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December 29, 2014

The Hon. Lee S. Dreyfus, Jr.
c/o Ms. Amy M., Judicial Assistant
Waukesha County Courthouse – Br. 5
Civil Division, Room C-167
P.O. Box 1627
Waukesha, WI 53187-1627

Re: O'Keefe, et al. v. Wisconsin Government Accountability Board, et al.
Waukesha County Case No. 14CV1139
Our File No. 6187.19261

Dear Judge Dreyfus:

Enclosed for filing in the above-referenced matter, is *Defendants' Answer and Affirmative Defenses to First Amended Complaint*.

By copy of this letter, a copy of the same is served upon counsel for plaintiffs. We appreciate the Court's attention to this matter.

Very truly yours,

LEE, KILKELLY, PAULSON & YOUNGER, S.C.

Paul W. Schwarzenbart

Enclosures

cc: Mr. Matthew W. O'Neill (via email & U.S. Mail; w/ enc.)
Mr. Dane C. Martin / Mr. Edward D. Greim (via email & U.S. Mail; w/ enc.)
Mr. Kevin J. Kennedy (via email; w/ enc.)
Mr. Thomas H. Brush (via email; w/ enc.)

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STATE OF WISCONSIN **CIRCUIT COURT** **WAUKESHA COUNTY**
BRANCH 5

ERIC O'KEEFE, and
WISCONSIN CLUB FOR GROWTH, INC.,
Individually and on behalf of others similarly situated,

Plaintiffs,

v. **Case No. 2014CV1139**

WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD, and KEVIN J. KENNEDY, in his official capacity,

Defendants,

DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES TO FIRST AMENDED COMPLAINT

NOW COME the defendants, the Wisconsin Government Accountability Board ("GAB" or "Board") and Kevin J. Kennedy (collectively, "defendants"), by their undersigned counsel, and for their answer to the plaintiffs' First Amended Complaint, state as follows:

General Statement

Headings and sub-headings from the First Amended Complaint are reproduced in this answer solely for the convenience of the court and the inclusion of such headings and sub-headings does not constitute an admission of any allegations contained in such heading and sub-headings. Defendants do not respond to allegations of the complaint that amount to nothing more than opinion and hyperbole, as such allegations are not a proper form of pleading. Wis. Stat. § 802.02(1) (a pleading that sets forth a claim form relief shall contain a "short and plain statement of the claim, identifying the transaction or occurrence or series

of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief").

Nature of the Action

1. In answering paragraph 1, said paragraph constitutes opinion and hyperbole which does not require a responsive pleading; if a response is required, defendants admit that GAB is a state agency having the responsibilities and authority delegated to it under the laws of the state of Wisconsin; defendants admit that a "John Doe" proceeding is an investigative tool authorized and governed by Wis. Stat. § 968.26; and defendants deny all other allegations contained therein.

2. In answering paragraph 2, said paragraph constitutes opinion and hyperbole which does not require a responsive pleading; if a response is required, defendants deny.

3. In answering paragraph 3, said paragraph sets forth conclusions of law to which no responsive pleading is required; if a response is required, defendants specifically deny that Wis. Stat. §§ 5.01 to 5.95 is properly characterized as an "Enabling Statute"; defendants specifically deny that Wis. Stat. §§ 5.01 to 5.95 confers any "rights" on the plaintiffs or persons similarly situated and therefore deny that plaintiffs have been deprived of any rights; defendants affirmatively state that Wis. Stat. § 5.05(1) provides that the GAB "has responsibility for the administration of chs. 5 to 12, other laws relating to elections and election campaigns, subch. III of ch. 13, and subch. III of ch. 19" and that the GAB possesses all power and authority expressly conferred or necessarily implied from the statutes under which it operates; defendants admit that the words "John Doe" do not appear within Wis. Stat. §§ 5.01 to 5.95 but affirmatively state that the GAB has authority to investigate both potential criminal and civil violations under Wis. Stat. §§ 5.05(2m)(a) and

(2m)c.4. and affirmatively state that after a finding of probable cause the GAB has authority to prosecute civil actions and to refer matters to district attorneys for criminal prosecution under Wis. Stat. § 5.05(2m)(c)11., 14., 15., and 16. and Wis. Stat. § 978.05 (1); and defendants deny all other allegations contained therein.

4. In answering paragraph 4, defendants affirmatively state that from August 2012 into June 2013 the district attorneys who petitioned to open John Doe proceedings initiated contacts with the GAB and consulted with the GAB regarding legal questions material to the subject matter of the investigations and that from June 20, 2013 to January 2014 the GAB cooperated with the district attorneys and special prosecutor in the John Doe II investigation; and defendants deny the allegations to the extent inconsistent with this statement and specifically deny that its conduct in consulting and cooperating with the district attorneys in John Doe investigations was "illegitimate and unauthorized."

5. In answering paragraph 5, said paragraph consists of a description of relief sought by the plaintiffs, and therefore no responsive pleading is required thereto; if a response is required, defendants deny that plaintiffs are entitled the relief they say they seek, and defendants affirmatively state that the GAB has conducted any investigation in compliance with its authority, particularly Wis. Stat. §§ 5.05(1)(c) and (2m), and that in doing so defendants have acted in reliance on Wisconsin Attorney General Opinion OAG 10-08, which states that the GAB is authorized by law to work cooperatively with district attorneys in criminal investigations and that:

> The Board also is not required to refrain from commencing an investigation after an investigation has been commenced by the district attorney. The district attorney has no statutory obligation to refrain from commencing an investigation once an investigation has been commenced by the Board. The district attorney also has no

> statutory obligation to refrain from commencing a criminal proceeding once the Board has commenced a civil action.
>
> To the extent statutorily possible the Board, district attorneys, the Attorney General, and law enforcement authorities should endeavor to cooperate and timely communicate with each other. Doing so will enhance efficiency, avoid duplication of effort, and permit the best use of limited investigative and prosecutorial resources on the part of all of the agencies involved.

In addition, the United States Court of Appeals for the Seventh Circuit has stated that "[t]he GAB has joint enforcement authority with elected district attorneys to investigate violations of the state election laws and to prosecute civil violations; district attorneys in each county have exclusive authority to prosecute criminal violations." Wisconsin Right To Life, Inc. v. Barland ("Barland II"), 751 F.3d 804, 809 (7th Cir. 2014) (emphasis added) (citing to 2007 Wis. Act 1, Sec. 1 and Wis. Stat. § 5.05(2m)). GAB specifically denies that plaintiffs are entitled to any relief under the Wisconsin Open Records law.

6. In answering paragraph 6, said paragraph consists of a description of other claims as to which plaintiffs say they reserve rights, and no response is required thereto; if a response is required, defendants assert that plaintiffs have no rights against the GAB as to the matters reserved and affirmatively state that the United States Court of Appeals for the Seventh Circuit ordered the parallel federal case commenced by the plaintiff dismissed in O'Keefe v. Chisholm, 769 F.3d 916 (7th Cir. 2014).

The Parties

7. In answering paragraph 7, defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first and second sentences of paragraph 7 and therefore deny the same and put plaintiffs to their proof thereon. As to the third sentence of paragraph 7, defendants deny and affirmatively state

that O'Keefe was identified as a person of interest in the investigation conducted by GAB.

8. In answering paragraph 8, defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations therein and therefore deny the same and put plaintiffs to their proof thereon.

9. In answering paragraph 9, as to the first and second sentences, defendants admit; as to the third sentence, defendants admit but affirmatively state that the GAB does have authority to conduct criminal investigations in conjunction with district attorneys under Wis. Stat. § 5.05(2m)(a) and that such authority has been recognized by the Office of the Wisconsin Attorney General in OAG 10-08 and by the United States Court of Appeals in Barland II, 751 F.3d at 809.

10. In answering paragraph 10, defendants admit and affirmatively state that defendant Kennedy has held the position of Director and General Counsel for the GAB since November 5, 2007.

Jurisdiction and Venue

11. In answering paragraph 11, defendants admit that GAB is a Wisconsin state board and Kennedy is domiciled within the State of Wisconsin, but deny all remaining allegations therein.

12. In answering paragraph 12, defendants admit that venue is proper if and only if plaintiffs seek relief against defendant Kennedy solely in his official capacity.

Factual Allegations

13. In answering paragraph 13, defendants deny and affirmatively state that Wis. Stat. § 5.05(1) provides that the GAB "has responsibility for the administration of chs. 5 to 12, other laws relating to elections and election campaigns, subch. III of ch. 13, and subch.

III of ch. 19" and that the GAB possesses all power and authority expressly conferred or necessarily implied from the statutes under which it operates; defendants further state that the GAB has authority to investigate both potential criminal and civil violations under Wis. Stat. §§ 5.05(2m)(a) and (2m)c.4. and that the GAB has authority after a finding of probable cause to prosecute civil actions and to refer matters to district attorneys for criminal prosecution under Wis. Stat. § 5.05(2m)(c)11., 14., 15., and 16. and Wis. Stat. § 978.05 (1); defendants specifically deny that it improperly used a John Doe proceeding and affirmatively state that any investigation by the GAB has been conducted consistent with its authority.

14. In answering paragraph 14, defendants deny that it has conducted a John Doe proceeding; defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations as to the extent of plaintiffs' knowledge of GAB's conduct in relation to the John Doe investigations and GAB Investigation 2013-02 and therefore deny the same and put plaintiffs to their proof thereon; further, defendants assert that information related to GAB investigations is confidential under Wis. Stat. §§ 5.05(5s) and 12.13(5) and that a release of such records may be subject to criminal prosecution under Wis. Stat. § 12.60(1)(bm).

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

15. In answering paragraph 15, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants admit but affirmatively state that the GAB has those responsibilities and that authority delegated to the GAB under all the applicable laws of the state of Wisconsin, as described in paragraphs 3, 5 and 13 of this answer, which is incorporated herein by reference.

16. In answering paragraph 16, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants admit and affirmatively state that the GAB is also responsible for administering Wisconsin laws relating to election campaigns, otherwise known as campaign finance.

17. In answering paragraph 17, said paragraph constitutes a conclusion of law to which no responsive pleading is required. If a response is required, defendants admit the first sentence of said paragraph but affirmatively state that the statutory provisions cited by the plaintiffs are not the exclusive statutory provisions prescribing the GAB's duties and powers; as to the second sentence of said paragraph, defendants deny that Wis. Stat. §§ 5.01 to 5.95 is properly characterized as an "Enabling Statute."

18. In answering paragraph 18, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny the allegations as stated and affirmatively state that the plaintiffs quote part of Wis. Stat. § 5.05(2m)(a) and omit the next sentence of the statute, which states that "[p]rosecutions of alleged criminal violations investigated by the Board may be brought only as provided in par. (c)11., 14., and 16. and s. 978.05(1)" and that plaintiffs' allegations are contrary to the opinion of the United States Court of Appeals for the Seventh Circuit in Barland II that the "GAB has joint enforcement authority with elected district attorneys to investigate violations of the state election laws and to prosecute civil violations; district attorneys in each county have exclusive authority to prosecute criminal violations."

19. In answering paragraph 19, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny and affirmatively state that the GAB is not required to have a complaint to investigate violations

of laws administered by the Board. Wis. Stat. § 5.05(2m)(a) provides in relevant part that "[t]he board shall investigate violations of laws administered by the Board" without respect to whether a complaint is filed with the Board and that "[p]rosecutions of alleged criminal violations investigated by the Board may be brought only as provided in par. (c)11., 14., and 16. and s. 978.05(1)." This authorization for the Board to investigate without the filing of a complaint is further addressed in Wis. Stat. § 5.05(2m)(c)13., which states that if a special investigator or the administrator of the ethics and accountability division, in the course of an investigation authorized by the board, discovers evidence that a violation that was not within the scope of the authorized investigation has occurred or is occurring, the special investigator or the administrator may present that evidence to the Board. If the Board finds that there is reasonable suspicion that a violation has occurred or is occurring that was not within the scope of the authorized investigation, the Board may authorize the special investigator or the administrator to investigate the alleged violation or may elect to authorize a separate investigation of the alleged violation as provided in Wis. Stat. § 5.05(2m)(c)4. In answering this paragraph, defendants reincorporate their statements set forth above in paragraphs 3, 5 and 13 of this answer.

20. In answering paragraph 20, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants state that the statute speaks for itself and deny insofar as plaintiffs' characterization is not complete or accurate.

21. In answering paragraph 21, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants state that the statute speaks for itself and deny insofar as plaintiffs' characterization is not complete

or accurate.

22. In answering paragraph 22, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants state that the statute speaks for itself, deny insofar as plaintiffs' characterization is not complete or accurate, and deny that Wis. Stat. §§ 5.01 to 5.95 is properly characterized as an "Enabling Statute."

23. In answering paragraph 23, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants state that the statute speaks for itself and deny insofar as plaintiffs' characterization is not complete or accurate.

24. In answering paragraph 24, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants state that the statute speaks for itself and deny insofar as plaintiffs' characterization is not complete or accurate.

25. In answering paragraph 25, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants state that the statute speaks for itself and deny insofar as plaintiffs' characterization is not complete or accurate.

26. In answering paragraph 26, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants state that the statute speaks for itself and deny insofar as plaintiffs' characterization is not complete or accurate.

27. In answering paragraph 27, said paragraph constitutes a conclusion of law to

which no responsive pleading is required; if a response is required, defendants state that the statute speaks for itself and deny insofar as plaintiffs' characterization is not complete or accurate.

28. In answering paragraph 28, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants state that the statute and opinion of the Wisconsin Attorney General speak for themselves and deny insofar as plaintiffs' characterization is not complete or accurate; and defendants further reincorporate their affirmative statements set forth in paragraphs 3, 5, 13 and 19 of this answer, which are incorporated by reference.

29. In answering paragraph 29, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny and reincorporate the affirmative statements set forth in paragraphs 3, 5, 13 and 19 of this answer.

II. The Use of John Doe Proceedings in Wisconsin

30. In answering paragraph 30, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants state that the statute authorizing John Doe proceedings speaks for itself.

31. In answering paragraph 31, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants state that the statute authorizing John Doe proceedings speaks for itself and deny insofar as plaintiffs' characterization is not complete or accurate.

32. In answering paragraph 32, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants state that

the statute authorizing John Doe proceedings and the opinion of the Wisconsin Supreme Court speak for themselves and deny insofar as plaintiffs' characterizations of the statute and the court's opinion are not complete or accurate.

33. In answering paragraph 33, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants state that the statute authorizing John Doe proceedings speaks for itself and deny insofar as plaintiffs' characterization is not complete or accurate.

34. In answering paragraph 34, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants state that the statute authorizing John Doe proceedings speaks for itself and deny insofar as plaintiffs' characterization is not complete or accurate.

35. In answering paragraph 35, said paragraph constitutes conclusions of law and legal argument to which no responsive pleading is required; if a response is required, defendants state that the statute authorizing John Doe proceedings speaks for itself and deny insofar as plaintiffs' characterization is not complete or accurate.

36. In answering paragraph 36, said paragraph constitutes conclusions of law and legal argument to which no responsive pleading is required; if a response is required, defendants state that the statute authorizing John Doe proceedings speaks for itself and deny insofar as plaintiffs' characterization is not complete or accurate.

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

37. In answering paragraph 37, defendants deny and affirmatively state that on June 20, 2013, the GAB voted to authorize an investigation designated as GAB Case No.

2013-02 and that all actions of defendants have been undertaken within the scope of, and consistent with, the authority delegated to the GAB under the statutes and administrative rules under which it operates, and consistent with the opinion of the Office of the Wisconsin Attorney General and the opinion of the United States Court of Appeals for the Seventh Circuit in Barland II, as described in the defendants' affirmative statements set forth in paragraphs 3, 5, 13 and 19 above, which are incorporated by reference.

A. The GAB and Precursor John Doe Proceedings

38. In answering paragraph 38, defendants deny.

39. In answering paragraph 39, defendants affirmatively state that the allegations regarding "John Doe I" are immaterial to the claims asserted and the relief sought in this action and therefore no response is required; if a response is required, defendants admit they participated in the issuance of the press release marked as exhibit A, but otherwise deny and affirmatively state that pursuant to Wis. Stat. § 5.05(2m)(c)4., the GAB provided notice to the District Attorneys of Washington and Milwaukee Counties that the GAB had retained a special investigator to investigate persons who were residents of each of their respective jurisdictions. Further, the defendants affirmatively state that the Washington County District Attorney appointed the Milwaukee County District Attorney as special prosecutor and that the Milwaukee County District Attorney and the GAB worked cooperatively on a joint criminal investigation for the best interests of Wisconsin taxpayers, consistent with, the authority delegated to the GAB under the statutes and administrative rules under which it operates, and consistent with the opinion of the Office of the Wisconsin Attorney General and the opinion of the United States Court of Appeals for the Seventh Circuit in Barland II, as described in the defendants' affirmative statements set forth in

paragraphs 3, 5, 13 and 19 above, which are incorporated by reference.

40. In answering paragraph 40, defendants affirmatively state that the allegations regarding "John Doe I" are immaterial to the claims asserted and the relief sought in this action and therefore no response is required; if a response is required, defendants admit that Exhibit B is a copy of the criminal complaint issued against the defendant William Gardner in the circuit court for Washington County and that the complaint speaks for itself; and defendants deny that a formal finding of probable cause was made by the GAB.

41. In answering paragraph 41, defendants affirmatively state that the allegations regarding "John Doe I" are immaterial to the claims asserted and the relief sought in this action and therefore no response is required; if a response is required, defendants state that the part of the press release quoted speaks for itself; otherwise, defendants deny that their actions were contrary to statute and affirmatively state that the GAB has authority to investigate both potential criminal and civil violations under Wis. Stat. §§ 5.05(2m)(a) and (2m)c.4. and that after a finding of probable cause the GAB has authority to prosecute civil actions and to refer matters to district attorneys for criminal prosecution under Wis. Stat. § 5.05(2m)(c)11., 14., 15., and 16. and Wis. Stat. § 978.05 (1); defendants deny a referral was made in the Gardner or "John Doe I" matter and deny that Wis. Stat. §§ 5.01 to 5.95 is properly characterized as an "Enabling Statute."

42. In answering paragraph 42, defendants affirmatively state that the allegations regarding "John Doe I" are immaterial to the claims asserted and the relief sought in this action and therefore no response is required; if a response is required, defendants affirmatively state that Gardner entered a guilty plea to criminal charges brought by the Milwaukee County District Attorney's Office and that the Wisconsin & Southern Railroad

Company ("WSOR") and other parties settled civil forfeiture claims brought by the GAB and that such charges were properly pursued by each agency acting within the scope of their respective authority; deny all other allegations, and specifically deny that Wis. Stat. §§ 5.01 to 5.95 is properly characterized as an "Enabling Statute," that the GAB "scoured" for evidence against "conservative-leaning organizations," that the GAB issued subpoenas, examined witnesses and executed a search warrant.

43. In answering paragraph 43, defendants affirmatively state that the allegations regarding "John Doe I" are immaterial to the claims asserted and the relief sought in this action and therefore no response is required; if a response is required, defendants admit the allegations contained in the first sentence of paragraph 43, deny that its investigation regarding the matter, Investigation No. 2010-05, had a one-sided focus, and affirmatively state that Exhibit A speaks for itself.

44. In answering paragraph 44, defendants affirmatively state that the allegations regarding "John Doe I" are immaterial to the claims asserted and the relief sought in this action and therefore no response is required; defendants affirmatively state that they were first informed of facts by a private source that led to the GAB initiating Investigation No. 2010-05, that the GAB notified the district attorneys of Milwaukee County (residence of WSOR) and Washington County (residence of Gardner) that they had retained a special investigator, in accordance with Wis. Stat. § 5.05(2m)(c)4, that the GAB was entitled to and did pursue civil remedies against WSOR to which WSOR consented, and that the GAB did not make a referral to any district attorney under Wis. Stat. § 5.05(2m)(c)11; defendants deny all other allegations contained therein, and specifically deny that it "sought to inject itself" into John Doe I, that it engaged in a far-reaching investigation through John Doe I

and that a referral from the GAB is a required predicate for a district attorney to initiate a criminal prosecution for a violation Wisconsin's campaign finance laws.

45. In answering paragraph 45, defendants affirmatively state that the allegations regarding "John Doe I" are immaterial to the claims asserted and the relief sought in this action and therefore no response is required; if a response is required, defendants admit that Nickel attested to the allegations of the criminal complaint as the "complaining witness" but deny that he acted on behalf of the GAB in doing so and deny that the conduct of Nickel and the GAB, or that the final adjudication of matters in "John Doe I" contravened the statutes under which the GAB operates and specifically deny that Wis. Stat. §§ 5.01 to 5.95 is properly characterized as an "Enabling Statute"; as to the allegation that Nickel's conduct was "[m]ost troubling of all," said allegation is not factual (see Wis. Stat. § 802.02(1)) and requires no response, but if a response is required, defendants assert that Nickel's role should not be troubling and that only persons without regard for Wisconsin Campaign Finance Laws would be troubled by the GAB assisting district attorneys in law enforcement work which resulted in criminal sanctions being imposed against William Gardner and civil sanctions imposed against WSOR for their unlawful conduct which they admitted, as recommended by the Wisconsin Attorney General in OAG 10-08 and recognized by the United States Court of Appeals in Barland II, 751 F.3d at 809.

46. In answering paragraph 46, defendants deny and further reincorporate their response to paragraph 45 as set forth above; defendants affirmatively state that the John Doe proceeding was opened by the John Doe Judge upon the petition of the Milwaukee County District Attorney's office, not by the GAB, and that the separate GAB Investigation No. 2010-05 was lawfully conducted consistent with the GAB's authority, for the reasons

described in paragraphs 3, 13, 15 and 19, which are incorporated by reference.

47. In answering paragraph 47, defendants deny.

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

48. In answering paragraph 48, defendants admit that plaintiffs were served with subpoenas, but lack knowledge or information sufficient to form a belief as to the truth of the balance of the allegations therein, and therefore deny the same and put plaintiffs to their proof thereon.

1. The Formation of John Doe II.

49. In answering paragraph 49, defendants admit that on August 10, 2012, the Milwaukee County District Attorney's Office filed a petition in the Milwaukee County Circuit to open a John Doe proceeding and that Exhibit C is a copy of an affidavit filed in support of the petition; as to the allegations regarding contact with the GAB, defendants affirmatively state that representatives of the Milwaukee County District Attorney's Office met with GAB staff, as employees of the state agency charged with overseeing the administration of Wisconsin's campaign finance laws, as subject matter experts to discuss information they had obtained as to whether a violation of campaign finance law may have occurred based on the information provided; and deny the allegations to the extent inconsistent with that statement.

50. In answering paragraph 50, defendants admit an order was issued but deny that they were "admitted as parties" to the John Doe; defendants affirmatively state that the September 5, 2012 Order states that the Board members, certain named professional staff, including but not limited to defendant Kennedy and Jonathan Becker, and "support staff

and other professional staff" of the GAB "may have access to the record of these proceedings to the extent necessary for the performance of their duties."

51. In answering paragraph 51, defendants reincorporate their response to paragraph 50 above; defendants specifically deny that defendant Kennedy and Jonathan Becker misled the Board; defendants specifically deny that Kevin Kennedy and Jonathan Becker unilaterally admitted the GAB to John Doe II without the knowledge or approval of the GAB Board; defendants affirmatively state they never requested being listed in the September 5, 2012 order; defendants affirmatively state that the provision in the September 5, 2012 order that the GAB and staff "may have access to the record of these proceedings to the extent necessary for the performance of their duties" did not require Board approval, that listing the Board in the September 5, 2012, order was a necessary predicate so defendant Kennedy could inform Board members of the facts forming the basis for John Doe II, that staff had been contacted by the Milwaukee County District Attorney's office who informed staff that they had discovered some information that appeared to show a violation of coordination rules under chapter 11 and requested input from staff regarding potentially applicable law; defendants further affirmatively state that during the fall of 2012 there was minimal further contact regarding the matter and that defendant Kennedy and staff did advise the Board chair of the contacts initiated by the Milwaukee County District Attorney's office outside of regular board meetings.

52. In answering paragraph 52, defendants deny and affirmatively state that they acted in compliance with the secrecy orders entered in John Doe II and in compliance with their duty of confidentiality under Wis. Stat. § 12.13(5) the violation of which can result in criminal sanctions; defendants affirmatively state that the "gmail" accounts described were

and other professional staff" of the GAB "may have access to the record of these proceedings to the extent necessary for the performance of their duties."

51. In answering paragraph 51, defendants reincorporate their response to paragraph 50 above; defendants specifically deny that defendant Kennedy and Jonathan Becker misled the Board; defendants specifically deny that Kevin Kennedy and Jonathan Becker unilaterally admitted the GAB to John Doe II without the knowledge or approval of the GAB Board; defendants affirmatively state they never requested being listed in the September 5, 2012 order; defendants affirmatively state that the provision in the September 5, 2012 order that the GAB and staff "may have access to the record of these proceedings to the extent necessary for the performance of their duties" did not require Board approval, that listing the Board in the September 5, 2012, order was a necessary predicate so defendant Kennedy could inform Board members of the facts forming the basis for John Doe II, that staff had been contacted by the Milwaukee County District Attorney's office who informed staff that they had discovered some information that appeared to show a violation of coordination rules under chapter 11 and requested input from staff regarding potentially applicable law; defendants further affirmatively state that during the fall of 2012 there was minimal further contact regarding the matter and that defendant Kennedy and staff did advise the Board chair of the contacts initiated by the Milwaukee County District Attorney's office outside of regular board meetings.

52. In answering paragraph 52, defendants deny and affirmatively state that they acted in compliance with the secrecy orders entered in John Doe II and in compliance with their duty of confidentiality under Wis. Stat. § 12.13(5) the violation of which can result in criminal sanctions; defendants affirmatively state that the "gmail" accounts described were

not private, were used specifically to communicate information related to Investigation No. 2013-02 and John Doe II, were used by governmental officials and employees working on matters in their official capacities, that the accounts were used exclusively for public purposes connected with John Doe II and Investigation No. 2013-02, in order to facilitate the anticipated high volume of communications and large size of attachments to emails, to centralize and organize communications concerning Investigation No. 2013-02 and John Doe II, and to protect against potential risks to the integrity of the investigation.

53. In answering paragraph 53, defendants affirmatively state that "offline" referred to the accounts being secure from the general state email system and that users of the gmail accounts were reminded of the purposes for which gmail accounts were used, as stated in paragraph 52 above; defendants deny all allegations to the extent not consistent with the foregoing statement.

54. In answering paragraph 54, defendants deny they participated or assisted in obtaining search warrants and subpoenas; defendants affirmatively state they were aware search warrants and subpoenas would be requested and consulted with the Milwaukee County District Attorney's office regarding campaign finance law cited in the Stelter affidavit.

55. In answering paragraph 55, defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence thereof, and therefore deny the same and put plaintiffs to their proof thereon. Defendants affirmatively state that the May 31, 2013 letter from Wisconsin Attorney General Van Hollen accords with the conclusion of OAG 10-08 and the opinion of the court in Barland II, supra, that the GAB may conduct criminal investigations in conjunction with district attorneys but that

if criminal enforcement is sought by the GAB, the Board must first make a predicate finding of probable cause and then refer the matter to the appropriate district attorney for prosecution; and the GAB and defendants further affirmatively state that Attorney General Van Hollen's letter (Exhibit H to the first amended complaint) speaks for itself.

56. In answering paragraph 56, defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations concerning communications between Chisholm and Van Hollen, and therefore deny all allegations contained therein and put plaintiffs to their proof thereon.

2. The GAB Investigation Commences.

57. In answering paragraph 57, defendants affirmatively state that on June 20, 2013, the GAB voted to authorize an investigation designated as GAB Case No. 2013-02, and that the purpose of the investigation was as stated in the Board's resolution authorizing the investigation; defendants deny all other allegations and specifically deny that the GAB had been "participating" in the John Doe as alleged therein.

58. In answering paragraph 58, defendants deny that it was ever admitted as a "party" to John Doe II and defendants deny that the GAB's participation in John Doe II was "substantial" until after June 20, 2013 when the GAB voted to authorize GAB Investigation No. 2013-02.

59. In answering paragraph 59, defendants admit that Becker was contacting individuals about possibly serving in a dual role as special prosecutor in the John Doe and as Special Investigator for the GAB; admit that Falk was researching legal issues as described in the July 2, 2013 meeting notes described; and admits on June 20, 2013, the GAB authorized the use of a forensic IT company and retention of special investigators;

and deny any other allegations contained therein.

3. The Expansion of John Doe II and Appointment of the Special Prosecutor.

60. In answering paragraph 60, defendants deny and affirmatively state that a representative of the Board was present at the June 26, 2013 meeting, that the meeting was jointly called by GAB staff and the Milwaukee County District Attorney, and that, pursuant to Wis. Stat. § 5.05(2m)(c)4., the GAB's purpose for the meeting was to provide notice that the GAB had retained a special investigator to investigate persons who were residents of each of the jurisdictions of the respective district attorneys.

61. In answering paragraph 61, defendants deny and affirmatively state that Becker asked Schmitz about his interest in a dual role as special prosecutor in the John Doe and as Special Investigator for the GAB and that Schmitz tentatively agreed to serve in those capacities subject to his being appointed by the John Doe Judge and retained by the GAB; and defendants affirmatively state that the affidavit of Francis Schmitz is dated April 15, 2014 and deny that it is dated August 22, 2014.

62. In answering paragraph 62, defendants deny and affirmatively state that the coordination among the prosecutors was primarily undertaken by the Milwaukee County District Attorney's office.

63. In answering paragraph 63, defendants admit that staff counsel did perform the work as described therein but affirmatively state that the work performed at this early stage of the investigation was intended to further both the John Doe II investigation and GAB Investigation No. 2013-02.

64. In answering paragraph 64, defendants deny and affirmatively state that the

letter referenced therein (Exhibit M to the first amended complaint) speaks for itself.

65. In answering paragraph 65, defendants deny plaintiffs' characterization of the contents of the letter and affirmatively state that the letter (Exhibit M to the first amended complaint) speaks for itself.

66. In answering paragraph 66, defendants admit that plaintiffs accurately quote Exhibit F; and defendants deny all other allegations.

67. In answering paragraph 67, defendants admit that portions of a letter drafted by the Milwaukee County District Attorney's Office are accurately quoted and admit that defendants were aware of the purpose of the letter and that it was to be sent to Judge Kluka, but deny that they drafted the letter or approved of its contents prior to its being sent; and defendants affirmatively state that the letter plainly and openly addressed issues material to the appointment of a special prosecutor; and defendants deny all allegations not consistent with the above statements and further affirmatively allege that Wis. Stat. § 12.13(5) prohibited disclosure of the commencement of GAB Investigation No. 2013-02 and therefore the non-disclosure of that fact to Judge Kluka was legally required.

68. In answering paragraph 68, defendants reincorporate their response to paragraph 67 as if fully set forth herein; and defendants lack knowledge or information sufficient to form a belief as to whether Schmitz obtained signatures of county prosecutors, and therefore deny the same and put plaintiffs to their proof thereon; defendants deny that Schmitz would have acted as their "agent" in doing so, assuming he did do so; and defendants affirmatively state that Wis. Stat. § 12.13(5) prohibited disclosure of the commencement of GAB Investigation No. 2013-02 and therefore the non-disclosure of that fact to Judge Kluka was legally required.

69. In answering paragraph 69, defendants admit but affirmatively state that the order speaks for itself.

70. In answering paragraph 70, defendants deny and affirmatively state that, including Schmitz, seven special investigators were retained to perform and performed at least some services for the GAB in GAB Investigation No. 2013-02, but admit their services also benefitted the John Doe prosecutors to the extent that GAB and the prosecutors were cooperating in their investigations; and defendants admit that Digital Intelligence was the main repository and custodian for the electronic evidence obtained in the John Doe investigations.

4. John Doe II is Revealed: The Warrants and Subpoenas against Targets.

71. In answering paragraph 71, defendants admit.

72. In answering paragraph 72, defendants admit but affirmatively state that Nickel's primary task was to review evidence for potential civil enforcement by the GAB and that to the extent the GAB was cooperating with the district attorneys his work also benefitted the criminal investigation undertaken by the district attorneys in John Doe II; and defendants further affirmatively state that upon consideration and discussion of staff research on the matter the board unanimously approved Nickel signing the request for issuance of search warrants as requested by the Milwaukee County District Attorney's office.

73. In answering paragraph 73, defendants admit Exhibit F is quoted accurately and admit that Stelter requested the subpoenas; defendants affirmatively state that they had no obligation to advise subpoena targets in a John Doe investigation being conducted by district attorneys or their special prosecutor of the issuance of subpoenas; and defendants

deny all allegations inconsistent with the foregoing statement.

74. In answering paragraph 74, defendants admit that search warrants were executed and subpoenas were served, but otherwise lack knowledge or information sufficient to form a belief as to the truth of said allegations, and therefore deny the same and put plaintiffs to their proof thereon; defendants further affirmatively state that the subpoenas speak for themselves.

75. In answering the first three sentences of paragraph 75, defendants deny that the search warrants and subpoenas extended to targets "throughout Wisconsin" and affirmatively state that the search warrants and subpoenas speak for themselves as to where they were issued; as to the fourth sentence of paragraph 75, defendants admit that there were discussions as to the possible issuance of search warrants and subpoenas to others, but deny that such were "planned."

76. In answering paragraph 76, defendants admit that GAB staff engaged in the review and revision activities referenced in Exhibit Q to the First Amended Complaint but affirmatively state that the Milwaukee County District Attorney's Office played a greater role in the drafting.

77. In answering paragraph 77, defendants admit.

5. The Order Quashing the John Doe II Subpoenas.

78. In answering paragraph 78, defendants admit.

79. In answering paragraph 79, defendants admit that Judge Kluka recused and that Judge Peterson was appointed, but defendants lack knowledge or information sufficient to form a belief as to the truth of the balance of said allegations, and therefore deny the same and put plaintiffs to their proof thereon.

80. In answering paragraph 80, defendants deny plaintiffs' characterization of the decision by Judge Peterson and affirmatively state that the written decision and Judge Peterson's rationale for the decision speaks for itself.

81. In answering paragraph 81, defendants admit.

82. In answering paragraph 82, defendants admit that defendant Kennedy filed an affidavit; defendants deny plaintiffs' characterization of the contents of the affidavit and affirmatively state that the Kennedy affidavit (Exhibit T to the first amended complaint) speaks for itself; defendants affirmatively state that the Court has a right to consider the interests of third parties and the public and the GAB was not a party to the writ proceedings, nor was the public. The GAB is charged with administration and enforcement of election campaign law in Wisconsin and regularly provides advice to candidates, and therefore, its interests were properly presented to the Wisconsin Court of Appeals. In addition, since the GAB is charged with the administration and enforcement of election campaign law in Wisconsin, and since Wis. Stat. § 11.001 clearly sets forth a policy mandating disclosure of election campaign financing sources to satisfy the public's right for information, the GAB is a proper representative of the public interest that the Wisconsin Court of Appeals may consider. Defendants also affirmatively state that Kennedy's affidavit was tailored in order to abide with Wis. Stat. § 5.05(5s) and 12.13(5).

83. In answering paragraph 83, defendants admit that petitions to bypass were filed, but otherwise lack knowledge or information sufficient to form a belief as to the truth of said allegations and therefore deny the same and put plaintiffs to their proof thereon.

IV. The GAB Has Exceeded its Statutory Authority by Using a John Doe Proceeding in Place of the Procedures Mandated by its Enabling Statute.

84. In answering paragraph 84, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny each and every allegation contained therein and reincorporate their statements set forth above in paragraphs 3, 5, 13 and 19 of this answer.

85. In answering paragraph 85, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny.

A. John Doe II: A Criminal Proceeding Conducted by the GAB.

86. In answering paragraph 86, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants specifically deny that Wis. Stat. §§ 5.01 to 5.95 is properly characterized as an "Enabling Statute" and affirmatively state that Wis. Stat. § 5.05(1) provides that the GAB "has responsibility for the administration of chs. 5 to 12, other laws relating to elections and election campaigns, subch. III of ch. 13, and subch. III of ch. 19" and that the GAB possesses all power and authority expressly conferred or necessarily implied from the statutes under which it operates; defendants further affirmatively state that the scope of the GAB's authority was construed by the Office of the Wisconsin Attorney General, in OAG 10-08, to include authority of the GAB to conduct criminal investigations and that the Attorney General specifically encouraged District Attorneys and the GAB to work together cooperatively to "enhance efficiency, avoid duplication of effort, and permit the best use of limited investigative and prosecutorial resources on the part of all of the agencies involved." Defendants further affirmatively state that the GAB's authority to conduct criminal

investigations in conjunction with district attorneys was recognized by the United States Court of Appeals for the Seventh Circuit Barland II.

87. In answering paragraph 87, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny and reincorporate their response to paragraph 86 as set forth above.

88. In answering paragraph 88, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants admit that the GAB does not have statutory authority to file or prosecute criminal charges and reincorporate their statements set forth above in paragraphs 3, 5, 13 and 19 of this answer.

89. In answering paragraph 89, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny.

90. In answering paragraph 90, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants admit that Schmitz and Nickel successfully defended the referenced, meritless lawsuit brought against them by the plaintiffs; defendants deny the plaintiffs' allegations concerning the nature of a John Doe proceeding, which both mischaracterize the arguments advanced by Schmitz and Nickel and the John Doe statute.

91. In answering paragraph 91, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny.

92. In answering paragraph 92 said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants admit that the GAB paid Schmitz at the rate of $130 per hour for services performed for the GAB in Investigation No. 2013-02 and deny all other allegations.

93. In answering paragraph 93, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny that it was unlawful to hire and compensate Schmitz for services performed for the GAB in Investigation No. 2013-02; and defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations regarding the payment or lack of payment to Schmitz for services performed as the special prosecutor in John Doe II and therefore deny the same and put plaintiffs to their proof thereon.

94. In answering paragraph 94, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny that it was improper to pay Schmitz.

95. In answering paragraph 95, defendants deny the first sentence and prologue to the quoted section of the GAB closed session minutes as grossly mischaracterizing what was told to the Board; defendants deny that Schmitz could not be paid more than $50.00 per hour for services as a special prosecutor and affirmatively state that his compensation could be set by the John Doe Judge and that this compensation was set by Judge Kluka at $130 per hour.

96. In answering paragraph 96, defendants deny and affirmatively state that Schmitz made certain corrections to invoices submitted to the GAB but affirmatively states that conversations about billing parameters and corrections occurred prior to the commencement of this lawsuit, that the GAB assisted Schmitz by providing him with the required forms to be paid from the Special Prosecutor's Fund for activities related to the John Doe, and that some other corrections may still be required.

97. In answering paragraph 97, defendants deny that the GAB paid Schmitz for

services as the special prosecutor and therefore deny all the remaining allegations which rely on the unfounded predicate allegation.

98. In answering paragraph 98, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny.

B. The Ten-Month Unauthorized Investigation.

99. In answering paragraph 99, defendants deny each and every allegation contained therein.

100. In answering paragraph 100, excepting for the quoted part of the statute, defendants deny the first sentence and affirmatively state that Investigation No. 2013-02 was authorized on June 20, 2013; defendants deny the balance of the allegations of said paragraph as grossly mischaracterizing both the nature and quantity of GAB's involvement in John Doe II prior to June 20, 2013.

101. In answering paragraph 101, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny that the GAB desired to avoid or avoided "procedural mandates," and defendants further reincorporate their response set forth in paragraph 86 above.

102. In answering paragraph 102, defendants deny and affirmatively state that the GAB conducts investigations consistent with the confidentiality requirements imposed by Wis. Stat. § 5.05(5s) and Wis. Stat. § 12.13(5) and that plaintiff's allegation that the GAB is required to conduct investigations with "knowledge and oversight of the accused and the public" is unfounded in law and in direct contradiction to the intent of the Wisconsin Legislature in adopting 2007 Wisconsin Act 1 and as Wis. Stat. § 5.05(5s) and Wis. Stat. § 12.13(5) were construed by the Office of the Wisconsin Attorney General in OAG 03-

14, a copy of which is attached as **Exhibit A** to this answer.

103. In answering paragraph 103, defendants deny.

104. In answering paragraph 104, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny.

105. In answering paragraph 105, defendants affirmatively state that the GAB commenced an investigation pursuant to Wis. Stat. § 5.05(2m)(a) and 5.05(2m)c.13. and that it met with district attorneys for the purpose of providing notice that the GAB had retained a special investigator to investigate persons who were a residents of each of their respective jurisdictions; and defendants deny all allegations inconsistent with the foregoing statement.

C. Post-Referral Involvement by the GAB.

106. In answering paragraph 106, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny and affirmatively state that the GAB has made no referral, nor the predicate finding of probable cause, and defendants further reincorporate their response set forth in paragraph 86 above.

107. In answering paragraph 107, defendants deny and affirmatively state that the GAB has made no referral, nor the predicate finding of probable cause; defendants further affirmatively state that the statements of Schmitz made during a status update meeting or the affidavit of Stelter requesting warrants or subpoenas do not change the facts that the GAB made no finding of probable cause in Investigation 2013-02 and made no referral.

108. In answering paragraph 108, said paragraph contains conclusions of law to which no responsive pleading is required; if a response is required, defendants deny and affirmatively state that the GAB has made no referral, nor the predicate finding of probable

cause, and defendants further reincorporate their response set forth in paragraph 86 above and affirmatively state that statements of individual Board members are immaterial to any issue in this case and the only material issues in this case stem from Board action.

109. In answering paragraph 109, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny and affirmatively state that the GAB has made no referral, nor the predicate finding of probable cause, and defendants further reincorporate their response set forth in paragraph 86 above.

110. In answering paragraph 110, defendants admit that Nickel signed affidavits in support of a request for issuance of search warrants and that GAB retained Schmitz as a special investigator and has provided him access to office space; defendants deny all allegations inconsistent with the foregoing statement.

111. In answering paragraph 111, defendants deny and affirmatively state that the GAB has made no referral, nor the predicate finding of probable cause, and defendants further reincorporate their response set forth in paragraph 86 above.

D. Unauthorized Requests for Search Warrants.

112. In answering paragraph 112, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny and affirmatively state that GAB Special Investigator Nickel requested search warrants on behalf of Francis Schmitz acting in his capacity as special prosecutor in John Doe II.

113. In answering paragraph 113, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants admit.

114. In answering paragraph 114, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny that

the GAB requested search warrants and affirmatively state that GAB Special Investigator Nickel requested search warrants on behalf of Francis Schmitz acting in his capacity as special prosecutor in John Doe II.

115. In answering paragraph 115, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny, and specifically deny that the GAB requested search warrants.

E. Illegal Inspection of Bank Records.

116. In answering paragraph 116, defendants admit that search warrants and subpoenas were served on financial institutions, but otherwise lack knowledge or information sufficient to form a belief as to the truth of said allegations and therefore deny the same and put plaintiffs to their proof thereon.

117. In answering paragraph 117, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny.

118. In answering paragraph 118, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants admit the records were not obtained by the GAB but affirmatively state that the records were properly obtained by the Milwaukee County District Attorney's office and by special prosecutor Schmitz in John Doe II and that the GAB and staff were authorized to review the records by the order entered in the John Doe judge on September 5, 2012 and any subsequent amendments thereto; defendants deny that the GAB made a finding of probable cause and deny that it acted outside the scope of its authority in reviewing the records; and defendants further reincorporate their response set forth in paragraph 86 above.

F. Continued Activity after Termination of its Investigation.

119. In answering paragraph 119, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny.

120. In answering paragraph 120, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants admit the words of the statute but deny that the statute was violated; defendants affirmatively state that the Board took votes and actions which explicitly directed staff to continue the investigation; and defendants affirmatively state that any alleged failure in the procedure in voting to continue an investigation confers no rights and remedies upon the plaintiffs, whether as taxpayers or in any other capacity.

121. In answering paragraph 121, said paragraph contains conclusions of law to which no responsive pleading is required; if a response is required, defendants affirmatively state that between June 20, 2013 and September 25, 2013, the Board took votes and actions which explicitly directed staff to continue the investigation; and defendants affirmatively state that any alleged failure in the procedure in voting to continue an investigation confers no rights and remedies upon the plaintiffs, whether as taxpayers or in any other capacity; and defendants affirmatively state that statements of individual Board members are immaterial to any issue in this case and the only material issues in this case stem from Board action.

122. In answering paragraph 122, said paragraph contains conclusions of law to which no responsive pleading is required; if a response is required, defendants affirmatively state that both formal and informal votes to continue Investigation No. 2013-02 occurred between September 25, 2013 and July 21, 2014; defendants admit that

Investigation No. 2013-02 terminated effective August 19, 2014 because of the vote conducted on July 21, 2014; defendants deny all allegations to the extent inconsistent with the foregoing statement.

123. In answering paragraph 123, defendants deny and affirmatively state the allegation is groundless and frivolous, and preposterous on its face; Investigation No. 2013-02 was closed on August 19, 2014 and activities in May 2014 occurred before the July 21, 2014 vote; the only activity of defendants related to the investigation since late May 2014 has consisted of defending this lawsuit initiated by the plaintiffs and filing an amicus brief in support of the defendants in in O'Keefe v. Chisholm, 769 F.3d 916 (7th Cir. 2014), in which plaintiffs had filed a motion for leave to amend their claims to bring official capacity claims against GAB members, all of which activity was authorized by the Board and necessary to defend against litigation commenced or threatened by the plaintiffs and to support defendants in the aforementioned federal case, as authorized by Wis. Stat. § 5.05(1)(e).

124. In answering paragraph 124, said paragraph contains conclusions of law to which no responsive pleading is required; if a response is required, defendants deny that the GAB has exceeded its statutory authority and therefore deny all allegations based on that unfounded predicate; defendants admit that as of March 19, 2014, monies had been expended by the GAB on Investigation 2013-02, defendants admit that there was discussion of the potential cost to complete the investigation.

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

125. In answering paragraph 125, defendants deny and defendants further deny

that the complaint in this matter identifies any "statutory rights" to which plaintiffs are entitled beyond their generalized interest allegedly as Wisconsin taxpayers; in addition, defendants allege, upon information and belief, that plaintiff Wisconsin Club For Growth, Inc., as an alleged not-for-profit corporation, is not a taxpayer of the state of Wisconsin and therefore may lack standing.

126. In answering paragraph 126, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny plaintiffs' characterization of the statute and specifically deny that Wis. Stat. §§ 5.01 to 5.95 is properly characterized as an "Enabling Statute."

127. In answering paragraph 127, defendants deny and defendants further deny the predicate allegation that the GAB received a complaint from District Attorney Chisholm.

128. In answering paragraph 128, defendants deny that the GAB was involved in requesting or obtaining subpoenas issued in December 2012; defendants admit it gave plaintiffs no notice of the commencement of Investigation No. 2013-02 and affirmatively state that the investigation never proceeded to the point where notice was required.

129. In answering paragraph 129, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny and affirmatively state that no notice was provided to plaintiffs because the GAB has not yet issued subpoenas or sought depositions, therefore pursuant to Wis. Stat. § 5.05(1)(c), no notice has been required; and defendants further reincorporate their response set forth in paragraph 86 above.

130. In answering paragraph 130, said paragraph constitutes a conclusion of law

to which no responsive pleading is required; if a response is required, defendants deny and affirmatively state that no notice was provided to the plaintiffs because Investigation No. 2013-02 had not proceeded to the point where notice was required; and defendants further reincorporate their response set forth in paragraph 86 above.

131. In answering paragraph 131, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny each and every allegation contained therein, including the predicate allegations that the GAB made probable cause findings and referred the matter to district attorneys, neither of which event occurred; defendants affirmatively state that no exculpatory evidence was provided to the plaintiffs because Investigation No. 2013-02 had not proceeded to the point where the requirement to provide exculpatory evidence was triggered; defendants specifically deny that Wis. Stat. §§ 5.01 to 5.95 is properly characterized as an "Enabling Statute"; and defendants reincorporate their response set forth in paragraph 86 above;

132. In answering paragraph 132, pursuant to and consistent with confidentiality requirements imposed by Wis. Stat. § 5.05(5s) and Wis. Stat. § 12.13(5), defendants denied plaintiffs' request for records and affirmatively state that such refusal was proper for the reasons stated in its letters to plaintiff's counsel denying such requests dated May 7, 2014, May 7, 2014 and May 30, 2014, copies of which are included in **Exhibit DD** to the First Amended Complaint, consistent with their obligations under Wis. Stat. § 5.05(5s) and Wis. Stat. § 12.13(5), as construed by the Office of the Wisconsin Attorney General in OAG 03-14, a copy of which is attached as **Exhibit A** to this answer.

133. In answering paragraph 133, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny each

and every allegation contained therein, including all of the predicate allegations previously denied in this answer.

134. In answering paragraph 134, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny each and every allegation contained therein, including all of the predicate allegations previously denied in this answer.

135. In answering paragraph 135, defendants deny and defendants further deny that the complaint in this matter identifies any "statutory rights" to which plaintiffs are entitled beyond their generalized interest allegedly as Wisconsin taxpayers; in addition, defendants allege, upon information and belief, that plaintiff Wisconsin Club For Growth, Inc., as an alleged not-for-profit corporation, is not a taxpayer of the state of Wisconsin and therefore may lack standing.

Count I

Declaratory Judgment – Taxpayer Suit for Illegal Expenditures by the GAB

136. In answering paragraph 136, defendants reincorporate as if fully set forth herein their responses to all paragraphs of the first amended complaint as set forth above in this answer.

137. In answering paragraph 137, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants lack knowledge or information sufficient to form a belief as to the truth of said allegations and therefore deny the same and put plaintiffs to their proof thereon; in addition, defendants affirmatively state that plaintiff Wisconsin Club For Growth, Inc., as an alleged not-for-profit corporation, is not a taxpayer of the state of Wisconsin and therefore may lack

standing.

138. In answering paragraph 138, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny and affirmatively allege that the GAB's authority extends to all matters as expressly conferred or necessarily implied from the statutes under which it operates and that the scope of such authority was construed by the Office of the Wisconsin Attorney General, in OAG 10-08, upon which defendants have relied with respect to its conduct in Investigation No. 2013-02, and defendants further reincorporate their statements set forth above in paragraphs 3, 5, 13 and 19 of this answer.

139. In answering paragraph 139, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny each and every allegation contained therein, including the predicate allegations previously denied in this answer.

140. In answering paragraph 140, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny each and every allegation contained therein, including the predicate allegations previously denied in this answer; and defendants specifically deny that the GAB's conduct at issue in this case represents an expansion of its authority.

141. In answering paragraph 141, defendants deny each and every allegation contained therein, including the predicate allegations previously denied in this answer.

142. In answering paragraph 142, said paragraph constitutes a conclusion of law to which no responsive pleading is required; if a response is required, defendants deny each and every allegation contained therein, including the predicate allegations previously

denied in this answer; and defendants specifically deny that the GAB's conduct at issue in this case represents an expansion of its authority.

143. In answering paragraph 143, defendants deny each and every allegation contained therein, including the predicate allegations previously denied in this answer; and defendants specifically deny that the GAB's conduct at issue in this case exceeds its authority.

144. In answering paragraph 144, defendants deny each and every allegation contained therein, including the predicate allegations previously denied in this answer.

145. In answering paragraph 145, defendants deny and affirmatively state that to the extent that certain parts of statements of individual Board members may dissent from the Board majority, individual Board members' views are immaterial to any issue in this case and the only material issues in this case stem from Board action.

146. In answering paragraph 146, defendants deny.

147. In answering paragraph 147, said paragraph consists of a description of relief sought by the plaintiffs, and therefore no responsive pleading is required thereto; if a response is required, defendants deny that plaintiffs are entitled the relief they say they seek; and defendants specifically deny that the GAB's conduct at issue in this case exceeds its authority and denies that defendants have made any illegal expenditures as alleged therein.

148. In answering paragraph 148, said paragraph consists of a description of relief sought by the plaintiffs, and therefore no responsive pleading is required thereto; if a response is required, defendants deny that plaintiffs are entitled the relief they say they seek; and defendants specifically deny that the GAB's conduct at issue in this case exceeds

its authority.

Count II

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

149. In answering paragraph 149, defendants reincorporate as if fully set forth herein their responses to all paragraphs of the first amended complaint as set forth above in this answer.

150. In answering paragraph 150, defendants deny each and every allegation contained therein, including the predicate allegations previously denied in this answer; and defendants specifically deny that the GAB's conduct at issue in this case exceeds its authority.

151. In answering the first sentence of paragraph 151, defendants deny each and every allegation contained therein, including the predicate allegations previously denied in this answer; defendants affirmatively state that Investigation No. 2013-02 had not proceeded to the point where notice and disclosure to the plaintiffs was required.

152. In answering paragraph 152, defendants deny each and every allegation contained therein, including the predicate allegations previously denied in this answer; and defendants specifically deny that the GAB referred the matter to district attorneys or deprived plaintiffs of any alleged rights.

153. In answering paragraph 153, defendants deny.

154. In answering paragraph 154, said paragraph consists of a description of relief sought by the plaintiffs, and therefore no responsive pleading is required thereto; if a response is required, defendants deny that plaintiffs are entitled to the relief they seek.

Count III

Open Records Law – Mandamus

155. In answering paragraph 155, defendants reincorporate as if fully set forth herein their responses to all paragraphs of the first amended complaint as set forth above in this answer.

156. In answering paragraph 156, said paragraph consists of a description of relief sought by the plaintiffs, and therefore no responsive pleading is required thereto; if a response is required, defendants deny that plaintiffs are entitled to the relief they seek.

157. In answering paragraph 157, defendants admit that plaintiffs made the requests described but deny that plaintiffs were entitled to receive any of the documents and materials requested, to the extent that any such documents and materials exist, under the Wisconsin Public Records law or Wis. Stat. § 5.05(5s); defendants specifically deny that Wis. Stat. §§ 5.01 to 5.95 is properly characterized as an "Enabling Statute."

158. In answering paragraph 158, defendants admit but affirmatively state that the basis for the GAB's responses to the Open Records requests are more fully set forth in the two letters from the GAB dated May 7, 2014, and a subsequent letter from the GAB dated May 30, 2014, which letters speak for themselves and copies of which are included in Exhibit DD attached to the plaintiffs' First Amended Complaint.

159. In answering paragraph 159, said paragraph consists of a description of relief sought by the plaintiffs, and therefore no responsive pleading is required thereto; if a response is required, defendants deny that plaintiffs are entitled to the relief they seek.

160. In answering paragraph 160, said paragraph consists of a description of relief sought by the plaintiffs, and therefore no responsive pleading is required thereto; if a

response is required, defendants deny that plaintiffs are entitled to the relief they seek.

161. In answering paragraph 161, defendants deny.

AFFIRMATIVE DEFENSES

As and for their affirmative defenses, defendants allege and state as follows:

1. Plaintiffs' complaint should be dismissed in whole or in part because there is no justiciable controversy.

2. Plaintiffs' complaint fails to state a claim for which relief can be granted.

3. Venue in the above-entitled action is proper as to defendant Kennedy if and only if plaintiffs seek relief against defendant Kennedy solely in his official capacity. Wis. Stat. § 801.50(3)(a).

4. Upon information and belief, plaintiffs lack standing as to all or parts of their Counts I and II of their First Amended Complaint.

5. Count III of the First Amended Complaint is plainly barred by Wis. Stat. §§ 19.36(1) and 5.05(5s).

6. The allegations of this lawsuit may be moot in whole or in part.

WHEREFORE, defendants request that the court enter judgment dismissing the First Amended Complaint upon its merits, with prejudice, and awarding defendants their costs, disbursements, and such other relief as may be provided by law or equity.

Dated this 29th day of December 2014.

LEE, KILKELLY, PAULSON & YOUNGER, S.C.
Attorneys for Defendants

By: _____
Thomas H. Brush
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EXHIBIT A

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

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Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

July 10, 2014 OAG-03-14

Mr. Kevin J. Kennedy
Director and General Counsel
Government Accountability Board
212 East Washington Avenue, Third Floor
Madison, WI 53703

Dear Mr. Kennedy:

¶ 1. You have requested an opinion regarding the ability of the Government Accountability Board ("GAB") to provide investigative records that are confidential under Wis. Stat. § 12.13(5) to the Legislative Audit Bureau ("LAB") for purposes of an audit of GAB's operations as directed by the Joint Legislative Audit Committee.

¶ 2. I conclude that Wis. Stat. § 12.13(5) prohibits GAB from providing confidential investigative records to LAB for purposes of an audit of GAB's operations directed by the Joint Legislative Audit Committee. Wisconsin Stat. § 12.13(5) prohibits disclosure of GAB's investigative records except for disclosures that are "specifically authorized by law." I conclude that Wis. Stat. § 13.94, which provides that LAB "shall at all times and with or without notice have access to all departments and to any books, records, or other documents maintained by the department," is not a specific authorization that would permit GAB to disclose its confidential investigative records to LAB.

¶ 3. Wisconsin Stat. § 12.13(5) provides:

> [e]xcept as *specifically* authorized by law and except as provided in par. (b), no investigator, prosecutor, employee of an investigator or prosecutor, or member or employee of the board may disclose information related to an investigation or prosecution under chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 or any other law specified in s. 978.05 (1) or (2) or provide access to any record of the investigator, prosecutor, or the board that is not subject to access under s. 5.05 (5s) to any person other than an employee or agent of the prosecutor or investigator or a member, employee, or agent of the board prior to presentation of the information or record in a court of law.

Wis. Stat. § 12.13(5)(a) (emphasis added). A violation of this provision is punishable by a fine of up to $10,000, imprisonment of up to 9 months, or both. Wis. Stat. § 12.60(1)(bm).

¶ 4. I begin with the plain language of the statute because "statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry. Statutory language is given its common, ordinary, and accepted meaning, except that technical or specifically-defined words or phrases are given their technical or special definitional meaning." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citations and quotation marks omitted). In reviewing the plain language of the statute, the "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.*, ¶ 46 (citations and quotation marks omitted). In addition, "[s]tatutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *Id.* Further, Wisconsin courts recognize that "exceptions should be strictly construed." *Lang v. Lang*, 161 Wis. 2d 210, 224, 467 N.W.2d 772, 777 (1991).

¶ 5. The use of the word "specifically" in Wis. Stat. § 12.13(5)(a) is significant because the Wisconsin statutes use the phrase "authorized by law" without the modifier "specifically," including those related to confidentiality of documents. *See, e.g.*, Wis. Stat. § 977.09 (documents maintained by the office of the state public defender "shall not be open to inspection by any person unless authorized by law"). In order to give meaning to the word "specifically" in the phrase "specifically authorized by law," courts recognize that the inclusion of "[t]he term 'specifically' indicates a legislative intent to require a certain degree of specificity or particularity in the authorization." *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 38 (Ill. 2005).

¶ 6. There is nothing particular about LAB's authorization to inspect records as it relates to accessing investigatory information. Wisconsin Stat. § 13.94 provides LAB with a general right to obtain documents from state departments like GAB. The statute provides that "the state auditor [the head of LAB] or designated employees shall at all times with or without notice have access to all departments and to any books, records or other documents maintained by the departments and relating to their expenditures, revenues, operations and structure except as provided in sub. (4)[.]" Wis. Stat. § 13.94. Wisconsin Stat. § 13.94(4)(a) broadly defines "department" as "[e]very state department, board, examining board, affiliated credentialing board, commission, independent agency, council or office in the executive branch of state government; all bodies created by the legislature in the legislative or judicial branch of state government." The statute does not specifically address the GAB, Wisconsin Stat. § 12.13(5), or even explicitly grant LAB the general right to obtain documents made confidential by other statutory sections. These general powers and duties do not satisfy a common, ordinary understanding of "specific[] authoriz[ation]."

¶ 7. Viewing the powers and duties of LAB in related statutory contexts confirms this conclusion. The legislature *has* provided specific authorization for LAB to obtain confidential information in other sections of the Wisconsin statutes. For example, Wis. Stat. § 71.78 prohibits the disclosure of information derived from tax returns except for a number of specific

exceptions, including one for disclosures to "[t]he state auditor and the employees of the legislative audit bureau to the extent necessary for the bureau to carry out its duties under s. 13.94." Wis. Stat. § 71.78(4)(s). The legislature has also specifically authorized state agencies to disclose certain confidential information to other state agencies, which would include LAB. For example, information provided to the department of administration in an energy alert must be kept confidential, but such information "may be disclosed to agencies of the state or federal government, under the same or similar rules of confidentiality." Wis. Stat. § 16.955. Similarly, the legislature provides for the confidentiality of certain information relating to veterans but recognizes an exception when the information is furnished for use "for official purposes . . . by any agency of this state . . . ." Wis. Stat. § 45.04(8). These statutory provisions demonstrate the type of specific authorizations that would satisfy Wis. Stat. § 12.13(5).

¶ 8. The fact that the legislature specificially authorized GAB to disclose investigatory information to entities other than LAB and for purposes other than auditing further confirms that the legislature did not intend to give the LAB access to this investigatory information. Wisconsin Stat. § 12.13(5)(b) carves out the multiple exceptions to the prohibition against disclosing investigatory information. GAB has a privilege to disclose the investigatory information "in the normal course of an investigation or prosecution," the privilege to disclose the investigatory information to any "local, state, or federal law enforcement or prosecutorial authority," and the privilege to disclose the investigatory information to a subject of the investigation, the subject's attorney, and the board's attorney. Wis. Stat. § 12.13(5)(b)1.-3.

¶ 9. In addition, Wis. Stat. § 5.05(5s) authorizes others to inspect certain GAB records relating to investigations in other contexts. These include materials considered by the GAB in open session; records made public in the course of a prosecution that results from a GAB investigation; and all investigatory records pertaining to a person whom GAB is prosecuting in a civil enforcement action and who has asked GAB to make those records available. Wis. Stat. § 5.05(5s)(a), (b) & (d). GAB must also provide to the Department of Children and Families and county child support agencies "all investigative and hearing records that pertain[] to the location of individuals and assets of individuals" as those entities carry out certain stautory administrative duties relating to public assistance and child support programs. Wis. Stat. § 5.05(5s)(c). Moreover, Wis. Stat. § 5.05(5s)(e) authorizes certain investigatory records to be available for inspection under the public records law: any record of an action of the board authorizing the filing of a civil complaint; any record of an action of the board referring a matter to a district attorney or other prosecutor for investigation or prosecution; any record containing a finding that a complaint does not establish reasonable suspicion that a violation of law has occurred; and any record containing a post-investigation finding that no probable cause exists to believe that a violation of the law has occurred.

¶ 10. In sum, the legislature created numerous specific instances in which GAB must produce generally confidential investigative records, but it did not do so with respect to LAB.

¶ 11. Finally, the Legislature emphasized the importance of the confidentiality provision not only by mandating that any disclosures be specifically authorized, but also by imposing criminal penalties for any unauthorized disclosures. Other state courts recognize that "[b]y mandating a criminal penalty when a state employee violates the confidentiality requirements . . ., the Legislature emphasized the importance of the confidentiality provisions." *Daily Gazette Co., Inc. v. Caryl*, 380 S.E.2d 209, 213 (W. Va. 1989). By imposing criminal penalties for a violation of Wis. Stat. § 12.13(5), the legislature emphasized the confidentiality of GAB's investigative records even more than in most other statutes addressing confidentiality. It is hard to imagine a more powerful way of saying "and we really mean what we say about confidentiality" than imposing criminal penalties for improper disclosure.

¶ 12. I recognize that opinions from my predecessors have recognized the LAB's power to access records in other contexts. But these opinions are easily distinguishable. Both the specific language of Wis. Stat. § 12.13(5) and its imposition of criminal penalties distinguish this issue from prior opinions of the attorney general relied upon by LAB. The first opinion, 74 Op. Att'y Gen. 14 (1985), examined whether a department could withhold a settlement agreement from LAB based on a contractual pledge of confidentiality and concluded that Wis. Stat. § 13.94 would permit LAB to access those documents. The opinion reasoned that "[t]he nature of the state auditor's role is such that he or she must have access to all pertinent records including those that may otherwise be confidential." 74 Op. Att'y Gen. at 17. While this opinion correctly interprets the law with respect to documents made confidential by contract, it does not determine whether LAB may have access to documents made confidential by statute. That question must be determined by the language of the statute at issue, and, as examined above, Wis. Stat. § 12.13(5) requires more for disclosure than a general policy that LAB should have access to confidential documents.

¶ 13. The second opinion, 57 Op. Att'y Gen. 187 (1968), also does not apply. In that opinion, the Attorney General concluded that the state health officer could share the identity of individuals who died in automobile accidents with the Department of Transportation for use in the study of alcohol as a cause of motor vehicle accidents. The Wisconsin statute at issue directed the state board of health to keep a record of the blood alcohol content of persons who died in automobile accidents to be used for statistical purposes only, and provided that the board would disclose the cumulative results to the public, but without identifying the individuals. 57 Op. Att'y Gen. at 188-89. The statute allowed the state board of health to keep the records for statistical purposes and did not affirmatively prohibit disclosure to another state agency; it merely prohibited the disclosure of the identities to the public. *See id.* The opinion reasoned that the identity of the individuals could be shared because, while this information was to be kept confidential from the general public, it "does not mean that such records may not be made available for proper purposes to other officers of government." *Id.* at 189. This reasoning cannot be applied here because Wis. Stat. § 12.13(5) explicitly prohibits disclosure of confidential investigatory information unless it has been "specifically authorized by law" and imposes criminal penalties including a prison sentence and/or a substantial fine. Moreover, the

legislature specifically authorized some government entities to have access to these records for certain purposes (for example, prosecutors, law enforcement, the Department of Children and Families); the Legislature's silence as to other government entities is indicative of an intent for confidentiality to apply to those other government entities.

¶ 14. I conclude that Wis. Stat. § 12.13(5) prevents GAB from providing its investigative records to LAB because such a disclosure is not "specifically authorized by law."

Sincerely,

J.B. VAN HOLLEN
Attorney General

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