No. ____

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

PETITION FOR WRIT OF CERTIORARI

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

Counsel for the Petitioners

QUESTIONS PRESENTED

The Anti-Injunction Act ("AIA") provides that federal courts "may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress…." 29 U.S.C. § 2283. *Mitchum v. Foster*, 407 U.S. 225 (1972), held that 42 U.S.C. § 1983 is such an express authorization, while recognizing that Section 1983 claims may still be subject to abstention under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). Six of the circuits have read *Mitchum* to establish a bright-line rule that the AIA itself does not itself bar Section 1983 claims that seek to enjoin state-court proceedings.

Petitioners brought suit under Section 1983 to challenge a district attorney's office's retaliatory campaign against political opponents, carried out in part through court-supervised investigatory proceedings. Notwithstanding *Mitchum*, the Seventh Circuit held that considerations of "equity, comity, and federalism" insufficient to support abstention nonetheless required dismissal of Petitioners' injunctive-relief claims pursuant to the AIA. It also refused to consider Petitioners' personal-capacity claim that they were subjected to an intrusive, harassing, and damaging criminal investigation in retaliation for their First Amendment-protected advocacy and association, holding instead that liability could lie only where officials seek to enforce state law that itself violates clearly established federal law.

The questions presented are:

1. Whether considerations of "equity, comity, and federalism" insufficient to support abstention can override *Mitchum's* holding that 42 U.S.C. § 1983 is an "expressly authorized" statutory exception to the Anti-Injunction Act.

2. Whether, as this Court left unresolved in *Hartman v. Moore*, 547 U.S. 250, 262 n.9 (2006), government officials may be held liable for subjecting citizens to investigation in retaliation for First Amendment-protected speech and association, particularly where non-retaliatory grounds are insufficient to support the investigation.

PARTIES TO THE PROCEEDING

Petitioners Eric O'Keefe and the Wisconsin Club for Growth, Inc., were the appellees below. Respondents John Chisholm, Francis Schmitz, Bruce Landgraf, David Robles, and Dean Nickel, sued in their official and personal capacities, were the appellants. The Honorable Gregory Peterson, who is represented by the Wisconsin Department of Justice, was also a defendant in the district court in his official capacity only but did not move to dismiss any claims, did not contest Petitioners' entitlement to injunctive relief, and did not appeal the district court's entry of a preliminary injunction against him.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Wisconsin Club for Growth, Inc., is a non-profit corporation. It has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Cases

Statutory Provisions

PETITION FOR WRIT OF CERTIORARI

The Petitioners are political activists who brought suit to enforce their First Amendment rights after they were targeted for abuse and intimidation by a rogue district attorney's office in its long-running investigation of Governor Scott Walker, his associates, and supporters of his policies. In retaliation for supporting Walker's controversial reforms limiting collective-bargaining rights for public-sector workers, conservative activists across the state were subjected to home raids, everything-but-the-kitchen-sink subpoenas demanding internal communications and membership information, and other intimidation—all as part of a secret investigation into conduct that a state court held isn't even regulated by Wisconsin law. The purpose of these actions was to silence Walker's supporters. It worked, to devastating effect.

The key historical facts regarding these events are not in dispute, and the district court found that Petitioners had "easily" stated a plausible claim for official retaliation. App. 29a. The court of appeals did not disagree. Yet it dismissed Petitioners' case in its entirety on grounds that do not withstand scrutiny under this Court's precedents and that conflict with the decisions of its sister circuits.

In the decision below, the Seventh Circuit contorted the holding of this Court's decision in *Mitchum v. Foster*, 407 U.S. 225 (1972), to authorize dismissal pursuant to the Anti-Injunction Act of Section 1983 claims that it thought raised issues of "equity, comi-

ty, and federalism" but do not implicate any abstention doctrine that this Court has ever recognized. App. 6a, 8a. In so doing, it departed from an unbroken line of authority in this Court and in the other circuits recognizing Section 1983 as an express statutory exception to the AIA. Certiorari is warranted to resolve those conflicts, to rebuke the lower court's transparent attempt to circumvent the limitations on *Younger* abstention that this Court recognized just last term in *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584 (2013), and to enforce the principle that federal courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given," *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821).

The court below also split with the position of five other circuits in holding that retaliatory investigation, unlike virtually all other kinds of official retaliation, can provide no basis for personal-capacity liability, even when it is calculated to, and actually does, chill the exercise of protected rights. This exception finds no support in law or logic, given the Court's recognition in prior cases that investigatory powers, just like any other kinds of official power, may be abused to stifle citizens' rights. *See, e.g.*, *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972). Certiorari is warranted to close this loophole by definitively answering in the affirmative the question of personal-capacity liability for bad-faith investigation that this Court expressly reserved in *Hartman v. Moore*, 547 U.S. 250, 256, 262 n.9 (2006).

The practical importance of these issues cannot be overstated. Reversal of the lower court decision is essential to ensure that citizens have recourse to federal court when state officials abuse investigatory powers to target them for abuse in retaliation for exercise of their federal right to speak out on controversial policy matters. The "freedom to oppose or challenge" government action without fear of official retribution is "a right by which we distinguish a free nation from a police state." *Hill v. Colorado*, 530 U.S. 703, 775 (2000) (Kennedy, J., dissenting) (alteration and quotation marks omitted). State officials should not be able to avoid federal-court scrutiny merely by cloaking retaliatory actions in the guise of investigation.

The Court should grant certiorari and reverse the decision of the court below.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 769 F.3d 936 and reproduced at App. 1a. The opinions of the United States District Court for the Eastern District of Wisconsin are available at 2014 WL 1379934 (denying motions to dismiss) and 19 F. Supp. 3d 861 (granting preliminary injunction) and reproduced at App. 17a and 37a.

JURISDICTION

The Seventh Circuit rendered its decision on September 24, 2014, App. 1a, and denied rehearing on

October 23, 2014, App. 66a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Anti-Injunction Act, 28 U.S.C. § 2283, 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.

Section 1983 of Title 42 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress….

STATEMENT OF THE CASE

A. Respondents' Years-Long Campaign of Retaliation

1. Petitioner Eric O'Keefe has a long history of political and policy activism, including co-founding the lead petitioner in *U.S. Term Limits, Inc. v.*

Thornton, 514 U.S. 779 (1995). A longtime resident of Wisconsin, he actively participates in that state's political debates as a director of the Wisconsin Club for Growth, a Section 501(c)(4) organization that advocates for free-market policies and fiscal responsibility at the state level. App. 38a. Petitioners have been prominent supporters of the policies of Wisconsin Governor Scott Walker, particularly Act 10, which limited collective-bargaining rights for most public employees. *Id.* Union-led opposition to its introduction and passage in 2011 threw Wisconsin into a state of turmoil, including months of street protests, boycotts of businesses, and an unprecedented series of recall elections. During this time, the Club took to the airwaves to educate the public on the benefits of Act 10's reforms. *See generally* App. 39a–40a.

2. O'Keefe and the Club were unaware, however, that they and virtually every other activist group publicly supporting Governor Walker's policies had become targets, due to their advocacy, of a long-running criminal investigation conducted by the Milwaukee County District Attorney's office. That "John Doe" investigation[1] commenced in 2010, soon after Walker, then serving as Milwaukee County Executive, became the frontrunner to be the Repub-

[1] Wisconsin's "John Doe" statute provides for criminal investigatory proceedings supervised by a judge, serving in a quasi-prosecutorial capacity, in lieu of a grand jury. Wis. Stat. § 968.26; *State ex rel. Newspapers, Inc. v. Circuit Court for Milwaukee Cnty.*, 221 N.W.2d 894, 896 (Wis. 1974).

lican candidate for governor. App. 40a–41a. Its stated purpose, at that time, was to investigate the "origin" of funds embezzled from a local charity; Walker's office, which donated the funds, had reported their apparent theft, and identified the likely thief, a year earlier.

At the beginning, those privy to the investigation raised questions about why a routine law-enforcement matter would require a secret John Doe proceeding, why that investigation would focus on the "origin" of the money, when the issue was who at the charity had taken it, and whether the investigation's stated purpose was a pretext for Walker's political opponents in the District Attorney's office to target Walker. Within days, the investigation raided Walker's County Executive office to seize documents and computers and absorbed a separate investigation (opened by the state's campaign regulator) into a straw-man contribution to Walker's gubernatorial campaign.

Over the next two years, the investigation's scope was officially expanded at least eighteen times to target Walker's staff, his campaign supporters, and finally his philosophical allies in the conservative movement. Although conducted in secret, the investigation became the leading political news story in the state, through leaks to local media that proved damaging to Walker, disclosures in other cases of Walker-related material obtained by the investigation, and raids timed to coincide with major political events like elections. Unbeknownst to O'Keefe and

the Club, investigators subpoenaed from third parties their financial and communications records (including email messages and phone logs), as well as those of the Club's allies and vendors and other conservative activists. No one suspected that the investigation had expanded to target Walker's policy supporters.

3. That changed on October 3, 2013, when armed officers raided the homes of conservative activists across Wisconsin, including the Club's associates and vendors. App. 43a–44a. Deputies, accompanied in several instances by representatives of the District Attorney's office, restrained their targets while they seized business papers, computers, phones, and other devices. Among the materials seized were many of the Club's records. App. 44a.

That same day, the Club's accountant and directors, including O'Keefe, were served with subpoenas demanding that they turn over Club records and communications from 2009 to the present. App. 44a–45a. This included donor information, correspondence regarding the Club's internal operations, and all financial materials. It wasn't just the Club: nearly all conservative advocacy groups in Wisconsin were also targets of the investigation and received identical subpoenas. App. 44a. (Subpoenas were also mailed to prominent out-of-state activists and vendors.) Each of the subpoenas warned that disclosing its contents or even the fact of its existence was grounds for contempt. *Id*.

The effect on O'Keefe and the Club's activism was immediate and devastating. App. 46a–47a. The raids and subpoenas put the Club's supporters, allies, and vendors on notice that it was a central target of a notorious John Doe investigation and intimidated them from working with it, lest they too become targets for retaliation. App. 47a. O'Keefe's allies and associates in his out-of-state activism got word of the investigation (some had received subpoenas) and canceled meetings with him and declined to take his calls. App. 46a–47a. Fundraising for activism became impossible because donors feared that associating with the Club could draw them into the investigation and O'Keefe was not at liberty, due to the secrecy order, to even attempt to explain what was happening. *Id.* O'Keefe also couldn't guarantee to donors that their identities would remain confidential—a major concern due to severe retaliation against Act 10 supporters—and that their money would go to fund advocacy, rather than legal expenses. App. 46a. Deprived of funds, cut off from its vendors and allies, and unsure even of what law it was alleged to have violated, the Club was paralyzed, as were all other major conservative advocacy groups in Wisconsin. App. 47a.

It was only after O'Keefe and other targets moved to quash the subpoena directed at them that he finally learned the basis of the investigation into the Club's activities. App. 45a. According to prosecutors, the Club's communications with Walker and his staff regarding Act 10 and other issues transformed the

Club's issue advocacy—the Club has never advertised in support of or opposition to any candidate, ever—into an in-kind contribution to Walker's campaign. The core of this illegal "coordination," they argued, was the Club's issue advocacy related to state senate races at a time when Walker was not even a candidate for office. Prosecutors also cited as illegal "coordination" the Club's donations to other social-welfare organizations and Walker's fundraising for the Club. That fundraising, they argued, actually transformed the Club into a "subcommittee" of Walker's official campaign committee, rendering all of its advocacy after that point illegal for failure to comply with campaign-finance requirements. App. 50a.

4. On January 10, 2014, the John Doe Judge, Gregory Peterson, granted the motion to quash, finding that "the subpoenas do not show probable cause that the moving parties committed any violations of the campaign finance laws." App. 69a. That was because the relevant state laws "only prohibit coordination by candidates and independent organizations for a political purpose, and political purpose…requires express advocacy," which was not in evidence. *Id*. The state itself, through its Attorney General, has also repudiated the theory of criminal liability underlying the investigation and embraced

Judge Peterson's order as stating the "correct interpretation of the Wisconsin Statutes."[2]

There being no right of appeal from an order entered in a John Doe proceeding, the prosecutors petitioned the Court of Appeals for a supervisory writ and writ of mandamus. App. 4a. Several of the investigation's targets, in turn, petitioned the Wisconsin Supreme Court to "bypass" the Court of Appeals and decide the issues itself. *Id.* The bypass petition was granted on December 16, 2014, and the case is now pending before the Wisconsin Supreme Court.

B. The District Court Denies Defendants' Motions To Dismiss and Enters an Injunction

Although quashing the subpoenas directed at the Club provided some relief, it did not end the John Doe investigation. Most worrisome to O'Keefe and the Club, it did not require the District Attorney's office to cease its years-long retaliatory targeting of the Club. After all, Defendants had carried out their retaliatory campaign through no fewer than six separate John Doe proceedings that they expanded and re-targeted at will and through conduct outside those proceedings; had employed a variety of theories of criminality to support their investigations;

---

[2] Letter from Daniel P. Lennington, Assistant Deputy Attorney General, State of Wisconsin, to Kevin J. Kennedy, Director and General Counsel, Wisconsin Government Accountability Board, Oct. 3, 2014, available at *Citizens for Responsible Government Advocates, Inc. v. Barland*, 2:14-cv-01222-RTR, ECF No. 15-3 (E.D. Wis. filed Oct. 9, 2014).

and had shown an unusual tenacity in pursuing Governor Walker and his supporters for years on end. So long as O'Keefe and the Club remained in Respondents' crosshairs—under whatever pretextual legal theory—they would be blocked from actively and effectively participating in Wisconsin political debates. Seeking to resume their advocacy and to deter future retaliation, O'Keefe and the Club brought suit in federal court seeking injunctive and monetary relief.

1. Based on pre-litigation investigation and the materials disclosed in the motion-to-quash proceedings, their 62-page complaint details Respondents' years-long campaign of retaliation against Governor Walker, his associates, and ultimately his allies on matters of public policy and, in particular, Act 10. App. 18a, 29a. The uncontested facts show that Respondents: targeted nearly the entire Wisconsin conservative movement that publicly supported Act 10, including groups that had little to do with one another or with Walker; timed their activities, including raids and disclosures, for maximum political impact; ignored reports of materially identical conduct by left-leaning groups, including labor unions and other opponents of Act 10; employed unusual, heavy-handed tactics likely to chill speech and associational rights; and relied on a legal theory that has been rejected as a matter state law, reflecting its pretextual nature. Taken altogether, the complaint alleged, these facts demonstrate that Respondents'

true purpose is not to enforce Wisconsin law but to harass, intimidate, and silence supporters of Act 10.

That circumstantial evidence of retaliatory purpose was subsequently confirmed by a whistleblower who had served in the District Attorney's Office. According to Michael Lutz, who had worked under Milwaukee County District Attorney John Chisholm, the District Attorney's office was a hotbed of anti-Walker activity, and Chisholm considered it his "personal duty" to fight Walker's Act 10 reforms. Chisholm, he said, led "an anti-Walker cabal of people in his office who were just fanatical about union activities and unionizing." Prosecutors hung blue union fists—symbolizing solidarity with union opposition to Act 10—on the walls of the office and conducted the investigation as a campaign to dig up dirt on Walker, his aides, and his allies, with the aim of taking down Walker and reversing his policies.[3]

The complaint brought several claims under Section 1983 for injunctive relief and monetary damages against the prosecutors and investigators responsible for the investigation, who are Respondents here. The first, and primary, claim alleged that Respondents were retaliating against O'Keefe and the Club due to their First Amendment-protected advocacy in support of Act 10 and association with Walker and other activists. The third claim alleged bad-faith ex-

[3] Stuart Taylor, Jr., District attorney's wife drove case against Wis. Gov. Walker, insider says, Legal Newsline, September 9, 2014, http://legalnewsline.com/news/251647-district-attorneys-wife-drove-case-against-wis-gov-walker-insider-says.

ercise of prosecutorial power in violation of the First and Fourteenth Amendments, *see Dombrowski v. Pfister*, 380 U.S. 479 (1965), and the fourth alleged that Respondents violated O'Keefe and the Club's associational rights by forcing disclosure, through seizures, of the Club's members, donors, and internal deliberations and strategies. The final claim sought injunctive relief from the gag order prohibiting O'Keefe from discussing or even acknowledging the existence of the John Doe proceeding, under penalty of contempt—which it alleged violated O'Keefe's First Amendment free speech rights.[4]

2. On April 8, 2014, the district court denied Respondents' motion to dismiss on a variety of abstention- and immunity-related grounds. App. 17a.

a. As relevant here, the district court found that *Younger* abstention was unavailable under the reasoning of *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584 (2013), because a John Doe proceeding is not, as required, a criminal prosecution, civil enforcement proceeding, or order "'in furtherance of the state courts' ability to perform their judicial functions.'" App. 20a (quoting *Sprint*). Instead, the court explained, a John Doe proceeding "is an investigatory device, similar to a grand jury proceeding, but lacking the oversight of a jury." *Id.* The court also

[4] O'Keefe previously moved the John Doe judge to lift the gag order, and that request was denied in a December 17, 2013 order. Under Wisconsin law, he has no right of appeal to seek reversal of that order. *In re John Doe Proceeding*, 660 N.W.2d 260, 273 (Wis. 2003).

stated that, irrespective of *Sprint*, *Younger* abstention did not apply because O'Keefe and the Club had alleged "'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.'" App. 22a. *See also Dombrowski*, *supra*.

Notably, none of the Respondents raised the Anti-Injunction Act as grounds for dismissal of the complaint's official-capacity claims.

b. As to the personal-capacity claims, the district court denied qualified immunity. App. 33a–34a. The complaint, it stated, had plausibly alleged that Respondents violated their right to be free from retaliation for First Amendment-protected speech and association. And, it reasoned, Respondents "cannot seriously argue that the right to express political opinions without fear of government retaliation is not clearly established." App. 34a. (citing, *inter alia*, *Delgado v. Jones*, 282 F.3d 511, 520 (7th Cir. 2002); *Pieczynski v. Duffy*, 875 F.2d 1331, 1336 (7th Cir. 1989)).[5]

3. On May 6, 2014, the district court preliminarily enjoined Respondents from undertaking further retaliation against O'Keefe and the Club, ordering them to cease all activities related to the investiga-

[5] The district court also denied Respondents' claims to sovereign immunity and prosecutorial immunity, reasoning as to the latter that Respondents' alleged conduct was investigatory, rather than prosecutorial, in function. App. 31a–33a.

tion and relieving O'Keefe and the Club from any obligation to cooperate further with the investigation. App. 37a. Based on the voluminous factual record before it—including hundreds of pages of evidence submitted by Respondents—the court found that Respondents carried out "a long-running investigation of all things Walker-related" that they had expanded "statewide" to target conservative supporters of Walker's policies. App. 40a–41a. Their actions in carrying out that investigation, in turn, had "'devastated' O'Keefe's ability to undertake issue advocacy with the [Club]," caused the Club to lose "$2 million in fundraising that would have been committed to issue advocacy," and "dramatically impaired" O'Keefe's out-of-state advocacy. App. 46a. And it found that, "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." App. 47a.

Analyzing the four preliminary-injunction factors, the court found that O'Keefe and the Club "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.'" App. 62a. (quoting *Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1975)). The court also found that "[w]hile the defendants deny that their investigation is motivated by animus towards the plaintiffs' conservative view-

points, it is still unlawful to target the plaintiffs for engaging in vigorous advocacy that is beyond the state's regulatory reach." App. 60a. Based on various constitutional precedents, the court held that Respondents targeted O'Keefe and the Club even though their advocacy was beyond Respondents' reach under law. App. 55a–62a.

The court found that the remaining preliminary-injunction factors all weighed in O'Keefe and the Club's favor because (1) loss of First Amendment rights constitutes irreparable injury, (2) damages are an inadequate remedy for First Amendment violations, and (3) injunctions protecting First Amendment freedoms are always in the public interest. App. 62a–63a (citing, *inter alia, Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

Accordingly, it entered the preliminary injunction requested by O'Keefe and the Club. App. 64a–65a.

C. The Seventh Circuit Orders Petitioners' Action Dismissed on Anti-Injunction Act and Qualified-Immunity Grounds

1. The Seventh Circuit consolidated Respondents' various appeals of the district court's orders, and determined that Respondents' appeals of denial of their motions to dismiss the official-capacity claims were frivolous and therefore incapable of supporting interlocutory jurisdiction. App. 76a–77a. Because O'Keefe and the Club had sought injunctive relief only with respect to their retaliation and "bad

faith" claims, those were the only official-capacity claims before the court of appeals.

2. In a September 24, 2014 decision, the Seventh Circuit ordered the district court to dismiss all of O'Keefe and the Club's claims—including those not even on appeal. App. 16a.

a. Raising the issue *sua sponte*, without the benefit of any briefing, the panel held that the Anti-Injunction Act ("AIA") barred O'Keefe and the Club's official-capacity claims for injunctive relief in light of the ongoing John Doe proceeding. According to the panel, this Court's decision in *Mitchum v. Foster*, 407 U.S. 225 (1972), requires lower courts to consider "principles of 'equity, comity, and federalism'" to determine whether injunctive relief in a Section 1983 suit is "appropriate" under the AIA. App. 2a. It undertook an *ad hoc* four-factor inquiry to determine that such relief was not appropriate in this case. First, there was an ongoing state proceeding. App. 6a–7a. Second, O'Keefe and the Club may have "adequate remedies at law" in that proceeding. App 7a. Third, federal relief might require "unnecessary constitutional adjudication." App. 7a. Fourth, the John Doe proceeding implicated important state interests because it was "criminal in nature." App. 8a. Although citing *Sprint*, the Court expressly declined to address *Younger* abstention. App. 6a.

b. As to the personal-capacity claims, the panel refused to consider what it called O'Keefe and the Club's "subjective[]" retaliation claim—i.e., that Respondents carried out their investigation targeting

O'Keefe and the Club for the purpose of retaliating against and chilling their exercise of First Amendment rights. App. 9a. Instead, it considered only whether O'Keefe and the Club could prevail on a claim "objectively" showing that "no reasonable person could have believed that the John Doe proceeding could lead to a valid conviction" because its underlying legal basis was invalid as a matter of federal law. *Id*. The answer, it held, was no, because it was not clearly established that the First Amendment "forbids regulation of coordination between campaign committees and issue-advocacy groups." App 13a. Accordingly, it held that Defendants were entitled to qualified immunity. *Id*.

Having disposed of just two official-capacity claims and one personal-capacity claim, the panel ordered the case "remanded with instructions to dismiss the suit, leaving all further proceedings to the courts of Wisconsin." App. 16a.

3. O'Keefe and the Club petitioned for rehearing and rehearing *en banc*, arguing that the panel decision had improperly failed to recognize their "subjective" retaliation claim, erroneously dismissed claims that were not on appeal, and conflicted with this Court's decisions in *Sprint* and *Dombrowski* regarding abstention. Rehearing was denied on October 23, 2014. App. 67a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Certiorari To Address the Applicability of the Anti-Injunction Act to Claims Not Subject to *Younger* Abstention

The Seventh Circuit's *sua sponte* invocation of the AIA as a basis to dismiss Petitioners' official-capacity Section 1983 claims was a transparent attempt to circumvent this Court's holding last term in *Sprint Communications, Inc. v. Jacobs* that federal courts are almost always "obliged to decide cases within the scope of federal jurisdiction" and that abstention in favor of state-court proceedings—that is, *Younger* abstention—is appropriate only in certain "exceptional" circumstances not present here. 134 S. Ct. 584, 588 (2013). Under the Seventh Circuit's reasoning, a federal court may effectively "abstain" under the AIA in any case that involves any manner of pending state-court proceeding, irrespective of the availability of *Younger* abstention. That approach clashes with *Sprint* and is incompatible with *Mitchum v. Foster*, 407 U.S. 225 (1972), which every other court of appeals to consider the issue has found to establish a bright-line rule that the AIA itself is no bar to Section 1983 suits. This Court's review is essential to bring consistency to the law and prevent wholesale circumvention of federal courts' "virtually unflagging" "obligation," 134 S. Ct. at 591 (quotation marks omitted), to hear and decide cases within their jurisdiction.

A. The Decision Below Misconstrued This Court's Precedent in *Mitchum v. Foster*

The Seventh Circuit's reasoning cannot be squared with *Mitchum*, which held that Section 1983 "is an Act of Congress that falls within the 'expressly authorized' exception" to the AIA's bar on injunctions to stay state-court proceedings. 407 U.S. at 243. *Mitchum* explained that the "very purpose of Section 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights," and that Congress "plainly authorized the federal courts to issue injunctions in § 1983 actions, by expressly authorizing a 'suit in equity' as one of the means of redress." *Id*. at 242. Accordingly, it reversed a lower court's determination that the AIA deprived it of power to enjoin a proceeding pending in state court. *Id*. at 243.

The Court's only qualification of its holding was that Section 1983 did not displace "the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Id*. This referred, it stated, to the principles of abstention "canvassed at length…in *Younger v. Harris*, 401 U.S. 37 (1971), and its companion cases." *Id*. So while the AIA could provide no basis to decline to decide a Section 1983 action, abstention pursuant to *Younger* remained available in appropriate cases. And that is how the Court has addressed *Mitchum's* holding in subsequent decisions. *See, e.g.*, *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 594 n.1 (1975) (explaining that *Mitchum* rejected dismissal "solely on

the basis of the anti-injunction statute," without addressing application of *Younger*); *Trainor v. Hernandez*, 431 U.S. 434, 444 n.8 (1977) (abstaining under *Younger*, while noting that the AIA "is not applicable here because this 42 U.S.C. § 1983 action is an express statutory exception to its application"); *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983) (same approach).

The decision below takes *Mitchum's* qualification to swallow its actual holding that Section 1983 is an "expressly authorized" exception to the AIA. Contrary to *Mitchum* and this Court's decisions applying it, the Seventh Circuit held that application of the AIA itself (as opposed to any abstention doctrine) to Section 1983 claims turns on consideration of "principles of 'equity, comity, and federalism.'" App. 2a. The district court's error, it stated, was that it "gave those principles no weight," and giving them weight, it concluded, required dismissal of all injunctive-relief claims pursuant to the AIA—including claims that weren't even on appeal. App. 8a. The court made clear that it was applying the AIA and not any abstention doctrine, expressly declining to "take sides" in the circuit split over *Younger's* application to investigatory proceedings or to address the application of *Sprint Communications*, which the parties had briefed at length. App. 6a.

Mitchum was the Seventh Circuit's only cited support for its approach, but *Mitchum* doesn't countenance anything like this. To the contrary, recognizing that Congress enacted Section 1983 to create "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* established a bright-line rule that the AIA itself *never* bars Section 1983 claims. *See Trainor*, *supra*. In rejecting that rule, the decision below sows confusion regarding the proper application of the AIA—an issue that will now presumably have to be briefed and addressed in future cases—and undermines Congress's objectives in establishing a comprehensive and effective federal-court remedy for violation of federal rights by state actors.

B. The Decision Below Squarely Conflicts with Decisions of the Second, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits

In the wake of *Mitchum*, many of the courts of appeals were asked to recognize various federalism-based exceptions to its holding, and all of them declined. *See Citizens for a Better Environment, Inc. v. Nassau Cnty.*, 488 F.2d 1353, 1359 (2d Cir. 1973) (rejecting application of AIA and applying "the normal rules of federal abstention"); *Timmerman v. Brown*, 528 F.2d 811, 814 (4th Cir. 1975); *Jones v. Wade*, 479 F.2d 1176, 1181 & n.5 (5th Cir. 1973); *Ealy v. Littlejohn*, 569 F.2d 219, 225 (5th Cir. 1978); *Gottfried v. Med. Planning Servs., Inc.*, 142 F.3d 326, 329 (6th Cir. 1998); *Lewellen v. Raff*, 843 F.2d 1103, 1109 & n.7 (8th Cir. 1988); *Phelps v. Hamilton*, 59 F.3d 1058, 1064 & n.11 (10th Cir. 1995). One may surmise that the issue has not been addressed in the

remaining circuits due to the clarity of *Mitchum* and futility (prior to the decision below) of raising it.

These decisions regarding Section 1983 as a categorical exception to the AIA, and abstention as a separate inquiry, are in plain conflict with the Seventh Circuit's *ad hoc* consideration of "equity, comity, and federalism" to trigger application of the AIA to Section 1983 claims. Whether a plaintiff has recourse to the federal courts to enjoin violation of federal rights by state officials should not vary depending on which circuit the state is located. The Court's review is now necessary to establish uniformity among the circuits.

C. The Court's Review Is Necessary To Prevent Circumvention of Federal Courts' "Virtually Unflagging" Obligation To Enforce Federal Rights

The Seventh Circuit's open-ended consideration of "equity, comity, and federalism" to avoid adjudicating federal-law claims is a new guise for the old approach that this Court specifically and unanimously rejected last term in *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584 (2013). If allowed to stand, the decision below provides a blueprint to circumvent *Sprint's* limitations on *Younger* abstention in almost every case.

Sprint reinforced the fundamental principle that "federal courts ordinarily should entertain and resolve on the merits an action within the scope of a jurisdictional grant, and should not 'refus[e] to de-

cide 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)). On that basis, it held that abstention in favor 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).

Sprint specifically rejected the multifactor approach to *Younger* abstention associated with *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432 (1982). Several lower courts had understood *Middlesex* to authorize *Younger* abstention where (1) there is "an ongoing state judicial proceeding," (2) the proceedings "implicate important state interests," and (3) there is "an adequate opportunity" in the state proceedings "to raise federal challenges." *Sprint*, 134 S. Ct. at 593 (quoting Eleventh Circuit's "*Middlesex* test") (alterations omitted). But *Sprint* clarified that these are "*additional* factors appropriately considered by the federal court" only after it is established that a case implicates one of the three "exceptional" circumstances where abstention in deference to state proceedings is available at all. *Id.*

The decision below resuscitates *Middlesex*-style abstention in all but name. According to the Seventh Circuit, the AIA bars Section 1983 claims for injunctive relief where (1) there is an ongoing state pro-

ceeding, App. 6a–7a; (2) that proceeding implicates important state interests (e.g., it is "criminal in nature"), App. 8a; and (3) plaintiffs may have an opportunity to raise their claims in that proceeding and obtain relief, 7a.[6] This approach, of course, strips *Sprint* of any practical effect: compliance with its holding requires nothing more than replacing any invocations of "*Younger*" or "*Middlesex*" with "Anti-Injunction Act."

The same considerations that motivated *Sprint* therefore merit the Court's review here. The decision below denies a federal forum for claims that are distinctly federal in nature and do not involve the kind of "exceptional" circumstances that threaten "undue interference with state proceedings." 134 S. Ct. at 588. It fosters confusion and undermines predictability regarding the availability of a federal forum for enforcement of federal rights. And it facilitates violation of the fundamental principles that federal courts have "'no more right to decline the exercise of jurisdiction which is given, than to usurp that which

[6] Underscoring the improvisational nature of its approach, the decision below throws in an additional factor, "the rule against unnecessary constitutional adjudication." App. 7a–8a (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 the proper interpretation of 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). The Seventh Circuit did not, however, consider the application of *Pullman* abstention in this case.

is not given.'" *Id*. at 590 (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821)).

Most of all, this Court's review is necessary to enforce lower-court adherence to its decision in *Sprint*.

II. The Court Should Grant Certiorari To Confirm That Government Officials May Be Held Liable for Subjecting Citizens to Bad-Faith Investigation in Retaliation for Speaking Out

Although recognizing that "as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions…for speaking out," this Court's decision in *Hartman v. Moore* expressly reserved the question of "[w]hether the expense or other adverse consequences of a retaliatory investigation would ever justify recognizing such an investigation as a distinct constitutional violation." 547 U.S. 250, 256, 262 n.9 (2006). Five Circuits to date have answered that question in the affirmative, holding that a retaliatory investigation is actionable when its particulars would likely deter a person of ordinary firmness from exercise of First Amendment rights. The court below, however, joined one other circuit in holding that retaliatory investigation is an exception to the general availability of damages for official reprisal against protected speech and association. This case presents the perfect vehicle for the Court to answer definitively the question left open in *Hartman* and resolve this important and recurring issue.

A. The Decision Below Deepens the Existing Circuit Split on This Question

The courts of appeal are split on the question presented.

1. Five circuits have rejected the position of the court below that retaliatory investigation, unlike virtually all other kinds of official retaliation, can provide no basis for personal-capacity liability. *See Izen v. Catalina*, 382 F.3d 566, 572 (2d Cir. 2004) (reversing grant of summary judgment on claim that IRS agent "violated the First Amendment when he undertook an investigation with the substantial motivation of retaliating against [an attorney] for his advocacy on behalf of unpopular criminal tax defendants"); *Pendleton v. St. Louis Cnty.*, 178 F.3d 1007, 1010–11 (8th Cir. 1999) (affirming denial of qualified immunity for officers who allegedly "fabricated a criminal investigation" in retaliation for the plaintiffs' advocacy); *Lacey v. Maricopa Cnty.*, 649 F.3d 1118, 1132 (9th Cir. 2011) (reversing dismissal of retaliation claim against special prosecutor for conducting "an extremely intrusive investigation" allegedly in retaliation for newspapers' reporting); *White v. Lee*, 227 F.3d 1214, 1226–29, 1237–38 (9th Cir. 2000) (affirming denial of qualified immunity for HUD officials who allegedly carried out "extraordinarily intrusive and chilling" investigation in retaliation for plaintiffs' advocacy against a housing project); *Smith v. Plati*, 258 F.3d 1167, 1176 (10th Cir. 2001) (quoting *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000)) ("'Any form of official retaliation for

exercising one's freedom of speech, including…bad faith investigation[] and legal harassment, constitutes an infringement of that freedom.'"); *Bennett v. Hendrix*, 423 F.3d 1247, 1248, 1250–56 (11th Cir. 2005) (affirming denial of qualified immunity for sheriff and deputies who allegedly "carried out a campaign of police harassment and retaliation" through investigatory actions "after plaintiffs supported a county referendum opposed by the sheriff").

Notably, none of these circuits has authorized liability for the mere commencement of a criminal investigation, but only for investigations involving retaliatory conduct that would deter a person of "ordinary firmness" from the exercise of First Amendment rights" *E.g.*, *Bennett*, 423 F.3d at 1254–55 (surveying cases applying objective "ordinary firmness" standard). *Cf. Rehberg v. Paulk*, 611 F.3d 828, 850 & nn.23, 24 (11th Cir. 2010) (rejecting retaliatory investigation claim where plaintiff did not allege that investigation caused him to incur expense or other adverse consequences).[7]

With nearly a decade's experience, there is no indication that the availability of retaliatory investiga-

[7] There is no plurality position, however, on whether (as with retaliatory prosecution claims under *Hartman*) it is a plaintiff's burden to plead lack of reasonable suspicion or probable cause. *Compare Skoog v. Cnty. of Clackamas*, 469 F.3d 1221, 1235 (9th Cir. 2006) (no), and *Izen*, 382 F.3d at 571–72 (no), *with Small v. McCrystal*, 708 F.3d 997, 1009–10 (8th Cir. 2013) (yes), and *Glober v. Mabrey*, 384 Fed. App'x 763, 772 (10th Cir. 2010) (citing *McBeth v. Himes*, 598 F.3d 708 (10th Cir. 2010)) (yes).

tion claims, even in circuits that do not require the plaintiff to plead probable cause, has resulted in a flood of claims challenging ordinary police work and run-of-the-mill criminal investigation. Instead, the circuits recognizing such claims have altogether seen no more than a few per year, many of them (like this case) involving blatantly abusive conduct unambiguously directed at chilling advocacy and association.

2. The court below joins the Fourth Circuit in holding that retaliatory investigation does not support a claim for money damages. *See Blankenship v. Manchin*, 471 F.3d 523, 528 n.3 (4th Cir. 2006) (holding that an official's actions with regard to an allegedly retaliatory investigation provide "no basis for an independent § 1983 claim"). As described above, the Seventh Circuit refused to consider O'Keefe and Club's claim that Respondents' retaliatory motive led them to undertake an intrusive investigation employing tactics intended to chill, and which did chill, O'Keefe and Club's exercise of their speech and associational rights. Instead, it reasoned that a claim could lie only if "no reasonable person could have believed that the John Doe proceeding could lead to a valid conviction" in light of federal law. App. 9a, 12a–13a. Under this "objective[]" approach, App. 9a, a "retaliation" claim is essentially identical to a facial challenge to state law, because it is the underlying state law that is on trial. Retaliatory motive is irrelevant, even if it was the but-for cause of investigatory actions and, by extension, the plaintiff's injury. *See* App. 11a–12a.

B. The Decision Below Is Manifestly Wrong

1. The Seventh Circuit's creation of an exception to the rule against official retaliation for actions that can be described as "investigatory" finds no support in this Court's precedents. To the contrary, it is in plain conflict with the Court's reasoning in this area.

"Official reprisal for protected speech 'offends the Constitution because it threatens to inhibit exercise of the protected right.'" *Hartman*, 547 U.S. at 256 (alterations omitted) (quoting *Crawford–El v. Britton*, 523 U.S. 574, 588, n. 10 (1998)). Thus, the Court's cases have confirmed time and again that "retaliation is subject to recovery as the but-for cause of official action offending the Constitution." *Id.*

There is no basis to exempt from that general rule official actions taken in the context of a criminal investigation. The Court has specifically recognized that investigatory proceedings like grand juries may, just like any other government action, be abused to stifle citizens' rights. Such a proceeding may "prob[e] at will and without relation to existing need," to chill protected association. *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972) (quoting *DeGregory v. Attorney General of N.H.*, 383 U.S. 825, 829 (1966)). It may "expose[] for the sake of exposure." *Id.* (quoting *Watkins v. United States*, 354 U.S. 178, 200 (1957)). And it may blatantly "attempt to invade protected First Amendment rights by forcing wholesale disclosure of names and organizational affiliations for a purpose that was not germane to the determination of whether crime has been committed." *Id.* (citing, *inter*

alia, *NAACP v. Alabama*, 357 U.S. 449 (1958); *NAACP v. Button*, 371 U.S. 415 (1963)). No less than any other official power, the power to investigate may be abused as a tool of reprisal.

Moreover, the Court has consistently refused to close the door to liability for retaliation in contexts implicating substantial governmental interests. For example, the Court has repeatedly recognized and enforced the right of government workers to be free from retaliation for constitutionally protected expression, notwithstanding the government's interests and prerogatives as an employer. *E.g.*, *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563, 574 (1968) (holding that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment"). Likewise, the Court has sanctioned personal liability for "claim[s] that prosecution was induced by an official bent on retaliation," notwithstanding the government's overriding interest in the enforcement of laws and the potential for abuse by criminal defendants. *Hartman*, 547 U.S. at 265. The government interests at stake in conducting investigation are surely no greater than in these other contexts and, as experience in the circuits allowing liability for retaliatory investigation has shown, are not at all compromised by the recognition of such claims.

In sum, there is no justification for departure from the general rule that official retaliation may be subject to recovery.

2. The circumstances of the instant case exemplify the illogic of the Seventh Circuit's approach. A state court held that Respondents lack probable cause (or any other reasonable basis under state law) to carry out their investigation—in other words, that their investigation has zero likelihood of leading to a valid conviction, because the conduct being investigated is not regulated by state law. *See* App. 68a–73a. But because it is not clearly established that such regulation would violate federal law, *see FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 n.17 (2001), Respondents have *carte blanche* to use it as a pretextual basis to harass and intimidate whomever they like. So long as they never make an arrest or bring charges, they need not fear that even actions specifically intended as retaliation will expose them to the risk of liability.

Under this view, a rogue district attorney's office could target members of a civil-rights group advocating police reform on more or less any bogus pretext. Whether or not the pretext is actually recognized by state law (it wasn't in this case) or is supported by any evidence whatsoever, the targeted citizens would have no damages remedy for intimidating investigatory tactics that drive away members and make it impossible to conduct effective advocacy.

The result is to punch a hole in the First Amendment's protections against retaliatory abuse of law-enforcement power. Citizens have a remedy against retaliatory arrest. *See Reichle v. Howards*, 132 S. Ct. 2088, 2096 (2012). They have a remedy against re-

taliatory prosecution. *Hartman*, *supra*. But under the Seventh Circuit's approach, they have no recourse against a campaign of intimidation and harassment that continues for years on end, suppressing protected speech and association, but that never culminates in an arrest or prosecution.

C. This Case Is an Ideal Vehicle To Resolve This Important Question

First, this petition squarely presents the question that the Court expressly left unresolved in *Hartman* and that has since divided the courts of appeals. Petitioners' retaliatory investigation claim is straightforward, and its viability has been briefed, argued, and decided in both the district court and the court of appeals.

Second, that claim is substantial. The district court found that the Petitioners' allegations of retaliatory purpose were plausible, App. 29a, and nearly all of the historical facts regarding the commencement and conduct of the investigation are undisputed at this stage. A decision in the Petitioners' favor would allow their retaliation claim to proceed to trial, there being no apparent grounds for summary judgment.

Third, a state court has already held that Respondents' investigation lacked any legal basis as a matter of state law. Even if this Court were to decide that a retaliatory-investigation plaintiff must plead lack of reasonable suspicion or probable cause, *see Hartman*, 547 U.S. at 262, that would have no effect

on Petitioner's claim. This case is therefore a suitable vehicle to resolve both questions associated with retaliatory-investigation claims—whether they state a constitutional tort and whether lack of probable cause is an element of the claim. Moreover, unlike in other cases raising these issues, the Court need not address the potentially complex and unrelated question of the viability of the challenged investigation's stated legal basis.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

DAVID B. RIVKIN, JR.
Counsel of Record
MARK W. DELAQUIL
ANDREW M. GROSSMAN
BAKERHOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1731
drivkin@bakerlaw.com
Counsel for the Petitioners

JANUARY 2015

APPENDIX

APPENDIX A

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. CHISOLM, *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*.

Opinion

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 (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 violation 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 needlessly. 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 proposed. 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 (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. 2010).

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.

APPENDIX B

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 CHISOLM, 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

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

[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.

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 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

APPENDIX C

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 CHISOLM, 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, 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

---

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

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

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

convictions for a variety of minor offenses, including illegal fundraising 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

---

[4] http://www.jsonline.com/news/milwaukee/former–walker–aide–pleadsguilty–to–cooperate–withda–oc43oit–138874409.html.

> 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.

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.

---

[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.*, 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.
>
> 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

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

type of factual finding because—once again—the phrase "political purposes" under Wisconsin law means express advocacy and coordination of expenditures for issue 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, unlike 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]

---

[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.

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

---

[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.

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 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

APPENDIX D

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

October 23, 2014

Before
DIANE P. WOOD, *Chief Judge*
WILLIAM J. BAUER, *Circuit Judge*
FRANK. H. EASTERBROOK, *Circuit Judge*

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. CHISOLM, *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*.

Order

Plaintiffs-appellees filed a petition for rehearing and rehearing en banc on October 8, 2014. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX E

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

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ORDER

June 9, 2014

Before

DIANE P. WOOD, *Chief Judge*

WILLIAM J. BAUER, *Circuit Judge*

FRANK H. EASTERBROOK, *Circuit Judge*

Nos. 14-1822, 14-1888, 14-1899, 14-2006, 14-2012, and 14-2023

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

JOHN T. CHISOLM, BRUCE J. LANDGRAF, DAVID ROBLES, FRANCIS D. SCHMITZ and DEAN NICKEL,
Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Wisconsin.

No. 2:14-cv-00139-RTR

Rudolph T. Randa, Judge.

The following are before the court:

1. **DEFENDANT-APPELLANT DEAN NICKEL'S MOTION FOR STAY,** filed on May 14, 2014, by counsel for the appellant Dean Nickels.

2. **DECLARATION OF JUSTIN H. LESSNER IN SUPPORT OF DEFENDANT-APPELLANT DEAN NICKEL'S MOTION FOR STAY,** filed on May 14, 2014, by counsel for Justin H. Lessner.

3. **DEFENDANT-APPELLANT'S MOTION TO STAY THE DISTRICT COURT'S CERTIFICATION OF DEFENDANT-APPELLANT'S APPEALS AS FRIVOLOUS AND ALL OTHER DISTRICT COURT PROCEEDINGS,** filed on May 14, 2014, by counsel for the appellant Francis D. Schmitz.

4. **DEFENDANTS-APPELLANTS JOHN CHISHOLM, BRUCE LANDGRAF AND DAVID ROBLES' MOTION FOR STAY OF DISTRICT COURT PROCEEDINGS,** filed on May 15, 2014, by counsel for the appellants John Chisholm, Bruce Landgraf and David Robles.

5. **PLAINTIFFS' RESPONSE TO DEFENDANTS' STAY MOTIONS AND CROSS-MOTION FOR SUMMARY AFFIRMANCE OF DENIAL OF DEFENDANTS' MOTION TO DISMISS,** filed on May 28, 2014, by counsel for the appellees.

6. **DEFENDANT-APPELLANT DEAN NICKEL'S REPLY IN SUPPORT OF MOTION FOR STAY AND RESPONSE TO PLAINTIFFS-APPELLEES' CROSS-MOTION FOR SUMMARY AFFIRMANCE,** filed on June 4, 2014, by counsel for the appellant Dean Nickels.

7. **DEFENDANTS-APPELLANTS JOHN CHISHOLM, BRUCE LANDGRAF, AND DAVID ROBLES' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR STAY OF DISTRICT COURT PROCEEDINGS,** filed on June 4, 2014, by counsel for the appellants John Chisholm, Bruce Landgraf and David Robles.

8. **DEFENDANT-APPELLANT FRANCIS SCHMITZ'S RESPONSE TO PLAINTIFFS-APPELLEES' CROSS-MOTION FOR SUMMARY AFFIRMANCE AND REPLY IN SUPPORT OF MOTION TO STAY,** filed on June 4, 2014, by counsel for the appellant Francis D. Schmitz.

After our order of May 7, 2014, the district court concluded that the appeals are frivolous. Under *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir. 1989), that clears the way for further proceedings in the district court, subject to the partial stay that our order of May 7 imposed while the appeals remain under advisement.

This court has set a briefing schedule, but most of the litigants have asked for other relief, including further stays, an order dismissing some or all of the appeals, or summary affirmance. We do not attempt

to address each of these motions individually but instead cover the ground as follows.

1. Appeal Nos. 14-2006, 14-2012, and 14-2023 challenge the district court's authority to issue a preliminary injunction, and to conduct proceedings concerning the request for permanent injunctive relief. They are frivolous to the extent they present this topic. Defendants' invocation of immunity does not affect litigation under *Ex parte Young*, 209 U.S. 123 (1908), that seeks prospective relief to compel compliance with federal law (including the Constitution). The district court therefore had authority, notwithstanding the appeals, to issue an injunction.

2. The injunction is appealable under 28 U.S.C. §1292(a). Appeal Nos. 14-2006, 14-2012, and 14-2023, to the extent they anticipated the injunction, are effective under Fed. R. App. 4(a)(2). We interpret these notices of appeal to contest that injunction (which the order of May 7 stayed in part). If this understanding is incorrect, appellants should inform us within seven days, and these three appeals will be dismissed outright.

3. The court needs further information to determine whether the appeals asserting qualified immunity from damages (Nos. 14-1822, 14-1888, and 14-1899) are frivolous. Some of the papers suggest that these appellants are arguing that the complaint is inadequate under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). That would be problematic as the basis of an interlocutory appeal. The Supreme Court has held, most recently in *Plumhoff v.*

Rickard, No. 12-1117 (U.S. May 27, 2014), slip op. 5-7, that an interlocutory appeal is proper to contend that legal uncertainty makes damages inappropriate, but that a fact-specific appeal is not authorized. Arguments about the adequacy of factual allegations in the complaint thus may come within the scope of *Johnson v. Jones*, 515 U.S. 304 (1995). But if appellants are arguing that the law is not clearly established in plaintiffs' favor, even if the allegations of the complaint suffice under Rule 8, then we have jurisdiction over the appeals. Those appellants who contend that qualified immunity protects them from awards of damages have 14 days to file memoranda explaining what issues they plan to raise on appeal and why, in their view, 28 U.S.C. §1291 confers jurisdiction.

4. Proceedings in the district court concerning damages are stayed pending further order of this court.

5. The briefing schedule set by order of May 13, 2014, is vacated. The court will establish a new schedule after all jurisdictional issues have been resolved.