

**ERIC O’KEEFE, and
WISCONSIN CLUB FOR GROWTH,
INC., individually and on behalf of others
similarly situated,**

Plaintiffs,

Civil Case No. _____

v.

Case Code 30701

**WISCONSIN GOVERNMENT
ACCOUNTABILITY BOARD, and**

JURY TRIAL DEMANDED

**KEVIN J. KENNEDY, in his official
capacity,**

Defendants.

COMPLAINT

Plaintiffs Eric O’Keefe and Wisconsin Club for Growth, Inc. (the “Club”) (collectively, “Plaintiffs”), on behalf of themselves and on behalf of all taxpayers in the State of Wisconsin, for their Complaint against Defendants Wisconsin Government Accountability Board and Kevin J. Kennedy, the Director and General Counsel for the Wisconsin Government Accountability Board (collectively, the “GAB”), state and allege as follows:

Nature of the Action

1. The GAB, a state agency charged with investigating and prosecuting alleged civil violations of Wisconsin state laws on elections, ethics, and lobbying, has exceeded its statutory authority and evaded its statutory obligations by pursuing and funding a far-reaching criminal investigation into virtually every conservative-leaning group in Wisconsin. This unprecedented criminal investigation has proceeded under the auspices of a secret proceeding called a John

Doe. John Doe proceedings are creatures of statute, and until recently, were used only by prosecutors and judges for the purpose of determining probable cause to pursue criminal charges.

2. The GAB's use of a John Doe has created a Frankenstein monster. The GAB has grafted its existing powers for civil enforcement of campaign finance laws onto law enforcement powers borrowed from the John Doe statute, and from this hybrid bundle of investigative powers, has lopped off vital procedural protections. The result is terrible to behold: a creature that covertly collects sensitive information on political activities that do not – and cannot – constitute a crime, all the while maintaining a nearly impenetrable shield of secrecy. Most troubling of all, the monster is fed by taxpayer dollars that were never intended for this purpose.

3. The GAB's enabling statute, Wis. Stat. §§ 5.01-5.95 (the "Enabling Statute"), makes no reference to the use of a John Doe. Instead, it provides for the adherence to a detailed procedure through which the GAB must pursue an investigation and enforcement action, along with procedural safeguards to the accused, including notice and disclosure to the subjects of the investigation. The Enabling Statute also creates a dichotomy between "civil" actions that may be pursued by the GAB and "criminal" actions that may not be pursued by the GAB. The GAB's use of the John Doe device exceeds the agency's statutory authority. Simultaneously, the GAB's decision to operate under the John Doe procedures instead of GAB's Enabling Statute deprives Mr. O'Keefe and the Club of their statutory rights.

4. The GAB's illegitimate and unauthorized participation in the John Doe proceeding has come at significant expense to the taxpayers in Wisconsin. Since at least August of 2012, the GAB has spent and continues to spend substantial resources in furtherance of the proceeding. To date, the GAB and its staff have obtained and examined hundreds of thousands of documents in connection with the John Doe proceeding. The GAB has appointed at least two

special investigators to head the criminal investigation, and more than 30 subpoenas have been issued throughout Wisconsin and across the country to conservative-leaning groups, internet service providers, and financial institutions. In addition, the GAB has obtained and executed search warrants through pre-dawn raids by armed deputies on the homes of targets throughout Wisconsin. The total expenditures related to the investigation, and the hourly rate of the special investigators, have remained a closely guarded secret.

5. This lawsuit seeks to halt the GAB's end-run around the substantive and procedural mandates of its Enabling Statute, requiring the GAB to dismember its Frankenstein monster and conduct only those activities for which it receives taxpayer dollars. Accordingly, Mr. O'Keefe and the Club seek relief in the form of: (1) a judgment declaring that the GAB has made and continues to make illegal expenditures associated with its participation in the secret John Doe proceeding, and enjoining GAB from making any additional unlawful expenditures of public funds; and (2) a judgment declaring that the GAB has deprived Mr. O'Keefe and the Club of their statutory rights and the procedural safeguards of the GAB's Enabling Statute, and enjoining GAB to follow the procedures mandated under its Enabling Statute.

6. Mr. O'Keefe and the Club hereby expressly reserve for independent adjudication in the federal courts all federal questions relating to this matter, including but not limited to any federal First Amendment and Fourteenth Amendment claims for freedom of speech or press, freedom of political association, freedom of communication of ideas, due process, and equal protection. The claims asserted in this case are not made in derogation of any claims pursued or to be pursued by Mr. O'Keefe and the Club in a United States District Court, but instead concern matters of state law properly litigated in state court. *See generally Pennhurst State Sch. v.*

Halderman, 465 U.S. 89 (1984); *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411 (1964).

The Parties

7. Plaintiff Eric O’Keefe is an individual residing in Iowa County, Wisconsin. Mr. O’Keefe is a veteran volunteer political activist who has been involved in political and policy advocacy since 1979. The GAB has targeted Mr. O’Keefe as a subject of its investigation in both his individual capacity and in his official capacity as a director and treasurer for Wisconsin Club for Growth.

8. Plaintiff Wisconsin Club for Growth is a Wisconsin corporation recognized as a non-profit entity under Section 501(c)(4) of the Internal Revenue Code. It is a local, independent affiliate of the national Club for Growth and promotes free-market beliefs and policies in Wisconsin.

9. Defendant Government Accountability Board (the “GAB”) is a Wisconsin state agency formed in 2007 to administer Wisconsin state laws on elections, ethics, and lobbying. The GAB is composed of six former appellate judges who serve staggered, six-year terms. The GAB has authority to pursue civil enforcement of Wisconsin state laws on elections, ethics, and lobbying, but is prohibited from pursuing criminal enforcement of such laws.

10. Defendant Kevin J. Kennedy is the Director and General Counsel for the GAB, a position he has held since formation of the GAB in 2007.

Jurisdiction and Venue

11. This Court has personal jurisdiction over the GAB and Mr. Kennedy because the GAB is a Wisconsin state board and Mr. Kennedy is domiciled within the State of Wisconsin. This Court is not deprived of personal jurisdiction on the basis of sovereign immunity because

this action is based on conduct by the GAB and Mr. Kennedy that is outside the bounds of their statutory authority.

12. Venue is proper in this Court pursuant to Wis. Stat. § 801.50 because Mr. O’Keefe and the Club have designated Waukesha County as the proper venue and the defendants in this action are a state board and an agent acting in an official capacity of that board.

Factual Allegations

13. In a calculated power grab, the GAB has improperly used a John Doe proceeding to explore speculative criminal theories of campaign finance law without prior notice to or challenge by the accused or scrutiny by the public. In so doing, the GAB has exceeded its statutory authority and has deprived Mr. O’Keefe and the Club of their statutory rights. The GAB’s actions not only have injured its political targets, but also have injured every taxpayer in the State of Wisconsin.

14. Due to the secretive nature of the GAB’s investigative process and its confidential John Doe proceeding, the full extent of the GAB’s conduct is unknown to many, including Mr. O’Keefe and the Club.

I. The Substantive and Procedural Strictures of Wis. Stat. §§ 5.01-5.95

15. The purpose, functions, duties, and powers of the GAB are set forth in its Enabling Statute, Wis. Stat. §§ 5.01-5.95.

16. Under Wis. Stat. § 5.05(1), the GAB is responsible for administering Wisconsin laws relating to elections, ethics, and lobbying (i.e., Chapters 5-12 and subchapter III of Chapter 13 and subchapter III of Chapter 19).

17. In discharging its duties, the GAB has the power to subpoena, depose witnesses, bring a civil forfeiture action, revoke licenses, sue for injunctive relief or a writ of mandamus or

prohibition, intervene in a civil action, and issue rules relating to the interpretation or implementation of laws concerning elections or election campaigns. *See* Wis. Stat. § 5.05(1)(b)-(f).

18. The process by which the GAB must pursue investigations of potential violations of the laws it administers is detailed at length in Wis. Stat. § 5.05(2m). In pertinent part, Wis. Stat. § 5.05(2m) states that “[t]he board shall investigate violations of laws administered by the board and may prosecute alleged civil violations of those laws, directly or through its agents under this subsection, pursuant to all statutes granting or assigning that authority or responsibility to the board.”

19. All matters investigated by the GAB must begin with a complaint filed by a person or entity, or informally by the Board itself. *See id.* at § 5.05(2m)(c)2.a (“Any person may file a complaint with the board alleging a violation[.]”).

20. Upon receipt of a complaint, the GAB must first determine whether there is reasonable suspicion that a violation has occurred or is occurring. *Id.* at § 5.05(2m)(c)4. Pursuant to regulations issued by the GAB, the Director of the GAB must promptly forward the complaint to the individual or entity subject of the complaint, who then has 10 business days to file a written answer or counterclaim. Wis. Admin. Code § GAB 20.04(3).¹ The complainant’s reply is due 10 business days after receipt of the answer, as well as a written answer to any counterclaim. *Id.* After submission of all pleadings, the parties have a right to submit a written statement of

¹ There is a notation to the online version of Wis. Admin. Code Chapter GAB 20 to the effect that the Chapter “has been superseded by s. 5.05(2m), Wis. Stat., and is no longer effective, except for complaints alleging a violation of election laws by a local election official under s. 5.06, Wis. Stat.” However, Chapter 20 has not been formally vacated by the GAB, and the notice procedures set forth in § GAB 20.04 are not inconsistent with the provisions of Wis. Stat. § 5.05(2m). Accordingly, these procedures continue in full force and effect until revised or vacated by formal GAB action.

facts to the director for approval. *Id.* § GAB 20.05(2). The parties may also submit a written argument or brief in support of their positions. *Id.* at § GAB 20.05(4).

21. The GAB will review the complaint at its next scheduled meeting. *Id.* at § GAB 20.05(1). If no reasonable suspicion exists, the GAB must dismiss the complaint and provide written notice of the dismissal to the subject(s) of the investigation and the party who made the complaint. Wis. Stat. §§ 5.05(2m)(c)4, 5.05(2m)(c)9. If reasonable suspicion exists that a violation has occurred or is occurring, the GAB may authorize the commencement of an investigation by issuing a resolution with an affirmative vote of at least four members. *Id.* The resolution must specifically describe the matter to be investigated. *Id.* at § 5.05(2m)(c)4.

22. To assist in its investigation, the GAB may authorize the Ethics and Accountability Division of the GAB to investigate or it may elect to retain a special investigator. *Id.* at § 5.05(2m)(c)4. To elect a special investigator, the administrator of the Ethics and Accountability Division of the GAB (who, during all relevant times, was Jonathan Becker) must submit the names of three qualified individuals to be selected by the GAB. *Id.* Any individual retained as a special investigator by the GAB must enter into a written contract with the GAB setting forth the terms of the engagement. *Id.*

23. After commencement of an investigation, the GAB and its agents must abide by a strict procedural timeline. The agent(s) in charge of the investigation, whether a special investigator or the Ethics and Accountability Division, must make periodic reports to the GAB at least every thirty (30) days. *Id.* at § 5.05(2m)(c)5. Before the GAB can spend more than \$10,000 on any investigation, a progress report must also be submitted with a recommendation to commit additional resources. *Id.*

24. In addition to the reporting requirements of the Enabling Statute, the GAB and its investigator(s) must meet in person every ninety (90) days to review the progress of the investigation. *Id.* During the meeting, the investigator(s) must recommend to the GAB one of three courses: (1) make a finding that probable cause exists to believe that a violation has or is occurring; (2) determine that further investigation of the matter is necessary; or (3) vote to terminate the investigation. *Id.* at § 5.05(2m)(c)5(a)-(c). At least four members of the GAB must affirmatively vote to continue the investigation or it will be deemed terminated. *Id.* at §§ 5.05(2m)(c)5, 5.05(1e).

25. At the conclusion of the investigation, the GAB must make preliminary written findings of fact and conclusions, including a determination of whether or not probable cause exists that a violation has occurred or is occurring. *Id.* at § 5.05(2m)(e)9.

26. If the GAB determines that there is probable cause to believe that a violation has occurred or is occurring, the GAB may either authorize the Ethics and Accountability Division to file a civil complaint or, “in lieu of civil prosecution of any matter by the board, refer the matter to the district attorney for the county in which the alleged violator resides[.]” *Id.* at § 5.05(2m)(e)11. In the event the appropriate district attorney fails to commence a civil or criminal prosecution, the GAB may refer the matter to the district attorney in a contiguous county and then to the attorney general. *Id.* at § 5.05(2m)(e)15. A special prosecutor may also be appointed under Wis. Stat. § 978.045 in lieu of a district attorney. *Id.* at § 5.05(2m)(e)17.

27. If the GAB refers the matter to a district attorney, special prosecutor, or attorney general, the prosecuting attorney must submit a report to the GAB within forty (40) days detailing any action taken regarding the matter. *Id.* at § 5.05(2m)(e)18. The prosecuting attorney must also file periodic reports with the GAB every 30 days. *Id.*

28. At no point is the GAB authorized to initiate and pursue criminal enforcement against an individual or entity. In fact, except as provided in Wis. Stat. § 5.05(2m)(i), which pertains to “an action for a criminal violation” against the attorney general or candidate for attorney general, the GAB is prohibited from pursuing criminal enforcement of alleged violations of laws relating to elections, ethics, and lobbying. *See id.* at § 978.05(1) (the district attorney shall “have *sole responsibility* for prosecution of all criminal actions from violations.” (emphasis added)); *see also* OAG 10-08 (“Except as provided in Wis. Stat. § 5.05(2m)(i), the Board cannot prosecute criminal proceedings under those statutory provisions.”).

29. The GAB’s Enabling Statute does not permit the GAB to investigate and pursue enforcement actions outside the context of the mandatory procedures set forth in the Enabling Statute. Accordingly, the GAB’s ability to utilize a John Doe proceeding is restricted by its Enabling Statute.

II. The Use of John Doe Proceedings in Wisconsin

30. A John Doe proceeding is an independent legal proceeding convened by a judge for the purpose of determining whether a crime has been committed and if so, by whom.

31. The John Doe procedure is codified in Wis. Stat. § 968.26. A John Doe proceeding may be initiated when “a district attorney requests a judge to convene a proceeding to determine whether a crime has been committed in the court’s jurisdiction.” *Id.* at § 968.26(1). Alternatively, a John Doe proceeding may be initiated if a person “who is not a district attorney complains to a judge that he or she has reason to believe that a crime has been committed within the judge’s jurisdiction[.]” *Id.* at § 968.26(2)(am). In that circumstance, the judge who received the complaint must refer the complaint to the district attorney or other prosecutor for a determination of whether to issue charges. *Id.* at § 968.26(2)(b). If the district attorney or other

prosecutor refuses to issue charges, the judge may nonetheless initiate a John Doe proceeding to determine if a crime has been committed. *Id.* at § 968.26(2)(b), (c).

32. The John Doe proceeding itself is conducted for the sole reason of determining whether probable cause exists that a crime has been committed. It is not a mechanism for determining whether an agency should pursue civil enforcement for violations of state law.

33. The John Doe proceeding involves an investigation into whether a crime has occurred. At its conclusion, the John Doe judge is charged with determining whether probable cause exists and, if so, initiating a prosecution by issuing a criminal complaint. *See State v. Unnamed Defendant*, 150 Wis. 2d 352, 359, 441 N.W.2d 696 (1989). At that time, a warrant may issue for the arrest of the accused. *See Wis. Stat.* § 968.04(1).

34. John Doe proceedings offer many advantages to law enforcement officials. For instance, a John Doe Proceeding carries with it the power to subpoena witnesses, take testimony under oath, compel the testimony of a reluctant witness, and issue a search warrant under appropriate circumstances. In addition, the Wisconsin Rules of Evidence are not applicable to John Doe proceedings and an accused does not have a right to testify through an examination by his or her lawyer, have that lawyer cross-examine other witnesses, or have his or her lawyer argue before the John Doe judge.

35. Perhaps most significantly, law enforcement officials may request the John Doe judge to issue a secrecy order providing that all aspects of the proceeding must remain secret for all purposes until closed. The secrecy order can be binding on not only the accused and on all witnesses examined, but also on the John Doe judge as well.

III. The Criminal Investigation into Mr. O’Keefe, the Club, and Other Conservative-Leaning Groups

36. The GAB, in conjunction with district attorneys in five counties in Wisconsin, has initiated a wide-scale criminal investigation into Mr. O’Keefe, the Club, and other conservative-leaning groups throughout Wisconsin and the country. In so doing, the GAB has both exceeded its statutory authority to act under the Enabling Statute and has side-stepped its obligations as detailed in its Enabling Statute and promulgated regulations.

A. The GAB and Precursor John Doe Proceedings

37. The criminal investigation into Mr. O’Keefe and the Club is an outgrowth from an unprecedented set of interrelated John Doe proceedings spearheaded by District Attorney John Chisholm at the Milwaukee County Attorney’s Office (“John Doe I”). John Doe I officially began on May 5, 2010 based on a sworn statement that the Milwaukee District Attorney had reason to believe that money (approximately \$11,000) had been misappropriated from a veteran’s fund called Operation Freedom, which Governor Scott Walker founded. Over the next three years, John Doe I expanded eighteen times and evolved into an ongoing, statewide audit of almost all of the political activities of supporters of Governor Walker.

38. The GAB did not hesitate to join in John Doe I. On May 10, 2010, the GAB opened an investigation into William Gardner and the Wisconsin & Southern Railroad Company (“WSOR”) after receiving a complaint by Mr. Gardner’s former girlfriend that she had been asked to make a campaign contribution on their behalf. *See* Government Accountability Board, *G.A.B. and Milwaukee County District Attorney Announce Resolution of Significant Campaign Finance Investigation* (Apr. 11, 2011), attached hereto as **EXHIBIT A**.

39. Despite the investigative procedures set forth in its Enabling Statute, which require the GAB to *either* pursue civil enforcement *or* refer the matter to the district attorney for

the county in which the alleged violator resides, Wis. Stat. § 5.05(2m)(c)11 (stating that the referral must be “in lieu of civil prosecution of any matter by the board[.]”), the GAB sought the best of both worlds. As stated in a press release by the GAB:

The Board subsequently contacted the Milwaukee County District Attorney’s Office and the two agencies worked closely together over the past year to complete a John Doe investigation before Judge Neal Nettlesheim. The investigation involved obtaining and reviewing hundreds of digital documents and e-mails from WSOR, bank records, and the testimony of over a dozen witnesses.

See id. The proceeding ultimately resulted in Mr. Gardner agreeing to plead guilty to two felony counts, and WSOR agreeing to pay a civil forfeiture to the GAB of \$166,900.00. *Id.*

40. Not only did the GAB fail to follow its statutory mandate to refer the matter to the district attorney in lieu of civil prosecution by the GAB, the GAB also failed to refer the matter to the appropriate district attorney (i.e., the district attorney for the county in which Mr. Gardner resides, Washington County, or the principal place of business for WSOR, Madison County). *See id.* Indeed, the Milwaukee County District Attorney’s Office had to file a complaint in Washington County in order to give effect to the plea deal. *See id.*

41. Instead of acting pursuant to the clearly defined mandates of its Enabling Statute, the GAB sought to take advantage of the additional authority, secrecy, and flexibility available to prosecutors in the John Doe proceeding in Milwaukee County.

42. John Doe I eventually came to an end pursuant to an order on February 21, 2013, but not before commencement of the current proceedings against Mr. O’Keefe, the Club, and other conservative-leaning groups.

B. The Current John Doe Proceeding Against Mr. O’Keefe, the Club, and Other Conservative-Leaning Groups

43. On October 3, 2013, Mr. O’Keefe and the Club were served with subpoenas requiring them to produce a staggering amount of documents that encompassed almost any

political activity by Mr. O’Keefe or the Club from 2009 to 2013 in Wisconsin and beyond. Unbeknownst to Mr. O’Keefe and the Club, they had already been the subjects of a secret coordinated John Doe proceeding for more than a year.

44. In late 2012, personnel from the Milwaukee County District Attorney’s office met with and notified the GAB of alleged criminal violations of Wisconsin’s campaign finance laws. Shortly thereafter, the Milwaukee County District Attorney’s office petitioned the Milwaukee County Circuit court to open a John Doe proceeding for the ostensible purpose of investigating alleged criminal campaign finance violations involving campaign coordination. On information and belief, the Milwaukee County District Attorney’s office asserted that it had reason to believe that a criminal violation of campaign finance law had been committed within its jurisdiction.

45. The current John Doe proceeding, Case No. 12JD000023 (“John Doe II”), officially commenced on September 5, 2012 pursuant to an order by the Honorable Barbara Kluka. At or near the same time, board members of the GAB and its staff, including the GAB Director and General Counsel Kevin J. Kennedy, were admitted as parties to John Doe II.

46. Ever since their admission to John Doe II, the GAB and Mr. Kennedy have attempted to hide their ongoing role in the criminal investigation, even from other public officials.

47. On January 18, 2013, Milwaukee District Attorney Chisholm met with Attorney General J.B. Van Hollen to seek assistance from the Wisconsin Department of Justice. In a letter dated May 31, 2013, the Attorney General declined to assist in the proceeding. *See* Letter from Attorney General J.B. Van Hollen to District Attorney John T. Chisholm, May 31, 2013, attached hereto as **EXHIBIT B**. The Attorney General declined to assist in the proceeding on the basis of potential conflicts of interest, concerns about the ability to maintain an appearance of

impartiality, and the availability of the GAB to conduct an investigation. *Id.* In particular, the Attorney General stated:

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.

Id.

48. District Attorney Chisholm never informed Attorney General Van Hollen that the GAB had already been admitted as a party to John Doe II since the outset of the proceeding. Nor did the GAB or Mr. Kennedy, who, having been admitted to John Doe II, presumably were aware of the content District Attorney Chisholm's letter, act to correct the misimpression District Attorney Chisholm had left with the Attorney General.

49. On information and belief, less than one month after the Attorney General declined to assist in John Doe II, the GAB voted to commence an investigation into whether there was probable cause that a violation of campaign finance laws had occurred or was occurring. At the time the GAB voted to commence its investigation, it had already been participating in John Doe II for more than nine months.

50. On information and belief, six days later, the GAB met with and referred the matter to the district attorneys for Milwaukee, Columbia, Dane, Dodge, and Iowa Counties at its offices in Madison, Wisconsin. During the meeting, the GAB informed the district attorneys of the alleged violations of campaign finance laws by Mr. O'Keefe, the Club, and other conservative-leaning groups, and the district attorneys discussed the initiation and coordination of four additional John Doe proceedings and the appointment of a unified special prosecutor to conduct the proceedings.

51. Shortly after the meeting held by the GAB, the district attorneys in Columbia, Dane, Dodge, and Iowa Counties petitioned for and commenced John Doe proceedings in their respective counties. The State Courts Administrator subsequently issued orders appointing Judge Kluka as the presiding judge for the coordinated John Doe proceeding.

52. On August 21, 2013, the district attorneys for the coordinated John Doe proceeding sent a letter to Judge Kluka requesting the appointment of Francis D. Schmitz as a special prosecutor. *See* Letter Seeking Appointment of Special Prosecutor, Aug. 21, 2013, attached hereto as **EXHIBIT C**. In the letter, the five district attorneys argue that appointment of a special prosecutor is warranted because, “by operation of § 978.05(1), the responsibility for the prosecution of the crimes alleged in the John Doe Petition is fractionated across the offices of five different Wisconsin prosecutors” yet the proceeding “is one overall undertaking and should be managed by one prosecutor with general authority in all five counties.” *Id.*

53. The district attorneys also referenced the Attorney General’s refusal to assist the criminal investigation. *Id.* In so doing, they specifically cited the GAB’s lack of authority to pursue charges of criminal conduct in a John Doe:

The Attorney General, however, does not address the fact that – to the extent this is a *criminal* investigation – the GAB is no substitute for statewide criminal justice authority. Plain and simple, the GAB lacks authority to criminally prosecute anyone.

Id. The district attorneys also recognized that continued involvement by the GAB implicates the procedures and requirements of the GAB’s Enabling Statute, which would undercut the secretive nature of the John Doe:

[M]indful that its investigation may compromise a related criminal inquiry by a prosecutor, the only rational course of action for the GAB (and the course actually taken here) is to involve – at the outset – the office of the affected prosecuting attorneys.

Id.

54. Instead, the district attorneys needed a special prosecutor “empowered to investigate the possible crimes that are more fully described in the John Doe papers filed herein.”

Id. Furthermore, the special prosecutor “should be authorized to determine if criminal charges are appropriate and if he so determines should be given the authority to issue charges and proceed through to disposition with any such charges.” *Id.*

55. In August of 2013, Judge Kluka issued orders appointing Francis D. Schmitz as the special prosecutor for each of the five counties in the coordinated John Doe II.

56. On information and belief, the GAB also appointed and has been paying Mr. Schmitz as a special investigator for the GAB. On further information and belief, the GAB had already appointed Mr. Schmitz as a special investigator before Mr. Schmitz was appointed as a special prosecutor by Judge Kluka. The GAB also provided Mr. Schmitz office space from which to work.

57. Approximately one month later, on September 30, 2013, Judge Kluka issued numerous subpoenas on the subjects of the John Doe proceeding, including Mr. O’Keefe and the Club. Judge Kluka also authorized at least five search warrants.

58. The search warrants authorized by Judge Kluka were requested by Dean Nickel, a special investigator appointed by the GAB to pursue the criminal investigation.

59. The search warrants issued by Judge Kluka were executed through pre-dawn raids by armed officers. The officers used floodlights to illuminate the subjects’ homes, restrained the occupants of the home, and seized business papers, phones, computer devices, and other devices. The same day, subpoenas were served on numerous individuals and entities, including Mr.

O’Keefe and the Club. The subpoenas indicated that they were covered by a secrecy order prohibiting the recipients from disclosing the contents and very existence of the subpoenas.

60. On or around October 25, 2013, Mr. O’Keefe, the Club, and four other recipients of subpoenas filed motions to quash the subpoenas. In addition, two subjects of the search warrants filed motions for return of the seized property.

61. Prior to a ruling on the motions to quash and motions for return of the seized property, Judge Kluka unexpectedly recused herself from the John Doe proceeding on October 29, 2013. Judge Kluka’s recusal prompted the Director of State Courts to assign Judge Gregory Peterson as the new presiding judge over the coordinated John Doe proceeding.

62. On January 10, 2014, Judge Peterson issued a decision and order quashing the subpoenas and ordering return of the seized property. In his decision and order, Judge Peterson found that the subpoenas and warrants were improper because the State only showed potential coordination in fundraising and issue advocacy, not express advocacy, and coordination without express advocacy is not a crime.

63. Shortly after Judge Peterson declared the purported basis for John Doe II to be without merit, Mr. O’Keefe and the Club initiated a civil rights action in federal court against three Milwaukee prosecutors involved in John Doe II, Special Prosecutor Francis Schmitz, and Investigator Dean Nickel, among others. *See O’Keefe, et al. v. Schmitz et al.*, Case No. 2:14-cv-00139 (E.D. Wis. Feb. 10, 2014).

64. Special Prosecutor Schmitz thereafter filed a Petition for Supervisory Writ and Writ of Mandamus with the Court of Appeals on February 21, 2014 for each of the coordinated John Doe proceedings. Through the Petition, Special Prosecutor Schmitz seeks a reversal of Judge Peterson’s decision to quash the subpoenas and order the return of the seized property.

65. Mr. Kennedy, the Director and General Counsel of the GAB, filed an affidavit in support of the Petition for Supervisory Writ and Writ of Mandamus. Consistent with his prior efforts to obfuscate his role and the role of the GAB in John Doe II, Mr. Kennedy did not disclose his status and the status of GAB as admitted parties to John Doe II, nor did he disclose that the GAB had hired Mr. Schmitz to act on its behalf. Instead, Mr. Kennedy asked that the “Court consider the rights of the G.A.B., as a third party, and the rights of the public in general” in analyzing the petition. See Affidavit of Kevin J. Kennedy in Support of Supervisory Writ and Writ of Mandamus, attached hereto as **EXHIBIT D**.

66. After briefing in the Court of Appeals, Plaintiffs and other parties filed petitions to bypass in the Supreme Court of Wisconsin. As of the filing of this Complaint, those petitions had been fully briefed.

67. On May 6, 2014, the Honorable Rudolph T. Randa of the U.S. District Court for the Eastern District of Wisconsin also found that the John Doe II prosecutors were pursuing an invalid theory of criminal liability. *See* Decision and Order, attached hereto as **EXHIBIT E**. Judge Randa issued a preliminary injunction against three Milwaukee prosecutors involved in John Doe II, Special Prosecutor Francis Schmitz, and Investigator Dean Nickel, finding that 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.” *Id.* at 12. In other words, the GAB’s “interpretation is simply wrong.” *Id.* at 13. Accordingly, “the plaintiffs cannot be and are not subject to Wisconsin’s campaign finance laws by virtue of their expenditures on issue advocacy.” *Id.* at 18. Because the John Doe II investigation was unsupported by any viable legal theory, had no possibility of obtaining a valid conviction, and was conducted in a retaliatory

fashion, Judge Randa determined that it was undertaken in retaliation for Mr. O’Keefe’s and the Club’s exercise of their federal rights.

IV. The GAB Has Exceeded its Statutory Authority and Has Deprived Mr. O’Keefe and the Club of their Statutory Rights

68. By pursuing speculative criminal theories through a secret John Doe, the GAB has departed from the procedural mandates and limitations set forth in its Enabling Statute. Accordingly, the GAB has both exceeded its statutory authority and has deprived Mr. O’Keefe and the Club of their statutory rights.

A. The GAB has Exceeded its Statutory Authority by Utilizing a John Doe Proceeding in Place of the Procedures Mandated by its Enabling Statute

69. The GAB’s authority to act is expressly provided by its Enabling Statute; the GAB is not authorized to act outside the authority granted in its Enabling Statute.

70. Under its Enabling Statute, the GAB’s authority is limited to determining whether there is reasonable suspicion that a violation has occurred or is occurring (upon receipt of a complaint or information tantamount to a complaint) and pursuing an investigation to determine if probable cause exists (upon finding that there is a reasonable suspicion that a violation has occurred or is occurring). *See* Wis. Stat. § 5.05(2m)(c)4.

71. The GAB has been involved in this case since its receipt of a complaint by Milwaukee District Attorney Chisholm in August of 2012. As a complainant to the GAB, District Attorney Chisholm informed the GAB of alleged violations of campaign finance laws by Mr. O’Keefe, the Club, and other conservative-leaning groups.

72. Despite the GAB’s authority to commence an investigation “[i]f the board believes that there is reasonable suspicion that a violation . . . has occurred or is occurring,” the GAB did not vote to authorize an investigation. *See* Wis. Stat. § 5.05(2m)(c)4. Instead, the GAB

side-stepped the investigatory procedures in its Enabling Statute by formally seeking to join the John Doe II proceeding in Milwaukee County. The GAB was admitted to John Doe II and was given complete access to all materials covered by the Secrecy Order in John Doe II.

73. As part of John Doe II, the GAB was able to conduct its affairs in complete secrecy, permitting the GAB to explore speculative criminal theories without any knowledge or oversight by the accused or the public.

74. For more than nine months, the GAB participated in carrying out the John Doe II proceeding without opening an investigation as required by its Enabling Statute. During that time, John Doe II continued to push forward, including the issuance of numerous search warrants for telephone records, bank records, and e-mail accounts. The GAB's actions throughout this time were in excess of its statutory authority. Furthermore, all resources used by the GAB in furtherance of John Doe II constituted illegal expenditures of taxpayer funds.

75. The GAB's desire to avoid its procedural mandates is apparent. On information and belief, the standard for commencing a John Doe proceeding is essentially identical to the standard for commencing an investigation by the GAB. A John Doe proceeding may commence upon a showing that there is "reason to believe" that a violation of campaign finance law had occurred. Similarly, a GAB investigation may commence if the GAB believes there is "reasonable suspicion" that a violation has occurred. *See id.* at § 5.05(2m)(c)4 ("If the board believes that there is reasonable suspicion that a violation under subd. 2 has occurred or is occurring, the board may by resolution authorize the commencement of an investigation.").

76. Only after learning that Attorney General Van Hollen would not assist with John Doe II did the GAB vote in mid-2013 to commence an investigation under Wis. Stat. § 5.05(2m)(c)(4). On information and belief, the GAB, working in concert with Milwaukee

prosecutors, commenced the investigation for the purpose of expanding John Doe II to Dane, Columbia, Dodge, and Iowa Counties and facilitating its participation in those proceedings. Only six days after voting to open its investigation, the GAB gathered the district attorneys at its offices in Madison, Wisconsin and referred the matter to them.

77. The GAB's referral to the district attorneys is a significant event under its Enabling Statute. The referral reflects the GAB's choice between either: (a) pursuing a civil enforcement action; or (b) referring the matter to a district attorney for criminal investigation and prosecution. *Id.* at § 5.05(2m)(c)11 (“[T]he board may, in lieu of civil prosecution of any matter by the board, refer the matter to the district attorney for the county in which the alleged violator resides.”). The GAB chose to refer the matter.

78. After the GAB referred the matter to the district attorneys, the GAB was required by its Enabling Statute to forego any further involvement in the matter. *See Wis. Stat. § 5.05(2m)(c)11* (the referred proceedings were to be held “in lieu of civil prosecution of any matter by the board[.]”). Indeed, the district attorneys even conveyed to Judge Kluka that the GAB would no longer be playing a role within John Doe II. *See Exhibit C* (further involvement by the GAB “may compromise a related criminal inquiry by a prosecutor.”).

79. Yet, since the time of its referral, the GAB has continued to play a prominent role in John Doe II. In September of 2013, for instance, GAB special investigator Nickel sought multiple search warrants in John Doe II on behalf of the GAB. Furthermore, on information and belief, the GAB continues to employ Mr. Schmitz as a special investigator for the GAB, providing him an office and paying him to pursue John Doe II on behalf of the GAB. The GAB itself also continues to be a party to John Doe II.

80. The GAB's continued involvement in John Doe II – or in any proceeding regarding the matters it referred to the district attorneys – is prohibited by its Enabling Statute and constitutes actions outside the scope of its statutory authority.

81. The GAB's actions exceeding its statutory authority have caused and continue to cause significant expense to the taxpayers in Wisconsin. On information and belief, for 2014 alone, the GAB has spent at least \$55,000.00 in connection with the John Doe II, including paying both Dean Nickel and Francis Schmitz as special investigators for the GAB. *See* OpenBook Wisconsin – Government Accountability Board, attached hereto as **EXHIBIT F**. The costs associated with the use of GAB staff and other contract services further increases the amount of illegal expenditures by the GAB.

B. The GAB has Deprived Mr. O'Keefe and the Club of their Statutory Rights by Avoiding the Procedural Mandates of its Enabling Statute

82. In addition to its illegal expenditures, the GAB's actions have deprived Mr. O'Keefe and the Club of their statutory rights afforded by the Enabling Statute.

83. The GAB's Enabling Statute specifies the process the GAB is required to follow in investigating alleged violations of campaign finance laws. The Enabling Statute obligates the GAB to follow various procedural safeguards designed to protect the subjects of the investigation and minimize the likelihood of arbitrary enforcement. These safeguards include notice and disclosure requirements, as well as mandatory voting, reporting, and appointment requirements. *See* Wis. Stat. §§ 5.05(1), 5.05(2m)(c)4-10. The GAB also has promulgated regulations regarding the process it must follow in considering allegations of wrongdoing, including providing the alleged violator an opportunity to answer, file counterclaims, and make arguments to the GAB. *See* GAB § 20.04.

84. Despite having received a complaint by District Attorney Chisholm and commencing an investigation into Mr. O’Keefe and the Club, the GAB has failed to satisfy the procedural mandates of its Enabling Statute and regulations.

85. To date, the only “notice” Mr. O’Keefe and the Club have received relating to the GAB investigation is when they were served subpoenas on October 3, 2013. Neither Mr. O’Keefe nor the Club were given an opportunity to file an answer, counterclaim, or present arguments to the GAB. Nor were Mr. O’Keefe or the Club provided information regarding exculpatory evidence in the possession of the GAB. *See* Wis. Stat. § 5.05(2m)(c)10.

86. Moreover, the GAB has expressly refused to provide such documents to Mr. O’Keefe or the Club, despite a formal request for documents under Wis. Stat. §§ 5.05(1)-(2m) and a formal request under the Wisconsin Public Records Law, Wis. Stat. §§ 19.31-19.39, for documents explicitly open to public inspection and copying under Wis. Stat. § 5.05(5s)(e)2.

87. The GAB’s participation in John Doe II – which itself is in excess of the GAB’s statutory authority – does not and cannot override the express procedural mandates of its Enabling Statute and promulgated regulations. Nor can the GAB seek admission to a John Doe proceeding and its accompanying secrecy order in order to avoid giving notice to the subject of its investigation and satisfying its disclosure requirements.

88. As shown by the GAB’s prior conduct in John Doe I, however, this is not the first time the GAB has utilized a John Doe proceeding in an attempt to avoid its obligations and responsibilities to conduct investigations in accordance with the investigative procedure clearly delineated in the Enabling Statute and applicable regulations. Not only did the GAB improperly refer its investigation into Mr. Gardner and WSOR to the wrong district attorney (who

incidentally had initiated a John Doe proceeding), the GAB then continued to pursue civil prosecution against WSOR despite the express prohibition in Wis. Stat. § 5.05(2m)(c)11.

89. By failing to follow the statutory safeguards and obligations in its Enabling Statutes and regulations, the GAB has deprived Mr. O’Keefe and the Club of their statutory rights.

Count I

Declaratory Judgment – Taxpayer Suit for Illegal Expenditures by the GAB

90. Mr. O’Keefe and the Club incorporate by reference the allegations in all paragraphs of this Complaint as though fully set forth in this paragraph.

91. Mr. O’Keefe and the Club bring this claim on their behalf and on behalf of all taxpayers in Wisconsin.

92. The GAB’s Enabling Statute authorizes the GAB to administer campaign finance laws in the State of Wisconsin, including both the power to issue regulations and the power to investigate potential violations of the laws it administers. However, the GAB must execute its powers in accordance with the procedural mandates and obligations provided by its Enabling Statute. The GAB has no authority to act outside of the statutory authority provided by its Enabling Statute.

93. In this case, the GAB has failed and continues to fail to stay within the confines of its statutory authority by, among other actions: (1) participating in a John Doe proceeding for more than nine months before it commenced its own investigation; and (2) continuing to participate in John Doe II after referring the matter to the district attorneys for criminal investigation and potential prosecution.

94. The GAB cannot seek to expand its statutory authority by utilizing the John Doe procedure in place of the procedural mandates and safeguards provided by its Enabling Statute and regulations. Nonetheless, that is exactly what the GAB has accomplished in this case. Under the veil of the John Doe proceeding and the Secrecy Order that comes with it, the GAB joined John Doe II in September of 2012 prior to the commencement of a GAB investigation, and the GAB has continued to play a prominent role in John Doe II ever since.

95. The GAB has made its choice and must abide by it. By opening an investigation and referring the matter to the district attorneys to pursue an expanded John Doe II proceeding, the GAB must forego any further involvement in the proceedings. *See Wis. Stat. 5.05(2m)(c)11* (“[T]he board may, in lieu of civil prosecution of any matter by the board, refer the matter to the district attorney for the county in which the alleged violator resides[.]”). Despite its desire to maintain control and expand its reach, the GAB cannot unilaterally expand its statutory authority to allow it to continue participating in the John Doe proceeding against Mr. O’Keefe, the Club, and other conservative-leaning groups.

96. Nor can the GAB seek to expand its statutory authority by arbitrarily refusing to make necessary findings and determinations, all the while participating in a years-long John Doe proceeding to no end. *See Wis. Stat. § 5.05(2m)(e)5* (establishing a 90-day period in which the GAB must review the investigation and setting forth the requirements to continue the investigation for another 90-day period).

97. As shown by the role assumed by the GAB in the proceedings against Mr. Gardner and WSOR, the GAB has shown a propensity to utilize John Doe proceedings in an attempt to exceed its statutory authority. The fact that the GAB prefers the extra power conferred

to district attorneys in a John Doe proceeding does not permit it to exceed its well-defined powers under its Enabling Statute.

98. Because the GAB is acting outside of its statutory authority, the time and money expended by the GAB constitutes an illegal expenditure of state resources. The illegal expenditures by the GAB not only includes the money it directly pays to Special Prosecutor Francis Schmitz (to pursue John Doe II) and to Dean Nickel (to support the pursuit), but also every hour of time spent by its staff and other agents of the GAB in its continued pursuit against Mr. O’Keefe, the Club, and other conservative-leaning groups through John Doe II.

99. The issue of whether the GAB is acting outside of its statutory authority, and thus making illegal expenditures, constitutes an actual, real, substantial, and presently existing controversy that may be resolved by specific relief.

100. Mr. O’Keefe and the Club seek, on behalf of themselves and all taxpayers in the State of Wisconsin, a declaratory judgment under Wis. Stat. § 806.04 declaring that the GAB has made and continues to make illegal expenditures associated with its participation in John Doe II.

101. Mr. O’Keefe and the Club also seek, on behalf of themselves and all taxpayers in the State of Wisconsin, equitable relief to enjoin the GAB from continued involvement in the John Doe II and any other participation in John Doe proceedings in lieu of the statutory procedures required by its Enabling Statute.

Count II

Declaratory Judgment – The Statutory Rights of Mr. O’Keefe and the Club

102. Mr. O’Keefe and the Club incorporate by reference the allegations in all paragraphs of this Complaint as though fully set forth in this paragraph.

103. Not only has the GAB exceeded its statutory authority by pursuing a criminal investigation in a secret John Doe proceeding, the GAB has utilized the John Doe proceeding to avoid adhering to its obligations and duties set forth in its Enabling Statute and promulgated regulations.

104. Despite opening an investigating into Mr. O’Keefe and the Club, issuing process through the John Doe proceeding, and referring the matter to district attorneys in lieu of civil enforcement, the GAB has failed to fulfill its notice and disclosure requirements. The GAB has also failed to provide Mr. O’Keefe and the Club an opportunity to file an answer, file counterclaims, and make arguments to the GAB.

105. The GAB’s refusal to comply with the procedural mandates of its Enabling Statute and regulations has deprived Mr. O’Keefe and the Club of their statutory rights. In addition, the very nature of the GAB’s involvement in the John Doe proceeding, which is in excess of its authority, deprives Mr. O’Keefe and the Club of the procedural safeguards set forth in the Enabling Statute. *See Wis. Stat. § 5.05(2m)(e)11* (referral to a district attorney must be “in lieu of civil prosecution of any matter by the board.”).

106. The issue of whether the GAB has deprived Mr. O’Keefe and the Club of their statutory rights and the procedural safeguards of the GAB’s enabling statute is an actual, real, substantial, and presently existing controversy that may be resolved by specific relief.

107. Mr. O’Keefe and the Club seek a declaratory judgment under Wis. Stat. § 806.04 declaring that the GAB has deprived Mr. O’Keefe and the Club of their statutory rights and the procedural safeguards of the GAB’s enabling statute. Mr. O’Keefe and the Club also seek equitable relief to enjoin the GAB from continuing to avoid its duties and obligations by participating in the John Doe proceeding.

Prayer for Relief

WHEREFORE, Mr. O’Keefe and the Club pray for and request relief against the Government Accountability Board in the form of:

- A. A declaratory judgment declaring that the GAB has made and continues to make illegal expenditures associated with its participation in John Doe II;
- B. A declaratory judgment declaring that the GAB has deprived Mr. O’Keefe and the Club of their statutory rights and the procedural safeguards of the GAB’s enabling statute;
- D. Equitable relief to enjoin the GAB from continued involvement in John Doe II and any future John Doe proceedings; and
- E. Equitable relief to enjoin the GAB to follow the procedures mandated in its Enabling Statute, including following the notice and disclosure requirements as to Mr. O’Keefe and the Club, and from continuing to avoid its duties and obligations by participating in the John Doe proceeding.

Demand for Jury Trial

Mr. O’Keefe and the Club demand a trial by jury on all claims or issues so triable.

Dated: May 28, 2014

Respectfully submitted,

FOX, O'NEILL & SHANNON, S.C.



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