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

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

Plaintiffs,

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

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

Defendants.

DEFENDANTS CHISHOLM, LANDGRAF, AND ROBLES' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR STAY PENDING APPEAL AND IN RESPONSE TO PLAINTIFFS' CROSS-MOTION TO CERTIFY APPEALS AS FRIVOLOUS

Defendants John Chisholm, Bruce Landgraf, and David Robles ("the Milwaukee County prosecutors"), by their attorneys, submit this reply memorandum in support of their Motion for Stay Pending Appeal and in response to Plaintiffs' Cross-Motion to Certify Appeals as Frivolous.

INTRODUCTION

Plaintiffs have mustered an 18-page response to a straightforward motion for stay. The response includes plaintiffs' usual grandstanding, falsely accusing defendants of seeking appeal as a delay tactic rather than a genuine attempt to vindicate their rights. Plaintiffs' arguments misrepresent defendants' filings and contrive sharp legal lines where none exist. The Milwaukee County prosecutors ask the Court to conclude that their governmental immunity arguments are not frivolous and stay this entire matter in accordance with *May v. Sheahan*, 226 F.3d 876 (7th Cir. 2000) and its progeny.

ARGUMENT

I. THE MILWAUKEE COUNTY PROSECUTORS' APPEAL REGARDING ABSOLUTE, QUALIFIED, AND SOVEREIGN IMMUNITY IS NOT FRIVOLOUS.

A court cannot find that an appeal is frivolous merely because the appellee believes that the appellant will not prevail. *See Harris N.A. v. Hershey*, 711 F.3d 794, 801-02 (7th Cir. 2013). As the Seventh Circuit acknowledged: "Reasonable lawyers and parties often disagree on the application of law in a particular case, and this court's doors are open to consider those disagreements brought to us in good faith." *Id.* at 801 (citation omitted). Frivolousness means that the "result is obvious" or that appellant's argument is "wholly without merit." *Id.* at 802 (quoting *Spiegel v. Continental Illinois Nat'l Bank*, 790 F.2d 638, 650 (7th Cir. 1986). "Typically the courts have looked for some indication of the appellant's bad faith suggesting that the appeal was prosecuted with no reasonable expectation of altering the district court's judgment and for the purpose of delay or harassment or out of sheer obstinacy." *Ruderer v. Fines*, 614 F.2d 1128, 1132 (7th Cir. 1980). It is simply astounding that plaintiffs could accuse lifelong law enforcement professionals of intentional misconduct in office and then seek to deny them the opportunity to have those claims challenged by appeal.

The Milwaukee County prosecutors' appeal is not frivolous, and it is not a close call.[1] The conclusion that absolute and qualified prosecutorial immunities do not apply to Wisconsin John Doe proceedings, and the activities undertaken during those proceedings, is certainly not well-established. There is little case law directly addressing these issues in the context of a John

[1] Even though plaintiffs are plainly wrong, the Court and parties can rest assured that these defendants are not hastily preparing an 18-page brief alleging that plaintiffs' request violated Fed. R. Civ. P. 11. Defense counsel refuses to cavalierly accuse their adversaries of bad faith.

Doe proceeding, but the case law that exists on absolute immunity favors the Milwaukee County prosecutors. *See Harris v. Harvey*, 605 F.2d 330 (7th Cir. 1979). As to sovereign immunity, the Milwaukee County prosecutors argued that it applied to plaintiffs' official capacity claims, and the Court made a ruling based on those arguments. The Milwaukee County prosecutors respectfully assert that the Court erred in concluding that sovereign immunity does not apply. Obviously, the Court disagrees, but the position is not frivolous.

A. The Milwaukee County Prosecutors' Arguments Regarding Absolute Immunity are Not Frivolous.

The Milwaukee County prosecutors argued that absolute immunity applied because the plaintiffs' allegations specific to them involved non-investigative acts conducted within the Wisconsin John Doe proceeding and, therefore, the acts were inseparable from the judicial process. (Milwaukee Defs.' Mot. Dismiss Br. at 30-31, 3/13/14, dkt. doc. no. 60.) That is, plaintiffs' allegations specific to these defendants implicate their role as advocates for the State of Wisconsin and not as mere investigators or administrators. (Id.) The Seventh Circuit in *Harris v. Harvey*, 605 F.2d 330, 336 (7th Cir. 1979)—the only published case addressing absolute prosecutorial immunity in the context of John Doe proceedings—stated that the trial court properly recognized absolute immunity for the appellant's acts conducted within a John Doe proceeding. In response, plaintiffs addressed *Harris* only in a footnote. This Court did not address the case at all. Respectfully, an appeal cannot be deemed frivolous where the only appellate court authority addressing the issue is supportive of the appellant's position. At a minimum, defendants are entitled to assert their immunity, as they have, under the authority of *Harris* and have the appellate court consider their argument. They should not be foreclosed of any meaningful opportunity to appeal where a plausible basis for appeal exists.

Additionally, plaintiffs' arguments ignore the abundance of federal case law holding that grand jury proceedings and search warrant applications—*i.e.*, judicial proceedings prior to the establishment of probable cause like a John Doe proceeding—are subject to absolute prosecutorial immunity. (Milwaukee Defs.' Mot. Dismiss Reply Br. at 4-5 (citing *Rehberg v. Paulk*, 132 S. Ct. 1497 (2012); *Burns v. Reed*, 500 U.S. 478 (1991); *Hill v. City of New York*, 45 F.3d 653 (2d Cir. 1995)), 4/9/14, dkt. doc. no. 87.) Again, plaintiffs' specific allegations against the Milwaukee County prosecutors implicate only conduct associated with the John Doe proceeding and are, like grand jury proceedings and search warrant applications, subject to absolute prosecutorial immunity.

The Court disagreed with defendants' arguments and denied their motion to dismiss on absolute immunity. (Decision and Order at 14-16, 4/8/14, dkt. doc. no. 83.) Without addressing plaintiffs' specific allegations with regard to the Milwaukee County prosecutors,[2] the Court concluded that prosecutors are at all times "investigators" within a John Doe proceeding. (Id. at 15.) The Court did not explain why a John Doe proceeding is not a judicial proceeding despite

[2] Citing to the Supreme Court *Burns v. Reed*, the Court did summarize plaintiffs' allegations as not challenging the prosecutors' "participation" in the John Doe proceeding, but rather challenging *why* the prosecutors "pursu[ed]" the John Doe proceeding "in the first instance." (Decision and Order at 16.) In doing so, this Court mistook the *Burns* Court's framing of the issue on appeal as an implicit exception to absolute immunity. In fact, not only has this Court's newly-found exception involving a prosecutor's motivation never been adopted in any immunity case, it has been flatly rejected. *Bernard v. County of Suffolk*, 356 F.3d 495, 504 (2d Cir. 2004) ("[T]he fact that improper motives may influence his authorized discretion cannot deprive him of absolute immunity"); *Kulwicki v. Dawson*, 969 F.2d 1454, 1464 (3d Cir. 1992) ("Consideration of personal motives is directly at odds with the Supreme Court's simple functional analysis of prosecutorial immunity."); s*ee also Buckley v. Fitzsimmons*, 509 U.S. 259, 274, n. 5 (1993) (indicating that the Court's conclusion that absolute immunity protects a prosecutor against §1983 claims in the nature of malicious prosecution was based in part on the "common-law tradition of immunity for a prosecutor's decision to bring an indictment, whether he has probable cause or not"). Otherwise, a plaintiff could always plead around the immunity defense by simply challenging *why* certain conduct was pursued rather than challenging the conduct itself.

oversight by a judge, issuance of orders, and the availability of motions and appeals as part of the proceeding, or why it is different than a grand jury proceeding for which absolute immunity applies. While the Milwaukee County prosecutors respect the Court's Decision and Order, these are fairly debatable issues that are not so ,lacking in merit that even considering an appeal should be foreclosed.

B. The Milwaukee County Prosecutors' Arguments Regarding Qualified Immunity are Not Frivolous.

The Milwaukee County prosecutors argued that qualified immunity applied because plaintiffs failed to show a clearly-established right. (Milwaukee Defs.' Mot. Dismiss Br. at 34-37.) They argued that plaintiffs do not have a clearly-established First Amendment right precluding a criminal proceeding regarding their campaign finance activities. (Id.) In fact, plaintiffs explicitly alleged in their complaint that they did have such a right. (Id. at 34-35 (citing Compl., ¶¶ 100, 102).) The federal case law, explained the Milwaukee County prosecutors, did not support plaintiffs' contention and, regardless, did not reflect any clearly-established right. (Id. at 35-37.)

The Court's Decision and Order did not address the Milwaukee County prosecutors' arguments, instead resolving the immunity question on "the right to express political opinions without fear of government retaliation." (Decision and Order at 17.) The Court quoted *Bennett v. Hendrix*, 423 F.3d 1247, 1255 (11th Cir. 2005) for the general proposition that "[t]his Court and the Supreme Court have long held that state officials may not retaliate against private citizens because of the exercise of their First Amendment rights." (Id.) Respectfully, defendants seek review of the Court's decision for three primary reasons. First, the United States Supreme Court has instructed that an immunity analysis should not rely only on a general right. *Anderson v.*

Creighton, 483 U.S. 635, 639-41 (1987). Second, this Court considered only plaintiffs' allegations regarding the defendants' *subjective motivation* for commencing the John Doe proceeding without considering the *objective reasonableness* of their actions within the John Doe proceeding. *See Kulwicki v. Dawson*, 969 F.2d 1454, 1464 n.12 (3d Cir. 1992) (citing *Anderson*, 483 U.S. at 641) ("Notably, motive is also irrelevant in the qualified immunity analysis. There the emphasis is on the objective reasonableness of the official's behavior."). Finally, and just as critical, the Court's conclusion begs the question originally posited by the Milwaukee County prosecutors: do plaintiffs' clearly-established First Amendment rights include a right to be free from a proceeding regarding potentially criminal campaign finance activity? *See Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 155 (7th Cir. 2011) (citing *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001) ("coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits.")). The Court did not address this question, and defendants deserve the opportunity to bring it before the court of appeals.

C. The Milwaukee County Prosecutors Argued that Sovereign Immunity Barred Plaintiffs' Official Capacity Claims, and Such Arguments Were Not Frivolous.

Plaintiffs' contention that the Milwaukee County prosecutors did not raise sovereign immunity is most perplexing and yet another example of plaintiffs' tendency to argue their position by flatly misstating defendants'. The Milwaukee County prosecutors' moving brief states in relevant part:

> As an initial matter, plaintiffs cannot bring a federal suit against the Milwaukee County prosecutors in their "official capacity." This Court previously and specifically recognized that Milwaukee County district attorneys and their assistants are state employees, entitled to immunity

> from such federal suits under the Eleventh Amendment. *Omegbu v. Wis. Elections Bd.*, 2007 U.S. Dist. LEXIS 7878, *3-4, 2007 WL 419372 (E.D. Wis. 2007); *see also Brokaw v. Mercer County*, 235 F.3d 1000, 1009 (7th Cir. 2000) ("Federal suits against state officials in their official capacities are barred by the Eleventh Amendment."). Thus, all claims seeking against Milwaukee County prosecutors in their "official capacity" must be dismissed.

(Milwaukee Defs.' Mot. Dismiss Br. at 29.)[3] Plaintiffs simply ignored the Milwaukee County prosecutors' sovereign immunity arguments in their responsive brief. (Pls.' Mot. Dismiss Resp. Br. at 28-29, 4/8/14, dkt. doc. no. 84.) Nonetheless, the Milwaukee County prosecutors replied to plaintiffs' arguments that sovereign immunity did not apply. (Milwaukee Defs.' Mot. Dismiss Reply Br. at 6-10.) The Court, in rendering its Decision and Order, stated that "[t]he prosecutor-defendants (i.e., the Milwaukee Defendants plus Schmitz) argue that they are entitled to sovereign immunity under the Eleventh Amendment to the extent that O'Keefe seeks injunctive relief against them in their official capacity." (Decision and Order at 13.) Plaintiffs' argument that defendants did not raise sovereign immunity is simply disingenuous.

Although the Milwaukee County prosecutors cited Fed. R. Civ. P. 12(b)(6) and explained the basis for sovereign immunity in their moving brief, plaintiffs suggest waiver because they did not state the words "sovereign immunity" in their motion document.[4] Plaintiffs cite to no case law whatsoever to support this. Plaintiffs were clearly not prejudiced by the omission of those

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[3] Additionally, when briefing the defendants' Motion to Stay the Preliminary Injunction, the Milwaukee County prosecutors noted that this Court should first resolve the sovereign immunity issues with respect to them before requiring briefing on the preliminary injunction. (*See* Defs.' Stay Br. at 3-5, 3/18/14, dkt. doc. no. 55.) Briefing on that stay motion was filed before plaintiffs' response to the defendants' motions to dismiss was due.

[4] Ironically, plaintiffs' present brief requests that the Court certify as frivolous defendants' appeals on the bases of absolute, qualified, and sovereign immunities while plaintiffs' cross-motion for certification mentions only sovereign immunity. (*Compare* Pls.' Br. at 10-12, 4/28/14, dkt. doc. no. 157 *with* Pls.' Mot. Cert., 4/25/14, dkt. doc. no. 155.)

words, and they do not argue that they were prejudiced. The Court obviously construed the Milwaukee County prosecutors' arguments to raise sovereign immunity. Even if there was some merit to plaintiffs' argument, the mere fact that the Court concluded that the Milwaukee County prosecutors were not entitled to sovereign immunity undermines any argument that their appeal is *frivolous* on this basis.

Plaintiffs also argue that the Milwaukee County prosecutors' appeal on sovereign immunity is frivolous because the Court concluded that the Milwaukee County prosecutors' arguments were "simply wrong." (Decision and Order at 13.) The Court further stated that "O'Keefe's complaint rather easily states a claim under *Ex parte Young*." (Id.) However, while the Court cited the method by which courts analyze sovereign immunity, (Id. at 13-14 (citing *McDonough Assoc., Inc. v. Grunloh*, 722 F.3d 1043, 1051 (7th Cir. 2013)), the Court never actually undertook such an analysis with respect to the specific allegations against the Milwaukee prosecutors. There is a conclusion, utilizing words like "simply" and "easily," and nothing more.

The Milwaukee County prosecutors are entitled to an explanation as to how plaintiffs' complaint seeks relief that is properly-characterized as prospective with respect to them specifically. The Milwaukee County prosecutors have neither received an explanation to date nor believe that one exists which sufficiently overcomes sovereign immunity. Consequently, they will now ask the court of appeals to determine whether plaintiffs' allegations can support the Court's conclusion that the complaint requests prospective relief against them. Simply put, this is not an appeal premised on frivolous arguments.

II. BECAUSE DEFENDANTS' APPEALS ARE NOT FRIVOLOUS, THE COURT MUST STAY THE ENTIRE PROCEEDING.

Plaintiffs do not disagree, as they cannot, that if defendants' appeals on the issues of absolute, qualified, and sovereign immunities are not frivolous, then the Court must stay all proceedings. The law is clear: such appeals "relate[] to the entire action and, therefore, [they] divest[] the district court of jurisdiction to proceed with any part of the action against an appealing defendant." *May v. Sheahan*, 226 F.3d 876, 881 (7th Cir. 2000); *see also Goshtasby v. Board of Trustees of the Univ. of Ill.*, 123 F.3d 427 (7th Cir. 1997); *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir. 1989). As a result, the Court should stay this entire proceeding while defendants seek an order from the court of appeals that they are immune.

However, even in the unlikely event that the Court decides that defendants' sovereign immunity arguments are frivolous, the Court must still order a stay of all proceedings. While plaintiffs argue that there is a meaningful distinction between personal-capacity and official-capacity claims on appeal, plaintiffs cannot cite any case law which supports such a distinction with respect to stays in the district court pending appeals on governmental immunity. (Pls.' Br. at 2-4, 4/28/14, dkt. doc. no. 157.) As *all* of plaintiffs' citations demonstrate, this distinction has meaning only when the court of appeals determines jurisdiction on appellate review. (Id.) None of the cited cases dealt with stays in the district court. Just as the case law on such stays pays no regard for the distinction between requests for injunctive relief and monetary relief, the case law does not direct district courts to parse plaintiffs' claims in the manner suggested by plaintiffs. Contrary to plaintiffs' tenuous arguments, *May v. Sheahan*, *Goshtasby v. Board of Trustees of the Univ. of Ill.*, and *Apostol v. Gallion* all stand for the proposition that a litigant's appeal on *any*

theory of governmental immunity stays the entire proceeding against that litigant in the district court.

III. THE COURT SHOULD CERTIFY THE ABSTENTION QUESTIONS FOR INTERLOCUTORY APPEAL AND ORDER A DISCRETIONARY STAY.

If the Court certifies its order denying defendants' abstention arguments for interlocutory appeal, then the Court should order a discretionary stay prior to the preliminary injunction hearing. Abstention relates to the Court's subject matter jurisdiction and raises questions of comity and federalism between the federal and state forums. Because the case law on abstention as it applies in the context of John Doe proceedings is unclear, the prudent approach would be to avoid any adjudication, including the extraordinary relief provided by a preliminary injunction, until the abstention issues are clarified on appeal. Defendants' arguments on both *Younger* and *Pullman* abstention mention the real risk that this Court's decisions on relief may directly contradict the Wisconsin appellate courts' orders on substantially similar arguments in the ongoing John Doe proceedings. For example, if the Court granted plaintiffs' request for a preliminary injunction, and the Wisconsin courts reversed Judge Peterson's decisions and remanded for further proceedings, then a serious, perhaps unprecedented, federalism question would arise. This is an untenable outcome, and the Court should order a discretionary stay upon granting defendants' motion for certification.

CONCLUSION

For the foregoing reasons, the Milwaukee County prosecutors respectfully request that the Court grant their motion for stay pending appeal and deny plaintiffs' motion to certify defendants' appeals as frivolous.

Dated this 29th day of April, 2014.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP

/s Samuel J. Leib

Samuel J. Leib, State Bar No.: 1003889
Douglas S. Knott, State Bar No.: 1001600
Attorneys for Defendants John Chisholm,
Bruce Landgraf and David Robles
River Bank Plaza, Suite 600
740 N. Plankinton Avenue
Milwaukee, WI 53203
Telephone: (414) 276-8816
Fax: (414) 276-8819
E-mail: samuel.leib@wilsonelser.com
E-mail: douglas.knott@wilsonelser.com