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

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

Plaintiffs' Memorandum in Opposition
To Defendants Chisholm, Landgraf, and Robles' Motion for Stay Pending Appeal
And in Support of Cross-Motion To Certify Appeals as Frivolous

EDWARD H. WILLIAMS
BAKERHOSTETLER
191 North Wacker Drive,
Suite 3100
Chicago, IL 60606
(312) 416-6229
ehwilliams@bakerlaw.com

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

Attorneys for Plaintiffs

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs filed this action to obtain timely relief from Defendants' unlawful retaliation against their First Amendment-protected advocacy and association. Recognizing the ongoing nature of Plaintiffs' injuries, and the urgency of relief if Plaintiffs turned out to be right on the facts and the law, the Court set an aggressive schedule for briefing and consideration of Plaintiffs' request for a preliminary injunction. At the same time, recognizing the interests of the individual Defendants and the governmental entities sued in Plaintiffs' official-capacity claims, the Court acceded to their request that resolution of their motions to dismiss come first, before consideration of the injunction. Plaintiffs did not object to this approach, because they believed it to be a reasonable accommodation of all parties' interests at the outset of this litigation. But what Plaintiffs, and perhaps the Court, failed to recognize was that Defendants never had any intention of honoring the schedule set by the Court.

Having lost on their motion to dismiss, Defendants John Chisholm, Bruce Landgraf, and David Robles (the "Milwaukee Defendants") now seek to escape this Court's jurisdiction and thereby delay any ruling on their unlawful secret criminal investigation. They have no legal basis to do so. Their appeal is frivolous, and their motion suggesting the Court lacks jurisdiction is without merit. The Court should deny their motion and certify their appeal as frivolous.

ARGUMENT

I. The Milwaukee Defendants Are Not Entitled to a Stay of Proceedings on Plaintiffs' Official-Capacity Claims

A. Interlocutory Appeal of the Court's Denial of Personal-Capacity Immunities Does Not Divest the Court of Jurisdiction over Plaintiffs' Official-Capacity Claims

Governing Seventh Circuit case law holds that, when a plaintiff brings both personal- and official-capacity claims against a named defendant, interlocutory appeal of a denial of immunity

with respect to personal-capacity claims transfers jurisdiction over only the personal-capacity claims, not the official-capacity claims—those remain before the district court. Rather than bring that authority to the Court's attention, the Milwaukee Defendants simply assert that their notice of appeal transfers jurisdiction over all of Plaintiffs' claims to the Court of Appeals, divesting this Court of jurisdiction and requiring a stay of all proceedings. That is not so.

In *Ruffino v. Sheehan*, 218 F.3d 697 (7th Cir. 2000), the Seventh Circuit considered a First Amendment retaliation action not dissimilar to this suit. The plaintiffs were deputy sheriffs who sued the sheriff in his personal and official capacities, alleging that he took adverse employment action against them in retaliation for their support of his election opponent, in violation of their First and Fourteenth Amendment rights. *Id*. at 699. The district court denied the defendant's motion for summary judgment on qualified immunity. The defendant then brought a collateral order appeal on qualified immunity grounds, asking the court of appeals to reverse with respect to both the personal- and official-capacity claims. *Id*. The Seventh Circuit flatly refused to consider his defense of the official-capacity claims on interlocutory appeal: "Since…there is neither a final judgment in the case nor another ground supporting an interlocutory appeal, we have no jurisdiction to consider it." *Id*. at 700.

Indeed, that result is quite common both in the Seventh Circuit's jurisprudence and in that of the other courts of appeals. *See, e.g., Feldman v. Bahn*, 12 F.3d 730, 731–32 (7th Cir. 1993) (dismissing appeal of official-capacity claims, even while considering related personal-capacity claims); *Jacobs v. W. Feliciana Sheriff's Dep't* 228 F.3d 388, 392–93 (5th Cir. 2000) (denying jurisdiction regarding official-capacity claims against sheriff, while considering defenses to personal-capacity claims); *Roberts v. City of Shreveport*, 397 F.3d 287, 290–91 (5th Cir. 2005) (same); *Zarnow v. City of Wichita Falls, Tex.*, 500 F.3d 401, 406–07 (5th Cir. 2007)

(denying interlocutory-appeal jurisdiction regarding official-capacity claims because "officers in their official capacity, however, have no comparable right to be free from suit"); *Walker v. City of Orem*, 451 F.3d 1139, 1152 (10th Cir. 2006) (noting that qualified-immunity appeal "only divested the district court of jurisdiction over claims against the individual officers," not against official-capacity defendants); *Harris v. Bd. of Educ. of the City of Atlanta*, 105 F.3d 591, 595 (11th Cir. 1997) (considering qualified-immunity appeal by board members, while denying jurisdiction to consider same members' defenses to official-capacity claims).

The conclusion that a court of appeals assumes jurisdiction only over personal-capacity claims on collateral-order appeal, and not over official-capacity claims that remain in the district court, is mandated by the bedrock principles of the Supreme Court's sovereign immunity jurisprudence:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, generally represent only another way of pleading an action against an entity of which an officer is an agent. As long as the government entity receives notice and an opportunity to respond, *an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity*. It is not a suit against the official personally, for the real party in interest is the entity.

Kentucky v. Graham, 473 U.S. 159, 165–66 (1985) (citations and quotation marks omitted and emphasis added). *Accord Brunken v. Lance*, 807 F.2d 1325, 1329 (7th Cir. 1986) (quoting emphasized text); *Hadi v. Horn*, 830 F.2d 779, 783 (7th Cir. 1987) (discussing application to requests for injunctive relief).[1]

As a result, official-capacity claims can be subject to collateral-order appeal *only* when the district court has denied some immunity claimed by the government entity. The government

[1] This principle is often called the "stripping doctrine." *See Geis v. Bd. of Educ. of Parsippany-Troy Hills, Morris Cnty.*, 774 F.2d 575, 580 (3d Cir. 1985).

entity, and the claims that are advanced against its officers in an official capacity suit under *Ex Parte Young* or 42 U.S.C. § 1983, do not go along for the ride when a personal-capacity defendant appeals denial of an immunity personal to him. Instead, the government entity must have an independent basis for interlocutory review. *Ruffino*, 218 F.3d at 700 (noting that there was no "ground supporting an interlocutory appeal" regarding official-capacity claims). Indeed, the Seventh Circuit recognized as much when it held that "a pending request for an injunction does not defeat jurisdiction of interlocutory appeals based on claims of [personal-capacity] immunity." *Scott v. Lacy*, 811 F.2d 1153, 1153 (7th Cir. 1987). As the court explained, the claim for injunctive relief "will be tried no matter the outcome of the appeal," but that did not undermine personal-capacity immunity because "a public official who is a defendant in a suit seeking an injunction is not 'on trial' at all"—the "governmental body" that employs him is. *Id*. at 1153–54. This case is no different.

The three cases cited by Defendants are not to the contrary, and two directly support the district court's continued jurisdiction over Plaintiffs' official-capacity claims. (The third has nothing to say on that point.) Most notably, in *May v. Sheahan*, 226 F.3d 876, 880 (7th Cir. 2000), the Seventh Circuit held that the pendency of a collateral order appeal on qualified immunity divested the court of jurisdiction over proceedings short of trial, like amendment of a complaint, but only where they "have an obvious effect on a pending *Forsyth*[[2]] appeal." It expressly recognized that appeal of a denial of personal-capacity immunity *does not* divest the district court of jurisdiction over the entire proceeding or automatically require a stay:

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[2] *Mitchell v. Forsyth*, 472 U.S. 511, 526–30 (1985), held that the denial of qualified immunity is immediately appealable as a collateral order, to the extent it turns on an issue of law. *See also Johnson v. Jones*, 515 U.S. 304 (1995).

> The scope of the divestiture of jurisdiction effected by a *Forsyth* appeal is limited, however. The district court has authority to proceed forward with portions of the case not related to the claims on appeal, such as *claims against other defendants or claims against the public official that cannot be (or simply are not) appealed.*

Id. at 880 n.2 (emphasis added). Given the Seventh Circuit's holding in *Ruffino* that the collateral order appeal of personal-capacity claims on qualified immunity grounds does not grant the court of appeals jurisdiction over official-capacity claims against the same defendants, the import of *May v. Sheahan* is that the district court retains jurisdiction over the official-capacity claims during the pendency of the collateral-order appeal. *See Trombetta v. Bd. of Educ., Proviso Twp. High Sch. Dist. 209*, 02 C 5895, 2004 WL 868265, at *3–4 (N.D. Ill. Apr. 22, 2004) (applying *May*, denying demand for stay pending interlocutory appeal on qualified immunity, and noting that Seventh Circuit declined to impose stay). Of course, the district court has discretionary power to delay proceedings pending resolution of a *Forsyth* appeal in appropriate cases, *see* 226 F.3d at 880 n.2, but given the irreparable harm the Plaintiffs are currently suffering and the Court's admonition that "this matter will not linger," Doc. 141, Decision and Order at 2, stay of the preliminary injunction proceedings is inappropriate.[3]

Similarly, *Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989), holds only that appeal of a denial of qualified immunity divests the district court of jurisdiction over the claims to which the defendant is claiming immunity. The court explained that, because an immunity is a right to be free from trial, "[i]t makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one." *Id*. Thus, "[w]hether there shall be a trial is precisely the 'aspect of the case involved in the appeal' under *Forsyth*. It follows that a proper *Forsyth* ap-

[3] Plaintiffs note that the Milwaukee Defendants request a discretionary stay only in conjunction with their motion to certify for appeal the Court's denial of their abstention-doctrine defenses, which is addressed below. *See infra* § III. The Milwaukee Defendants' motion does not seek a discretionary stay in the event that the Court denies their motion for certification.

peal divests the district court of jurisdiction (that is, authority) to require the appealing defendants to appear for trial." *Id*. (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)). *Apostol* therefore does not support the proposition that a qualified-immunity appeal (or the like) also divests the district court of jurisdiction over claims against official-capacity defendants—that is, government entities—unless they themselves have some immunity the denial of which confers a right to interlocutory appeal.

Finally, *Goshtasby v. Board of Trustees of the University of Illinois*, 123 F.3d 427, 428–29 (7th Cir. 1997), holds that that same basic framework applies to appeals of denial of the one immunity that may be claimed by official-capacity defendants—sovereign immunity under the Eleventh Amendment—but not where the sovereign immunity appeal is frivolous. For the reasons discussed below, the Milwaukee Defendants' sovereign-immunity appeal is frivolous.

In sum, the case law is clear that appeal of a denial of personal-capacity immunity, such as qualified or absolute immunity, does not divest the district court of jurisdiction over official-capacity claims or require a stay of proceedings regarding those claims. That rule is dispositive of the Milwaukee Defendants' request to stay Plaintiffs' claims for injunctive relief as a result of their asserted prosecutorial- and qualified-immunity defenses, which relate only to claims that Plaintiffs have brought against the Defendants in their personal capacities. And, as discussed below, the Defendants' appeal of denial of sovereign immunity is frivolous and therefore does not divest the Court of jurisdiction.

B. The Milwaukee Defendants' Purported Appeal of Denial of Sovereign Immunity Is Frivolous and Should Be So Certified

Where Defendants pursue a frivolous collateral-order appeal for dilatory purposes, the "district court may certify to the court of appeals that the appeal is frivolous and get on with the trial." *Apostol*, 870 F.2d at 1339. "If a district court certifies the appeal to be frivolous, it may

proceed forward with the case despite the pendency of the appeal. Thus, district court proceedings need not be delayed by successive appeals that raise only issues previously decided," *May*, 226 F.3d at 881 (internal citations omitted), or by appeals where "the disposition is so plainly correct that nothing can be said on the other side," *Apostol*, 870 F.2d at 1339. In *Goshtasby*, the Seventh Circuit warned in particular that official-capacity defendants might attempt to manipulate district court jurisdiction by taking frivolous collateral-order appeals on sovereign-immunity grounds, *see* 123 F.3d at 428, as had previously occurred in the qualified-immunity context, *see Apostol*, 870 F.2d at 1339–40.

The Milwaukee Defendants have done precisely that, appealing on the basis of a sovereign immunity defense that they did not raise in their motion to dismiss and that the Court found was "simply wrong" when raised by Defendant Schmitz. Doc. 83, Decision and Order at 13. The Milwaukee Defendants' attempt to derail the preliminary-injunction hearing by an eleventh-hour appeal perpetuating this "simply wrong" argument is frivolous and does not divest the Court of jurisdiction. To remove any possible doubt regarding the scope of the Defendants' appeals, the Court should certify to the Seventh Circuit that the Defendants' purported appeal regarding sovereign immunity is frivolous.

While the Court undoubtedly must exercise its power to declare an appeal frivolous "with restraint," *see Apostol*, 870 F.2d at 1339, that procedure is appropriate here. First, Defendants' sovereign-immunity argument is frivolous because *Ex Parte Young* "permit[s] private citizens to sue state officials in their official capacities to require them to comply with federal law on an ongoing basis." *McDonough Assocs., Inc. v. Grunloh*, 722 F.3d 1043, 1049 (7th Cir. 2013) (citing 209 U.S. 123 (1908)). "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 [1] an ongoing violation of federal law and [2] seeks relief properly characterized as prospective.'" *Id.* at 1051 (quoting *Verizon Md. Inc. v. Public Serv. Commc'ns of Md.*, 535 U.S. 635, 645 (2002)). The Complaint (1) alleges that Defendants, including Schmitz, are engaged in an ongoing violation of federal law (retaliation against Plaintiffs' First Amendment-protected advocacy) and (2) seeks prospective relief (that they be forced to stop, *see* Compl. Prayer for Relief ¶¶ b–e). *Compare with Verizon Md.*, 535 U.S. at 645 ("Here Verizon sought injunctive and declaratory relief, alleging that the Commission's order requiring payment of reciprocal compensation was pre-empted by the 1996 Act and an FCC ruling. The prayer for injunctive relief—that state officials be restrained from enforcing an order in contravention of controlling federal law—clearly satisfies our 'straightforward inquiry.'"). This is, as the Court held, completely and utterly dispositive and any argument to the contrary is "simply wrong." S*ee* Doc. 83 at 13–14. The frivolousness of this appeal is further shown by the fact that the Milwaukee Defendants did not even raise this defense in their motion to dismiss.[4] There is no possible room for disagreement under *Verizon's* straightforward two-factor test, and even if there were, the Milwaukee Defendants would not be the proper ones to raise it.

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[4] While the Court's Order (at 13) suggests that the Milwaukee Defendants raised a sovereign immunity argument, the Milwaukee Defendants' motion to dismiss named as grounds "principles of abstention, absolute and qualified immunity, standing and ripeness, and failure to name indispensible parties." Doc. 52, Chisholm MTD. The memorandum in support of that motion, in turn, claimed absolute immunity and qualified immunity, *see* Doc. 60 at i, 28–37, but does not even mention the words "sovereign immunity." Indeed, Defendants' only mention of the "Eleventh Amendment" was with regard to its bar against money-damage claims against states, but that holding has nothing to do with Plaintiffs' official-capacity claims for injunctive relief, which are authorized by *Ex Parte Young*, 209 U.S. 123 (1908), and 42 U.S.C. § 1983. *See Williams v. Wisconsin*, 336 F.3d 576, 581 (7th Cir. 2003). While the Milwaukee Defendants attempted to backfill their waiver by discussing sovereign immunity in their reply brief, *see* Doc. 87, Chisholm Reply at 6–10, "it is improper for a party to raise new arguments in a reply brief . . . ," *Mattek v. Deutsche Bank Nat'l Trust Co.*, 766 F. Supp. 2d 899, 902–03 (E.D. Wis. 2011) (Randa, J.).

Second, the "deleterious effects" of an unfounded appeal on this point are substantial. Plaintiffs filed this action and sought preliminary injunctive relief so that they could be free from Defendants' abusive conduct and threats, and quickly resume their First Amendment-protected advocacy, so as to participate in current Wisconsin political and policy debates. Balancing the interests of Plaintiffs and Defendants, the Court granted Defendants' request to consider their motions to dismiss prior to ruling on Plaintiffs' request for a preliminary injunction, while setting both for accelerated briefing and consideration. The Court having denied Defendants' motions, Defendants now seek to delay indefinitely its consideration of Plaintiffs' request for relief and thereby prolong the irreparable injury to Plaintiffs' First Amendment rights.

It would be one thing if Defendants had some plausible basis to seek delay—for example, some applicable immunity from injunctive-relief claims. But their asserted defense is not colorable because it directly contradicts binding case law of the Supreme Court and Seventh Circuit, without even attempting to account for or confront that case law. *See* Doc. 87, Chisholm Reply at 6–9. In these circumstances, Defendants' insistence that a baseless defense deprives the Court of any ability to so much as consider Plaintiffs' entitlement to preliminary relief should be formally recognized for what it is—a bad-faith attempt to further prejudice Plaintiffs—and treated accordingly.

In sum, any appeal regarding sovereign immunity—the only possible defense to Plaintiffs' official-capacity claims for injunctive relief that would provide grounds for immediate appeal—is entirely frivolous, and the Could should certify it as such and get on with Plaintiffs' motion for preliminary relief.

II. The Court Should Also Certify as Frivolous the Milwaukee Defendants' Appeal Regarding Plaintiffs' Personal-Capacity Claims

A. The Milwaukee Defendants' Qualified-Immunity Appeal Is Frivolous

A proper qualified-immunity defense asserts that a given officer's challenged "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Omdahl v. Lindholm*, 170 F.3d 730, 733 (7th Cir. 1999) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). If the officer is correct on that score, he is entitled to immunity not only from damages, but also from the burden of trial—which, in turn, may justify interlocutory review consistent with the collateral-order doctrine. *See Forsyth*, 472 U.S. at 526–27.

Under those principles, the Milwaukee Defendants' appeal of denial of qualified immunity is frivolous in two respects. First, even while asserting an entitlement to "qualified immunity," they never argued that their challenged conduct—First Amendment retaliation through bad-faith abuse of law-enforcement proceedings, *see* Compl. ¶¶ 196–201 (stating core retaliation claim)—did not violate Plaintiffs' clearly established rights. Instead, they argued that their actions did not violate Plaintiffs' right under the First and Fourteenth Amendments "to coordinate political expenditures so long as they do not engage in 'express advocacy.'" Doc. 60 at 34. That right, however, is not the subject of any of Plaintiffs' claims, *see* Compl. ¶¶ 196–225, and so can provide no basis for qualified immunity.

Second, any appeal on qualified immunity by the Milwaukee Defendants could not preclude suit on any of Plaintiffs' claims and therefore does not support jurisdiction under the collateral-order doctrine. That doctrine provides jurisdiction for interlocutory appeal only when the issue appealed "conclusively determines the defendant's claim of right not to stand trial on the plaintiff's allegations." *Forsyth*, 472 U.S. at 527. But given that the Milwaukee Defendants do not contest Plaintiffs' right to be free from First Amendment retaliation, appeal of the narrow

question Defendants did articulate could not conclusively dispose of any of Plaintiffs' claims regarding Defendants' retaliatory conduct. Defendants would still have to defend their history of targeting conservatives, their pretextual and absurdly unconstitutional interpretation of Wisconsin law, their decision to take aim at the whole of Wisconsin's conservative activist movement, and so on—in other words, all of the many things that evidence their retaliation against Plaintiffs.

The Milwaukee Defendants have failed to assert "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law." *Forsyth*, 472 U.S. at 526. Because their interlocutory appeal is not "conclusive" as to any claim, it cannot support collateral-order jurisdiction and is frivolous. *See id*. at 527.

B. The Milwaukee Defendants' Absolute-Immunity Appeal Is Frivolous

Seventh Circuit law is clear that a prosecutor "does not enjoy absolute immunity before he has probable cause." *Whitlock v. Brueggemann*, 682 F.3d 567, 579 (7th Cir. 2012). *See also Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993) ("A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested"). The Milwaukee Defendants have conceded their investigation "seek[s] information necessary to determine whether probable cause exists." Doc. 60 at 13. Moreover, as the Court recognized, Plaintiffs "do[] not attempt to hold the prosecutors liable for their participation in the formal processes of the John Doe proceeding," but instead "call[] them to account for pursuing the investigation in the first instance." Doc. 83 at 16. The Milwaukee Defendants do not even argue that *that* conduct is shielded by prosecutorial immunity, nor could they. *See Burns v. Reed*, 500 U.S. 478, 487 (1991); *Malley v. Briggs*, 475 U.S. 335, 340–41 (1986); *Cervantes v. Jones*, 188 F.3d 805, 810

(7th Cir. 1999). Defendants' concessions are dispositive of the matter of absolute immunity, and any attempt to seek appeal on that issue is therefore frivolous.

III. A Discretionary Stay Is Not Warranted Because a Ruling on the Plaintiffs' Preliminary-Injunction Motion Will Moot the Milwaukee Defendants' Request for Interlocutory Certification and Discretionary Stay

While Plaintiffs will, in due course, respond in opposition to the Milwaukee Defendants' motion to certify for appeal application of *Younger* and *Pullman* abstention, it should be noted that any decision by this Court on Plaintiffs' preliminary-injunction motion would be immediately appealable by the losing parties and that such an appeal would include the abstention issues. 28 U.S.C. § 1292(a)(1) (generally providing appellate jurisdiction); *FreeEats.com, Inc. v. Indiana*, 502 F.3d 590, 595–600 (7th Cir. 2007) (considering *Younger* abstention in appeal of order denying preliminary injunction); *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011) (considering *Pullman* abstention in appeal of order granting preliminary injunction). Accordingly, in addition to the harm that a stay would cause Plaintiffs, no purpose would be served by granting Defendants' request for a discretionary stay of proceedings.[5]

[5] For that reason, Plaintiffs do not object to the Court achieving effectively the same result by deciding the Plaintiffs' preliminary-injunction motion on the papers and entering a time-limited preliminary injunction that allows for expedited discovery followed by an evidentiary hearing or trial. A 90-day preliminary injunction would provide necessary relief to Plaintiffs, afford the parties adequate time to conduct discovery on the key issues, and allow Defendants an opportunity to properly raise any additional defenses they may have based on the evidence and, if they so choose, to take a single appeal encompassing all issues related to official-capacity liability after the court rules on more permanent relief. Plaintiffs believe that this course of action would substantially advance judicial and party economy, while adequately accounting for the parties' distinct interests.

CONCLUSION

The Milwaukee Defendants' motion should be denied and their appeal certified as frivolous with respect to all issues or, at the least, with respect to the issue of sovereign immunity.[6]

Dated: April 25, 2014

Respectfully submitted,

/s/ David B. Rivkin

David B. Rivkin
Gregory L. Baker
Lee A. Casey
Mark W. DeLaquil
Andrew M. Grossman
Richard B. Raile
BakerHostetler
1050 Connecticut Ave., N.W., Suite 1100
Washington, D.C. 20036
(202) 861-1731
drivkin@bakerlaw.com

Edward H. Williams
BakerHostetler
191 North Wacker Drive, Suite 3100
Chicago, IL 60606
(312) 416-6229
ehwilliams@bakerlaw.com

Attorneys for Plaintiffs

[6] To avoid yet another round of unnecessary briefing, the Court's certification of frivolousness should make clear that it applies to all Defendants, as no Defendant has a colorable claim to sovereign immunity.

Plaintiffs also note that Defendant Schmitz, who claims to make "the final decisions" regarding the current John Doe proceedings, Doc. 117 at 4 ¶ 20, does not purport to appeal this Court's denial of sovereign immunity. *See* Doc. 124 at 2 ¶ 4 (stating that Schmitz "appeals from that portion of the district court's decision and order denying his motion to dismiss based on absolute prosecutorial immunity and qualified immunity"). Accordingly, there is no possible jurisdictional bar to the Court's consideration of injunctive relief against Schmitz in his official capacity.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Plaintiffs' Memorandum in Opposition to Defendants Chisholm, Landgraf, and Robles' Motion for Stay Pending Appeal and in Support of Cross-Motion To Certify Appeals as Frivolous was served on April 25, 2014, upon all counsel of record by the United States District Court's ECF system.

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