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

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

Plaintiffs,

v. Case No. 14cv139-rtr

FRANCIS SCHMITZ, in his official
and personal capacities,
JOHN CHISHOLM, in this official
and personal capacities,
BRUCE LANDGRAF, in his official
and personal capacities,
DAVID ROBLES, in his official
and personal capacities,
DEAN NICKEL, in his official
and personal capacities,
GREGORY PETERSON, in his
official capacity,

Defendants.

DEFENDANT DEAN NICKEL'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PURSUANT TO FED.R.CIV.P. 12(b)(1), (b)(6) AND (b)(7)

INTRODUCTION

With the filing of their Complaint, Plaintiffs seek the extraordinary remedy of enjoining an ongoing state John Doe criminal investigation [redacted] In doing so, Plaintiffs turn a blind eye to longstanding principles of constitutional law that

preclude such relief[1]. As explained below, Plaintiffs' lawsuit is barred by the *Younger* abstention doctrine, which precludes federal lawsuits that seek to halt ongoing state criminal investigations or prosecutions. The State of Wisconsin undoubtedly has a vital interest in enforcing its own campaign finance laws and intervention by a federal court on those interests violates principles of equity, comity and federalism. The proper avenue to address Plaintiffs' constitutional concerns is to raise those issues with the judge in the John Doe proceeding, [redacted]. Even if Plaintiffs' overcome the significant hurdle posed by *Younger* abstention, the *Pullman* doctrine warrants dismissal for lack of jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1) because Wisconsin state courts are best left to determine the important state campaign finance issues raised in this lawsuit.

Dismissal is also mandated pursuant to Fed.R.Civ.P. 12(b)(6) because Plaintiffs have failed to plead sufficient facts to establish a cause of action for bad faith prosecution or violation of Plaintiffs' constitutional rights against Dean Nickel. [redacted]

[1] For this reason, Dean Nickel will also be filing a motion for sanctions pursuant to Fed.R.Civ.P. 11 for, among other things, disregarding the law and/or failing to explain why existing law does not apply to this case.

The Complaint is also defective because it fails to plead any causal nexus between the alleged bad faith conduct of Dean Nickel and any animus held by Nickel towards conservative groups or causes. To prevail on their retaliation and bad faith prosecution claims, Plaintiffs must show that the cause of their differential treatment was a totally illegitimate animus towards them by each specific defendant. [redacted] Indeed, the Complaint does not even allege that Dean Nickel was a Democrat or held any resentment towards conservative groups or candidates. For this reason also, Dean Nickel is entitled to dismissal of all claims with prejudice.

Finally, the Complaint is defective under Fed.R.Civ.P. 12(b)(7) because it does not name all of the District Attorneys that initiated the John Doe Investigation. [redacted] Wisconsin law requires that a person accused of violating Wisconsin's campaign finance laws be prosecuted in his or her home county [redacted]

FACTUAL AND LEGAL BACKGROUND

A. Background On John Doe Proceedings Under Wisconsin Law.

A John Doe proceeding is intended as an independent, investigatory tool used to ascertain whether a crime has been committed and, if so, by whom. *In re John Doe Proceeding*, 260 Wis.2d 653, 669, 660 N.W.2d 260 (2003). A John Doe is "not so much a procedure for the determination of probable cause as it is an inquest for the discovery of crime in which the judge has significant powers," including the ability to subpoena witnesses. *State v. Washington*, 83 Wis.2d 808, 822, 266 N.W.2d 597 (1978). A finding of probable cause does not have to be made before a John Doe proceeding is commenced; rather, the standard is an objective reason to believe that a crime has been committed. *State ex rel. Reimann v. Circuit Court for Dane County*, 214 Wis.2d 605, 624, 571 N.W.2d 385 (1997) (emphasis added).

A John Doe judge's authority stems from both the statutes and from the powers inherent to a judge, including those necessary to fulfill the jurisdictional mandate. Wis. Stat. § 968.26 provides how and when a John Doe proceeding is initiated:

> (1) If a district attorney requests a judge to convene a proceeding to determine whether a crime has been committed in the court's jurisdiction, the judge shall convene a proceeding described under sub. 3 and shall subpoena and examine any witnesses the district attorney identifies.
>
> (2) ……
>
> (3) The extent to which the judge may proceed in an examination under sub. (1)… is within the judge's discretion. The examination may be adjourned and may be secret. Any witnesses examined under this section may have counsel present at the examination but counsel shall not be allowed to examine his or her client, cross-examine other witnesses, or argue before the judge. Subject to s. 971.23 [what a district attorney must disclose to a defendant], if the proceeding is secret, the record of the proceeding and the testimony taken shall not be open to inspection by anyone except the district attorney unless it is used by the prosecution at the preliminary

> hearing or the trial of the accused and then only to the extent that it is so used…..

Wis. Stat. § 968.26. Also relevant is Wis. Stat. § 978.045(1r)m, which provides that any judge "may appoint an attorney as special prosecutor to perform…the duties of the district attorney" and the special prosecutor "shall have all of the powers of the district attorney." When a court appoints a special prosecutor on its own motion, it may do so for any reason so long as it states the cause on the record. *State v. Carlson*, 250 Wis.2d 562, 571-72, 641 N.W.2d 451 (Wis. App. 2001).

A John Doe judge has broad discretion to determine the nature and extent of John Doe proceedings and has the final responsibility for the proper conduct of John Doe proceedings. *State v. O'Connor,* 77 Wis.2d 261, 284, 252 N.W.2d 671 (1977) (a John Doe judge must "ensure that the considerable powers at his or her disposal are at all times exercised with due regard for the rights of witnesses, the public, and those whose activities are subject to investigation"). In John Doe proceedings, witnesses and persons under investigation "have substantial rights and due process protections," including the right to have counsel present during the questioning. *In re John Doe Proceeding*, 260 Wis.2d at 683 (emphasis added). "It is the John Doe judge's responsibility to ensure procedural fairness" and he has broad authority to take action to uphold that responsibility. *Id.* at 685.

Under Wis. Stat. § 968.26(1), a John Doe judge has the authority to issue subpoenas. In the context of a John Doe proceeding, the judge must determine if the documents sought are relevant to the topic of the inquiry; that is, that the information sought is "in some manner connected with" the suspected criminal activity. *State v. Washington***,** 83 Wis.2d 808, 843, 266 N.W.2d 597, 614 (1978).

The Court of Appeals has supervisory jurisdiction over the actions of a judge presiding over a John Doe proceeding. As noted by the Wisconsin Supreme Court, "interpreting the constitution to allow for the court of appeals to exercise jurisdiction over the actions of a John Doe judge represents sound practice and is in keeping with the court of appeals' traditional role as an error-correcting court." *In re John Doe Proceeding*, 260 Wis.2d at 683. Another layer of protection afforded to participants in a John Doe proceeding is circuit court review of any criminal complaint that results from the proceeding. *State ex rel. Reimann*, 214 Wis.2d at 624. Additionally, probable cause to bind over for arraignment and trial may be tested in a preliminary examination in the circuit court in a felony matter. *In re John Doe Proceeding*, 260 Wis.2d at 683.

Wisconsin courts have further recognized that it is often desirable for John Doe proceedings to be carried out in secrecy. *See, e.g., State ex rel. Newspapers, Inc. v. Circuit Court for Milwaukee County*, 65 Wis.2d 66, 72, 221 N.W.2d 894 (1974). There are a number of reasons why secrecy may be vital to the very effectiveness of a John Doe proceeding:

> (1) keeping knowledge from an unarrested defendant which could encourage escape;
>
> (2) preventing the defendant from collecting perjured testimony for the trial;
>
> (3) preventing those interested in thwarting the inquiry from tampering with prosecutive testimony or secreting evidence;
>
> (4) rendering witnesses more free in their disclosures; and
>
> (5) preventing testimony which may be mistaken or untrue or irrelevant from becoming public.

State v. Cummings, 199 Wis.2d 721, 736, 546 N.W.2d 406 (1996).

B. Legal Background On Wisconsin's Campaign Finance Laws.

Chapter 11 of the Wisconsin Statutes governs campaign financing. It makes certain conduct unlawful and provides both civil and criminal penalties. *See* Wis. Stat. §§ 11.60 and 11.61. When a criminal prosecution is brought against a defendant for violating campaign finance laws the action must be brought in the county where the defendant resides. Wis. Stat. § 11.62(2) (All criminal prosecutions must be "conducted by the district attorney for the county where the defendant resides or, if the defendant is a nonresident, by the district attorney for the county where the violation is alleged to have occurred.")

Under the laws of campaign finance, consistent with First Amendment considerations, campaign contributors must be identified and contributions may be limited in amount. *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Campaign reporting laws, which require disclosure of the true source and extent of candidate support, guard against potential corrupting influences that undermine the democratic process. *Id.; See also* Wis. Stat. §11.001(1).

The Wisconsin Court of Appeals addressed the issue of illegal coordination and issue advocacy in *Wisconsin Coalition for Voter Participation, Inc.* ("WCVP") *v. SEB,* 231 Wis.2d 670, 605 N.W.2d 654 (Wis. Ct. App. 1999). In that case, plaintiffs sought to enjoin an investigation by the State Elections Board into illegal coordination between Supreme Court Justice Jon Wilcox's campaign and WCVP. *Id.* at 674. At issue was the dissemination of a post card that WCVP maintained did not constitute express advocacy. *Id.* The Court of Appeals considered both statutory and constitutional affirmative defenses, rejected them and dismissed plaintiffs' motions. *Id.* at 678. The Court of Appeals definitively wrote, "[c]ontributions to a candidate's campaign must be reported *whether or not* they constitute express advocacy." *Id.* at

679. The Court of Appeals emphasized that if the WCVP mailing was coordinated, it was a contribution, and it was illegal regardless of how one might interpret the postcards' language. *Id.*

C. The Subject John Doe Investigation.

[redacted]

[2] The prior 2010 John Doe proceeding resulted in six different criminal convictions, including convictions for embezzlement, campaign finance violations, misconduct for doing campaign work while working on Milwaukee County time and political fundraising in a courthouse. (Compl., ¶ 173-179).

[redacted]

[redacted]

[redacted]

[3] [redacted]

[redacted]

D. Plaintiffs' Allegations Against Dean Nickel[4].

[redacted] Nickel worked under Peggy Lautenschlager, the former Attorney General of Wisconsin from 2003 to 2007 and a member of the Democratic Party. *Id.* [redacted]

ARGUMENT

I. NICKEL IS ENTITLED TO DISMISSAL UNDER RULE 12(b)(1).

A. Legal Standard Under Rule 12(b)(1).

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) asks the court to dismiss an action over which it allegedly lacks subject matter jurisdiction. Fed.R.Civ.P.

[4] While Nickel disputes many of the factual allegations made in the Complaint, the following allegations are taken as true solely for the purposes of this motion.

12(b)(1). "Where jurisdiction is in question, the party asserting a right to a federal forum has the burden of proof, regardless of who raises the jurisdictional challenge." *Craig v. Ontario Corp.*, 543 F.3d 872, 876 (7th Cir. 2008). "The district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Ezekiel v. Michel*, 66 F.3d 894, 897 (1995).

B. The *Younger* Abstention Doctrine Precludes Federal Court Jurisdiction.

Long-standing Supreme Court precedent precludes federal courts from enjoining state criminal prosecutions, which are pending when the federal suit is filed in accordance with judicial principles of equity, comity and federalism. *Younger v. Harris*, 401 U.S. 37, 53, 91 S.Ct. 746 (1971). On multiple occasions, the Supreme Court has refused to allow a federal court to step in and interfere with an ongoing state criminal prosecution or investigation. *Id.* at 43; *Huffman v. Pursue, Ltd*., 420 U.S. 592, 608, 95 S.Ct. 1200 (1975). In *Younger*, the Court held that injunctive relief against state criminal prosecutions is available only if there is irreparable injury that is both great and immediate. 401 U.S. at 45, 91 S.Ct. 746. The cost, anxiety and inconvenience of having to defend against a criminal prosecution are not enough. *Id.* Instead, in a case in which *Younger* abstention applies, relief can be given only on a showing of bad faith or harassment. 401 U.S. at 54, 91 S.Ct. at 755. To establish bad faith, plaintiff must set forth specific evidence that the prosecution was brought in bad faith for the purpose of retaliating for or deterring the exercise of constitutionally protected rights. *Wilson v. Thompson*, 593 F.2d 1375, 1382-83 (5th Cir. 1979). It is only when there is evidence of "official lawlessness" that a federal court may interfere with a state criminal proceeding. *Younger*, 401 U.S. at 56, 91 S.Ct. 746.

The *Younger* abstention doctrine requires federal courts to abstain from enjoining ongoing state proceedings based on the following factors: (1) whether the underlying proceedings constitute an ongoing judicial proceeding, (2) whether the proceedings implicate an important state interest, and (3) whether there is an adequate opportunity in the state proceedings to raise a constitutional challenge. *FreeEats.com, Inc. v. Indiana*, 502 F.3d 590, 595 (7th Cir. 2007).

[redacted], the *Younger* abstention doctrine applies equally to criminal investigations. *See Fieger v. Cox*, 524 F.3d 770, 775 (6th Cir. 2008) (criminal investigation into law firm and partner's possible violation of state election finance laws involved an ongoing proceeding as required for *Younger* abstention). The initiation of the John Doe Investigation, which is presided over by an independent judge, certainly qualifies as an ongoing judicial proceeding.

The second factor also supports application of *Younger* abstention because campaign finance laws and the investigation into campaign finance violations involving state elections undoubtedly involve an important state interest. Indeed, the preamble to the Wisconsin statutes regulating campaign finance spell out this important interest in no uncertain terms:

> The legislature therefore finds that the **state has a compelling interest** in designing a system for fully disclosing contributions and disbursements made on behalf of every candidate for public office, and in placing reasonable limitations on such activities. Such a system must make readily available to the voters complete information as to who is supporting or opposing which candidate or cause and to what extent, whether directly or indirectly. **This chapter is intended to serve the public purpose** of stimulating vigorous campaigns on a fair and equal basis and to provide for a better informed electorate.

Wis. Stat. § 11.001. (emphasis added). The case law is also in accord. *See Fieger*, 524 F.3d at 775 (finding that the regulation of campaign finance and advertisements all involved important state interests under *Younger*).

The third factor, whether there was an adequate opportunity in the state proceedings to raise a constitutional challenge, were present throughout the underlying John Doe proceedings. As this Court previously recognized when analyzing the *Younger* abstention doctrine "all that matters is the opportunity to raise constitutional claims." *Nommensen v. Lundquist*, 630 F.Supp.2d 994, 998 (E.D.Wis. 2009). Federal courts "must presume that….state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Id.*

The third factor is satisfied here because Plaintiffs have the ability to challenge the constitutionality of the investigation. [redacted] Further, the Wisconsin Court of Appeals has jurisdiction over the actions of a John Doe judge and can review any rulings for error. *See In re John Doe Proceeding*, 260 Wis.2d at 683. Because Plaintiffs have open avenues to raise and address constitutional concerns in the John Doe proceeding itself, this federal lawsuit is unnecessary and *Younger* abstention applies.

The facts of this matter are strikingly similar to those in *Fieger v. Cox*, 524 F.3d 770 (6th Cir. 2008) where the Court dismissed plaintiffs' suit on the basis of *Younger* abstention. In that case, a law firm, attorney, advertising firm and others brought a federal civil rights lawsuit against the Michigan's attorney general, state supreme court justice, secretary of state and other state officials seeking injunctive relief for violating their constitutional rights for launching an investigation into possible violations of state campaign finance laws. *Id.* at 773-774. The Court carefully analyzed the three factors for *Younger* abstention finding that the state had a clear interest in regulating campaign advertisements and financing and that plaintiffs had the ability to

raise constitutional arguments in the lower state court proceeding. *Id.* at 775. Not only did the Court dismiss plaintiffs' suit in its entirety but it also imposed sanctions for the filing of a frivolous lawsuit against plaintiffs. *Id.* at 776.

1. The Bad Faith Prosecution Exception to *Younger* Abstention Does Not Apply.

In determining whether a prosecution is commenced in bad faith or to harass, courts have typically considered three factors: (1) whether the prosecution is frivolous or undertaken with no reasonably objective hope of success; (2) whether the prosecution is motivated by the defendant's suspect class or in retaliation for the defendant's exercise of constitutional rights; and (3) whether the prosecution is conducted in such a way as to constitute harassment and an abuse of prosecutorial discretion, typically through the unjustified and oppressive use of multiple prosecutions. *Phelps v. Hamilton*, 59 F.3d 1058, 1065 (10th Cir. 1995). A plaintiff has a heavy burden in overcoming the bar of *Younger* abstention and must set forth more than allegations of bad faith or harassment. *Olson v. Fajardo-Velez*, 419 F.Supp.2d 32, 38 (D.Puerto Rico 2006) ("although there may be merit to [plaintiff's] serious allegations of political discrimination and selective prosecution, fundamental principles of equity, comity, and federalism preclude[ed] the Court from enjoining [plaintiff's] ongoing criminal proceeding").

The standard for initiating a John Doe proceeding under Wis. Stat. § 968.26 is whether there is a **reason to believe** that a crime has occurred within the jurisdiction of the court. *State ex. rel. Reimann v. Circuit Court for Dane County*, 214 Wis.2d 605, 611, 571 N.W.2d 385 (1997) (emphasis added). A John Doe proceeding is not a procedure for the determination of probable cause so much as it is an inquest for the discovery of crime. *State v. Washington*, 83 Wis.2d 808, 822, 266 N.W.2d 597 (Wis. 1978).

[redacted]

[5] As explained above, this court may take judicial notice of prior court orders when ruling on a Rule 12(b)(6) motion to dismiss. See *Kourtis v. Cameron*, 419 F.3d 989 (9th Cir. 2005) (district court could consider unpublished court order from prior litigation without converting defendant's motion to dismiss into motion for summary judgment).

[redacted]

[redacted]

While Plaintiffs' cite to *Collins v. County of Kendall, Illinois*, 807 F.2d 95 (7th Cir. 1986) in their pleadings, a close review of that case actually supports application of *Younger* abstention and dismissal of this lawsuit. In *Collins*, the owners and employees of an adult book store brought a section 1983 lawsuit against the Kendall County sheriff and state's attorney after they were criminally charged with obscenity and subjected to searches and seizures. *Id.* at 97. Over a two year period, the plaintiffs were the subject of 34 state criminal prosecutions that led to only three convictions. *Id.* at 99. Plaintiffs alleged that such unfair treatment was evidence of bad faith prosecution and justified enjoining the criminal proceedings against them. *Id.* at 97. On appeal, the 7th Circuit found no evidence of bad faith prosecution and dismissed plaintiff's complaint. In particular, the court noted that all searches and seizures were conducted pursuant to valid warrants upheld by courts of review and found that "instituting approximately thirty criminal prosecutions over a two-year period does not constitute bad faith harassment in and of itself." *Id.* at 99. The 7th Circuit found that this evidence and the sheer number of prosecutions did not constitute specific evidence of bad faith conduct that precluded the application of *Younger* abstention.

[redacted] The *Collins* decision also directly refutes Plaintiffs' assertion that the length and number of prosecutions arising from the John Doe investigations are *prima facie* evidence of a bad faith prosecution. In fact, the prior John Doe investigations resulted in six convictions for different crimes, including campaign finance violations. Thus, Plaintiffs have failed to meet their burden of establishing the bad faith prosecution exception to *Younger* abstention.

C. The *Pullman* Doctrine Also Requires Abstention.

In *Railroad Comm'n of Texas v. Pullman Co*., 312 U.S. 496, 61 S.Ct. 643 (1941), the Supreme Court held that when a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question. Where there is an action pending in state court that will likely resolve the state-law questions underlying the federal claim, the Supreme Court has regularly ordered abstention. *See Askew v. Hargrave*, 401 U.S. 476, 91 S.Ct. 856 (1971); *Harris County Comissioners of Court v. Moore*, 420 U.S. 77, 95 S.Ct. 870 (1975). Similarly, when the state law questions involve matters peculiarly within the province of the local courts, abstention is appropriate. *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 91 S.Ct. 156 (1970). If a state court is likely to construe a state statute in a fashion that would avoid the need for a federal constitutional ruling or otherwise significantly modify the federal claims, abstention is strongly favored. *Moore*, 420 U.S. at 85.

Here, Wisconsin courts are best suited to determine important issues involving Wisconsin campaign finance law. [redacted]

[redacted] Therefore, abstention is required and this lawsuit should be dismissed.

II. NICKEL IS ENTITLED TO DISMISSAL UNDER RULE 12(b)(6).

A. Legal Standard Under Rule 12(b)(6).

In ruling on a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), "the court must treat all well-plead allegations as true and draw all inferences in favor of the non-moving party." *In re marchFIRST Inc.*, 589 F.3d 901, 904 (7th Cir. 2009). At the Rule 12(b)(6) stage, a court can consider exhibits attached to the complaint and exhibits attached to the parties' briefs that are "referred to" in the complaint and "central to [the plaintiff's] claim." *Witzke v. Femal*, 376 F.3d 744, 749 (7th Cir. 2004); *Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1248 (7th Cir. 1994). Under Fed.R.Evid. 201(b), courts may take judicial notice of adjudicative facts that are "not subject to reasonable dispute" because they are either "generally known within the * * * court's territorial jurisdiction," or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201(b). For instance, it has long been established that "federal courts may * * * take notice of proceedings in other courts, both within and outside of the federal judicial system, if the proceedings have a direct relation to matters at issue." *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 369 (7th Cir. 1983); *See also See Cancer Found., Inc. v. Cerebrus Capital Mgmt. LP*, 559 F.3d 671, 676, n.2 (7th Cir. 2009) (considering article and filings in other suit that were outside of the complaint because they were

central to plaintiff's claims). To the extent an exhibit or a judicially noticed court document contradicts the complaint's allegations, the exhibit or court document takes precedence. *See Forrest v. Universal Sav. Bank, F.A,* 507 F.3d 540, 542 (7th Cir. 2007).

[redacted]

B. The Complaint Fails To State A Claim Against Nickel Upon Which Relief May Be Granted.

Even if Plaintiffs overcome the significant hurdle posed by Nickel's abstention and immunity defenses, the Complaint still fails because it does not adequately state a cause of action against Nickel. [redacted]

Therefore, the Complaint fails to state a claim upon which relief may be granted and Nickel is entitled to dismissal.

1. Count I Does Not State A Cause of Action Against Nickel For First Amendment Retaliation.

To prevail on their First Amendment retaliation claims, Plaintiffs must offer proof that the cause of their differential treatment was a totally illegitimate animus toward them by each defendant. *Olech v. Village of Willowbrook,* 160 F.3d 386, 387 (7th Cir. 1998). Causation is a

necessary element to prove a prima facie case of retaliation under the First Amendment. *Thayer v. Chiczewski*, 705 F.3d 237, 252 (7th Cir. 2012) (dismissing anti-war protesters First Amendment retaliation claims where protestors failed to show that arrests were caused by their anti-war views as opposed to their unlawful refusal to disperse). If the "retaliation is not the but-for cause of the arrest, the claim fails for lack of causal connection between unconstitutional motive and resulting harm, despite proof of some retaliatory animus in the official's mind." *Id.* (citing *Hartman v. Moore*, 547 U.S. 250, 260, 126 S.Ct. 1695 (2006)). "It may be dishonorable to act with an unconstitutional motive…but action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway." *Id.*

Despite naming Dean Nickel as a defendant, there are no allegations that Nickel held an animus or discriminatory motive towards Plaintiffs or other conservative groups. [redacted] The only allegation about Dean Nickel's political beliefs is that he once worked under a Democrat attorney general in his long career at the Wisconsin Department of Justice. (Compl. ¶ 13). There are also no claims that Dean Nickel was closely aligned or associated with the Democratic Party or held a retaliatory animus against conservative groups or causes. [redacted]

2. As A Non-Attorney, Dean Nickel Cannot Be Liable For Selective Or Bad Faith Prosecution Under Counts II And III.

In Counts II and III, Plaintiffs make claims for "selective use of prosecutorial power" and "bad faith exercise of prosecutorial power." According to the Complaint, the "decision to target" Plaintiffs and investigate their activities and conduct violates the First and Fourteenth Amendments. (Compl., ¶¶ 203-04). These claims must be dismissed against Nickel because he does not hold any such "prosecutorial power" and was not responsible for initiating the John Doe investigation.

To establish a discriminatory prosecution claim, the plaintiff must show that the prosecution "had a discriminatory effect and….was motivated by a discriminatory purpose." *Wayte v. United States*, 470 U.S. 598, 608, 105 S.Ct. 1524 (1985). To make a prima facie showing of discriminatory prosecution, plaintiff must show that at a minimum the defendant was singled out for prosecution while others similarly situated have not, and that the prosecutor's discriminatory selection was based on an impermissible considerations such as race, religion or the exercise of constitutional rights. *United States v. Kerley*, 787 F.2d 1147, 1148 (7th Cir. 1986). With regards to John Doe proceedings, under Wis. Stat. § 968.26, the district attorney of the county where the alleged crime occurred is responsible for carrying out the John Doe Investigation. The applicable Wisconsin statutes give no authority to a non-attorney investigator to initiate a John Doe investigation or determine its scope.

[redacted] Even if Plaintiffs' allegations that Defendants ignored similar criminal campaign coordination by Democrats are taken as true, it was not within Dean Nickel's authority to select which groups to investigate and prosecute. [redacted]

[redacted] Therefore, Plaintiffs' claims of prosecutorial misconduct must be dismissed against Nickel.

3. Count IV Should Be Dismissed Because The Use Of Subpoenas And Search Warrants Is Permitted Under The John Doe Statute.

[redacted] Therefore, Count IV fails to state a cause of action and should be dismissed.

4. Count V Does Not State A Cause of Action Against Nickel For The Infringement of the Right of Free Speech.

In Count V, Plaintiffs allege that their First Amendment rights have been violated [redacted] Accordingly, Count V must be dismissed.

C. Plaintiffs' Claims Against Nickel In His Individual Capacity For Money Damages Must Be Dismissed Because He Is Entitled to Qualified Immunity.

Qualified immunity protects government officials from liability for civil damages if their actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Villo v. Eyre*, 547 F.3d 707, 709 (7th Cir. 2008). Qualified immunity is immunity from suit rather than merely a defense to liability. *Scott v. Harris*, 550 U.S. 372, 376 n.2, 127 S.Ct. 1769 (2007). The qualified immunity analysis comprises a two-part inquiry: (i) "whether the facts alleged show that the state actor violated a constitutional right," and (ii) "whether the right was clearly established." *Hanes v. Zurick*, 578 F.3d 491, 493 (7th Cir. 2009). The plaintiff bears the burden of showing that the right allegedly violated was clearly established. *Id.* This proof cannot be at a general level, such as that the Fourth Amendment was violated, but instead must be specific. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034 (1987).

Numerous courts have addressed this exact issue and have overwhelmingly decided that a special investigator involved in a criminal proceeding is entitled to qualified immunity when conducting his normal investigatory duties. In *Bianchi*, a former state's attorney brought a section 1983 action against special prosecutors and investigators alleging false arrest and violations of due process after he was acquitted of official misconduct. *Bianchi v. McQueen*, 917 F.Supp.2d 822 (N.D.Ill. 2013). The investigators were retained by the special prosecutors to investigate the former state's attorney and were directed on who to interview, what questions to ask and what information to documents. *Id.* at 835. They also served search warrants, subpoenas and subpoenas duces tecum at the direction of the prosecutors. *Id.* The court determined that the investigators were entitled to qualified immunity for their conduct as private investigators hired by the state. *Id.* Particularly, the court found that the investigators "could not

have committed a constitutional tort by simply interviewing witnesses and preparing reports." *Id.* There were also no allegations that the investigators fabricated evidence or tricked the prosecutors into bringing charges. *Id.* As such, all claims against the investigators were dismissed.

Courts from around the country have similarly found that special investigators are entitled to qualified immunity. *See Rich v. Dollar,* 841 F.2d 1558, 1565 (11th Cir. 1988) (state's attorney's investigator that wrote and submitted probable cause affidavit was shielded from section 1983 claim for damages by qualified immunity as public official acting within the scope of his discretionary authority); *Roberts v. Kling,* 144 F.3d 710, 711 (10th Cir. 1998) (execution of criminal complaint by investigator for district attorney's office, by which investigator affirmed the truth of facts set forth in that document to the best of his information and belief, was protected by qualified immunity in plaintiff's civil rights lawsuit); *Keating v. Martin,* 638 F.2d 1121, 1122 (8th Cir. 1980) (investigators for state prosecutor enjoy immunity from suits brought under section 1983 so long as the actions complained of appear to be within the scope of prosecutorial and investigatory duties).

[redacted]

[redacted]

III. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(7) FOR FAILING TO JOIN INDISPENSABLE PARTIES.

Dismissal under Fed.R.Civ.P. 12(b)(7) requires a two-step inquiry. First, Rule 19(a) is applied to determine whether the absent party is conditionally necessary and therefore to be joined if feasible. Rule 19(a)(1) requires that a party be joined if: "in that person's absence, the court cannot accord complete relief among existing parties; or that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may….as a practical matter impair or impede the person's ability to protect the interest…" Fed.R.Civ.P. 19(a)(1). Second, when a court decides a party is necessary but cannot be joined, the court must then determine whether the party is indispensable to the action. *Id.* In deciding a case under Rule 12(b)(7), the Court may review materials submitted outside of the pleadings and consider extrinsic evidence. *Davis Cos. V. Emerald Casino, Inc.*, 268 F.3d 477, 480, n.4 (7th Cir. 2001).

[redacted]

[redacted]

CONCLUSION

For the foregoing reasons, Defendant Dean Nickel respectfully requests that this Court grant his Motion to Dismiss.

Dated this 12th day of March, 2014.

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