second, it held that retaliatory purpose was irrelevant to Petitioners' personal-capacity retaliation claim, even in the absence of probable cause to undertake a retaliatory investigation. Due to these holdings, the court below never passed judgment on the factual allegations that the district court found "easily" stated a plausible claim for retaliation, App. 29a, or the evidence that the district court found sufficiently compelling to justify a preliminary injunction, App. 37a, 40a, 46a, 56a–58a, 62a, 64a. In its view, a public official can retaliate against his opponents' political speech with impunity, so long as he whitewashes his intimidation through an investigatory proceeding like a grand jury or John Doe.

Respondents' defense of the decision below only underscores the need for this Court's review. They construe the lower court's decision as applying a free-floating abstention doctrine that authorizes federal courts to decline to exercise their jurisdiction

based on an *ad hoc* consideration of federalism concerns in any given case. Opp. 28. But ending the era of improvisational abstention was the point of this Court's decision in *Sprint*. That aside, the decision below still clashes with the precedent of this Court and the other courts of appeals that the "equity, comity, and federalism" considerations of *Mitchum v. Foster*, 407 U.S. 225, 243 (1972), are nothing more than a reference to the accepted abstention doctrines (particularly *Younger*) that the lower court chose not to apply—because they are inapplicable here.

Likewise, Respondents' "defense" of the lower court's refusal to recognize liability for official retaliation carried out through investigatory actions only confirms the need for review. Respondents effectively concede that the lower court's decision is incorrect by failing to defend it on the merits, instead arguing that review is inappropriate because it would constitute mere "error correction." Opp. 36–37. But that claim is belied by the Court's reservation of this same issue in a prior case, a split in authority among the courts of appeals, and the self-evident importance of definitively confirming that public officials cannot retaliate against their ideological opponents through investigatory actions free from any risk of personal liability. Indeed, to avoid having to address these points directly, Respondents attempt to recharacterize Petitioners' straightforward retaliation claim as stating a constitutional challenge to Wisconsin campaign-finance law and to raise ancillary state-law issues that have already been decided

(against them) in state court. Respondents' evident reluctance to confront the liability issue actually raised by Petitioners' retaliation claim only reinforces its importance and the necessity of review.

Unfortunately, the decision below is not some outlier, but reflects the reluctance of a number of the lower courts to exercise their jurisdiction when necessary to enforce federal rights against state officials. This is the same reluctance that the Court addressed in *Sprint* and other cases pruning back abstention doctrines. The two questions presented are ones that recur repeatedly in official-retaliation cases, and the Court will not find a better vehicle to address them. And failure to address them will leave in place a gaping hole in the First Amendment's protections against retaliatory abuse of law-enforcement power. The need for review is acute, and the Court should therefore grant certiorari.

ARGUMENT

I. Respondents' Arguments Underscore the Conflict with *Sprint Communications* and the Precedent of Other Circuits

Respondents' argument that the court below dismissed Petitioners' claims based on "principles of equity, comity, and federalism" pursuant to *Mitchum* and therefore did not abstain is a *non sequitur*. *See* Opp. 24. *Mitchum* identifies those three principals as the ones "canvassed at length...in *Younger v. Harris*, 401 U.S. 37 (1971), and its companion cases." 407 U.S. at 243. And *Younger* itself states that those three principles—equity, comity, and federalism—are the basis for its rule of abstention. 401 U.S. at 43–45 (discussing "Our Federalism"). Ordering a federal case dismissed in favor of state-court proceedings for reasons of "equity, comity, and federalism" is the very definition of *Younger* abstention. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 594 n.1 (1975) (defining "the principles of equity, comity, and federalism" that might preclude a Section 1983 injunction as those "canvassed in *Younger*").

That's why the other courts of appeals to consider novel federalism-based exceptions to *Mitchum's* holding have rejected them in favor of "the normal rules of federal abstention." *Citizens for a Better Environment, Inc. v. Nassau Cnty.*, 488 F.2d 1353, 1359 (2d Cir. 1973). *See also* Pet. 22 (citing cases). Respondents fail to identify a single case to the contrary in the precedent of this Court and the courts of appeals, instead citing a hodge-podge of cases that

bear little relevance to the question here but for their repetition of the phrase "equity, comity, and federalism." *See* Opp. 26–27. For example, Respondents' leading case, *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983), cites "equity, comity, and federalism" only as reasons to "decline the invitation to slight the preconditions for equitable relief," not as justification for doctrinal improvisation. *See* Opp. 26–27. The one relevant case cited by Respondents, *O'Shea v. Littleton*, 414 U.S. 488, 499–500 (1974), actually contradicts their argument, specifically identifying "equity, comity, and federalism" as grounds to abstain under *Younger*.[1]

Respondents' suggestion (at 24) that the lower-court dismissal was grounded in "normal principles of equity" is belied by their own characterization of the decision. The lower court did not apply the ordinary standard for a plaintiff seeking equitable relief. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (stating standard). Instead, as Respondents acknowledge, it employed a multifactor approach taking account of such things as possible "interference with state criminal proceedings" and the possibility of "adequate remedies" in those proceedings. Opp. 28–29.

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[1] Respondents suggest that the lower court's dismissal was not pursuant to the AIA, but to *Mitchum*. Opp. 30–31. Although that is not what the lower court said it was doing, *see* App. 2a, 6a, the distinction makes no difference, because *Mitchum* interprets and applies the AIA. Under either view of the lower court's decision, the conflict with the precedent of this Court and other courts of appeals is equally stark. *See* Pet. § I.A–B.

Respondents refuse to acknowledge the simple fact that this reasoning is indistinguishable from the multifactor approach to *Younger* abstention associated with *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432 (1982), that this Court repudiated in *Sprint*. Although they deem this point "the archetypal straw man," Respondents do not attempt to rebut it, instead simply asserting that it is premised on a "perverse reading" of the decision below, which they say "applied the plain language of *Mitchum*." Opp. 24–25.

But, eschewing labels, one could be forgiven for thinking that the court below actually abstained. First, as discussed above, is the application of the *Middlesex* factors and lack of any traditional equitable analysis. App. 6a–8a. Second is the remedy, dismissal of Petitioners' claims for injunctive relief, rather than mere reversal of the preliminary injunction. *Contrast Winter*, 555 U.S. at 33 (reversing preliminary injunction where plaintiff failed to satisfy equitable factors). Third is the concomitant dismissal of Petitioners' claims for declaratory relief. *Compare Samuels v. Mackell*, 401 U.S. 66, 73 (1971) (holding that *Younger* abstention also requires dismissal of declaratory claims). Fourth is the reversal of an injunction as to a defendant, Judge Peterson, who had not even appealed it and the dismissal of claims (also unappealed) against him. And fifth is the direction to "leav[e] all further proceedings to the courts of Wisconsin." App. 16a. *Compare Younger*, 401 U.S. at 44

(when a federal court abstains, state "institutions are left free to perform their separate functions in their separate ways").

This is *Younger* abstention in all but name, and that cannot be reconciled with *Sprint's* holding that federal courts are "obliged to decide cases within the scope of federal jurisdiction" except for in certain "exceptional" circumstances not present here. 134 S. Ct. 584, 588 (2013).

Moreover, by abstaining in these circumstances, the decision below all but precludes relief from official retaliation undertaken through state investigatory proceedings—at a time of rapidly increasing abuse of such proceedings for political ends. *See* Center for Competitive Politics Br. § II (describing growth in abusive campaign-finance investigations). And it empowers rogue officials to carry out intimidating investigations of their opponents without end. *See, e.g.*, Wisconsin Institute for Law and Liberty Br. 25–26 (describing how a John Doe proceeding continues indefinitely and "provides no avenue for the target to force its 'dismissal'"). Unless overturned, the decision below provides a road map for officials seeking to target their political opponents for abuse.

Accordingly, this Court's review is warranted to guarantee a federal forum for important federal claims, to resolve circuit splits over the AIA and abstention in favor of investigatory proceedings, *see* Pet. § I.B; MacIver Br. § I, and to enforce lower-court adherence to *Sprint*.

II. Respondents Do Not Attempt To Defend the Lower Court's Denial of Liability for Official Retaliation

Respondents' suggestion (at 36–37) that confirming the availability of personal-capacity liability for retaliatory investigation would be mere "error correction"—a concession that even Respondents will not defend the contrary position on the merits—is not credible. The Court identified the issue itself in *Hartman v. Moore*, 547 U.S. 250, 256, 262 n.9 (2006), as one to be decided in a future case, and it remains open today, as well as the subject of a circuit split. *See* Pet. § II.A. Its importance also cannot be gainsaid, given the First Amendment's rejection of "[o]fficial reprisal for protected speech," *id.* at 256, and the increasing use of investigatory powers to intimidate political opponents, *see* Cause of Action Br. 6–8 (describing recent cases); Center for Competitive Politics Br. 10–13 (describing recent initiatives to use investigatory powers to suppress independent political expenditures). *Cf.* Cato Br. 18–19 (describing link between overcriminalization and the potential to abuse investigatory powers).

Rather than contest any of these points, Respondents attempt to change the topic. Their assertion that review is unwarranted because their investigatory actions were supported by probable cause is contradicted by both fact and law. As a factual matter, Respondents' claim that they possessed probable cause has already been rejected as a matter of state law, in a decision that remains in force. App. 69a;

Pet. 9–10. And as a legal matter, the relevance of probable cause to the question presented is unsettled and is itself the subject of a circuit split. *See* Pet. 28 n.7. This case presents a vehicle for the Court to address or reserve that issue as it so chooses, a flexibility that is likely to be lacking in other cases. *See* Pet. 33–34.

Likewise, Respondents' focus on the constitutional status of coordinated issue advocacy is also misplaced. *See* Opp. 34–36. As the district court explained, the claim at issue "challenges that [Respondents'] investigation is being conducted for the primary purpose of intimidating conservative groups, impairing their fundraising efforts, and otherwise preventing their participation" in political and policy debates. App. 18a. In other words, it states a claim for First Amendment retaliation: that Petitioners have been targeted for retaliation based on the political viewpoint and policy positions taken in their speech. The right that Petitioners' claim puts at issue is "the right to express political opinions without fear of government retaliation." App. 34a. *See also* Compl. ¶¶ 196–201 (stating "Count I," "Retaliation in Violation of the First and Fourteenth Amendments").[2]

By contrast, the legal status of coordinated issue advocacy is relevant only insofar as it might provide further evidence of Respondents' bad faith and retal-

[2] Available at ECF No. 1, *O'Keefe v. Schmitz*, No. 14-cv-00139 (E.D. Wis. filed Feb. 10, 2014).

iatory purpose, in addition to Petitioners' direct and circumstantial evidence of those things.[3] Contrary to Respondents' argumentation, this case contains no claim challenging, on a facial or as-applied basis, the constitutionality of Wisconsin's regulation of coordinated issue advocacy.

As for the "specificity" that Respondents say is required by *Reichle v. Howards*, 132 S. Ct. 2088, 2094 (2012), that case recognized the general right to be free from official retaliation, while holding that it was not clearly established that a person has a "right to be free from a retaliatory arrest that is otherwise supported by probable cause." That was because a "reasonable official" could have believed that the rationale underlying *Hartman's* holding—a plaintiff cannot state a claim of retaliatory prosecution if the charges were supported by probable cause—might extend to retaliatory arrests. *Id.* at 2095. But even if the rationale of *Hartman* and

[3] To that end, Petitioners pleaded that Wisconsin law, interpreted in light of this Court's campaign-finance precedents, could not be read to regulate coordinated issue advocacy, thereby supporting the inference that Respondents' stated basis for investigation was a pretext. Compl. ¶ 110 (alleging that "any broad language in Wisconsin law that might arguably extend to 'all coordination' between a candidate and independent organizations is constitutionally suspect") (quotation marks omitted). Subsequent to the filing of this case, Wisconsin's election-law regulator and one of the Respondents here agreed that Wisconsin law does not regulate issue advocacy and entered a consent judgment to that effect. *See* Final Judgment, ECF No. 133, at 2, *Wis. Right to Life, Inc. v. Barland*, No. 10-cv-669 (E.D. Wis. filed Jan. 30, 2015). Petitioners also pleaded numerous specific facts that directly and circumstantially support Respondents' retaliatory purpose. *See* Pet. 11–12.

Reichle might be extended to the retaliatory-investigation context, it would make no difference in this case, because the Respondents' investigatory actions have already been held to be unsupported by probable cause. Is there any public official who doesn't understand that employing an aggressive criminal investigation, undertaken without probable cause, to retaliate against citizens' speech violates the First Amendment? In this case, "the contours of the right" at issue "are clear to a reasonable official." *Id.* at 2094.

The Court should grant certiorari to answer definitively the question left open in *Hartman* and resolve this important and recurring issue.

III. This Case Is an Ideal Vehicle

As set forth above, this case presents pure and substantial questions of law that are the subject of disagreement among the lower courts. Respondents nonetheless claim that various issues would stymie this Court's review. Opp. 31–33. None have the least merit.

To begin with, Respondents' factual disagreements are without support in the record and, in any case, beside the point. Because this case arises from a motion to dismiss, the Court accepts as true the allegations of the complaint. *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1705 (2012). One point that must be corrected is the Respondents' claim (at 29) that the Seventh Circuit passed judgment on "Petitioners' allegations of bad faith." It did not. Instead,

it expressly disregarded Petitioners' allegations "subjectively" showing Respondents' bad faith—that is, all of their detailed allegations (and evidence, as to the preliminary injunction stage) regarding Respondents' retaliatory purpose. App. 9a, 12a. The only court to review those allegations was the district court, which found that they "easily" stated a plausible retaliation claim. App. 29a.

Second, the purported "uniqueness of Wisconsin John Doe proceedings," Opp. 32, is irrelevant here. As shown in the *amicus* brief of the MacIver Institute (at 7–11) a John Doe is simply a "one-man grand jury" of the kind that this Court has previously regarded as indistinguishable from grand juries. *In re Oliver*, 333 U.S. 257, 264–65 (1948). Respondents do not identify any material distinction, and none is apparent concerning the investigatory actions at issue—warrants and subpoenas—which are no different than in other jurisdictions.

Third, equally irrelevant is the fact that the Wisconsin Supreme Court has agreed to consider aspects of Wisconsin's campaign-finance law, Opp. 32–33, because this case does not challenge that law but, instead, Respondents' retaliatory conduct.

Fourth, the Respondents' invocation (at 33) of various abstention doctrines is just baffling. There is, after all, a reason that the Seventh Circuit went to so much effort to contort *Mitchum* and the AIA rather than simply abstain under *Younger* or *Pullman*. Regardless, those issues would be outside the scope

of any grant of certiorari and could be considered as appropriate on remand.

In sum, this case presents the perfect vehicle for the Court to address two substantial and recurring questions of law that have been the subject of confusion among the lower courts.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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