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

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

Plaintiffs' Response in Opposition to Defendants' Motion To Stay Briefing

Defendants' motion to indefinitely delay consideration of a preliminary injunction in this case demonstrates only that they are willfully blind to the substantial ongoing injury that their conduct inflicts on Mr. O'Keefe and the Wisconsin Club for Growth. [redacted] they are unable to associate freely with their allies and supporters, they are unable to raise the funds necessary to promote their views to the public, and they are therefore unable to meaningfully participate in Wisconsin political and policy debates. These injuries are not hypothetical: the Club has been entirely unable to participate in the current public debate over Wisconsin tax policy, an issue that is

central to its beliefs and pro-growth mission. This chilling effect is exactly the kind of *per se* irreparable injury that merits immediate injunctive relief to avoid further harm. *Wilson v. Thompson*, 593 F.2d 1375, 1383 (5th Cir. 1979); *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013).

Oddly, Defendants choose not to address that point. Odder still, they do not even attempt to demonstrate that they are *entitled* to a stay of proceedings. Mr. O'Keefe and the Club have, in their preliminary-injunction briefing, shown that they are likely to succeed on the merits of their claims, that they are suffering irreparable harm in the absence of an injunction, and that an injunction is favored by the balance of equities and will further the public interest. By contrast, Defendants only complain that the burden of justifying their unlawful targeting of Mr. O'Keefe, the Club, [redacted] too great for them to bear at this time, unless and until their every conceivable defense has been rejected.

But every lawsuit to vindicate federal rights against state officials' actions raises similar issues of comity, immunity, etc., and Defendants offer no particular reason that indefinite delay is appropriate in this instance. To the contrary, it is particularly inappropriate, given Plaintiffs' ongoing First Amendment injury. Defendants' hodge-podge of excuses for delay are meritless. Their last-minute motion should be denied, and Defendants should be held to the deadline for response that they have known about for weeks.

ARGUMENT

I. Defendants Are Not Entitled to a Stay

"The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken v. Holder* 556 U.S. 418, 433–34 (2009). "The factors regulating the issuance of a stay are: '(1) whether the stay applicant has made a strong showing that he is likely to succeed…on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies.'" *Shakman v. Democratic Organization of Cook County*, No.69 C 2145, 2005 WL 693242, *2 (N.D. Ill. Mar. 24, 2005), (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)) (denying motion to stay proceedings), *vacated on other grounds*, 157 Fed. App'x 895 (7th Cir. 2005). Defendants do not even attempt to carry their burden, and their motion should be denied on that ground alone. Moreover, they cannot carry their burden here.

A. Defendants Have Zero Likelihood of Success on the Merits

Defendants stated "Constitutional and Jurisdictional Concerns" have no likelihood of resulting in the dismissal of the claims at issue in Plaintiffs' preliminary-injunction motion. *See* Doc. 35, Memorandum in Support of Stay Motion ("Mot.") at 3.

First, the Court's jurisdiction cannot seriously be questioned, the Plaintiffs having brought suit to vindicate their federal rights under 42 U.S.C. § 1983 and the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). *See* 28 U.S.C. § 1331. Nor can Plaintiffs' standing under Article III's "case" or "controversy" requirement, the Defendants' challenged conduct presently chilling Plaintiffs' exercise of their federal rights. *See, e.g., Lujan*

Defenders of Wildlife, 504 U.S. 553, 560 (1992) (standing requires an injury in fact caused by the conduct complained of and likely to be redressed by a favorable decision).

Second, sovereign immunity is no defense to Plaintiffs' claims for injunctive relief. "*Ex parte Young* recognized what has become one of several well-established exceptions to the Eleventh Amendment bar on suing states in federal court, permitting private citizens to sue state officials in their official capacities to require them to comply with federal law on an ongoing basis." *McDonough Assocs., Inc. v. Grunloh*, 722 F.3d 1043, 1049 (7th Cir. 2013) (citing 209 U.S. 123 (1908)). *See also Williams v. Wisconsin*, 336 F.3d 576, 581 (7th Cir. 2003) ("Official-capacity suits against state officials seeking prospective relief are permitted by § 1983[.]").

Third, prosecutorial immunity is no defense to Plaintiffs' claims for injunctive relief. "Prosecutors enjoy absolute immunity from damages liability, but they are natural targets for § 1983 injunctive suits since they are the state officers who are threatening to enforce and who are enforcing the law." *Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 736 (1980) (citation omitted). In addition, prosecutorial immunity does not apply at all in the circumstances of this case: "a prosecutor's absolute immunity is limited to the performance of his prosecutorial duties, and not to other duties to which he might be assigned by his superiors or perform on his own initiative, *such as investigating a crime before an arrest or indictment*." *Fields v. Wharrie*, 740 F.3d 1107, 1111 (7th Cir. 2014) (emphasis added).

Fourth, qualified immunity is no defense to Plaintiffs' claims for injunctive relief. *Denius v. Dunlap*, 209 F.3d 944, 959 (7th Cir. 2000) ("The doctrine of qualified immunity does not apply to claims for equitable relief.").

Fifth, the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), does not apply to claims, such as Plaintiffs', that "a law enforcement proceeding 'was brought in bad faith for the purpose of retaliating for or deterring the exercise of constitutionally protected rights.'" *Collins v. Kendal Cnty., Ill.*, 807 F.2d 95, 98 (7th Cir. 1986) (quoting *Wilson v. Thompson*, 593 F.2d 1375, 1383 (5th Cir. 1979)). Moreover, *Younger* says nothing about the circumstances "under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun." 401 U.S. at 41.

Finally, Defendants' assertion that Plaintiffs' claims somehow implicate "full faith and credit considerations" is inscrutable. *See* Mot. at 3. Plaintiffs have not challenged the authenticity of any state-court orders. And the "state judicial orders commencing [the John Doe] proceedings" could not have any *res judicata* effect on Plaintiffs' claims that Defendants' actions (including the institution of those proceedings) were undertaken in bad faith for purposes of retaliation because (among other things) those orders were issued *ex parte*, without Plaintiffs' participation, and do not even purport to address Plaintiffs' claims of bad faith and retaliation—which, in any case, Plaintiffs had no opportunity to raise in the John Doe proceedings.

In sum, Defendants identify no ground at all that could merit any delay in briefing and adjudication of Plaintiffs' motion for a preliminary injunction.

B. Defendants Have Made No Showing of Irreparable Injury

Defendants complain that having to justify their conduct at this time would be unduly burdensome. *See* Mot. at 2. "Over and over, the Supreme Court says that the burdens and expenses of the legal process (including retrials) are not irreparable injury."

Owens-Corning Fiberglas Corp. v. Moran, 959 F.2d 634, 636 (7th Cir. 1993). Indeed, "this principle is so entrenched that sanctions are in order when a litigant seeks urgent relief (such as a stay pending appeal) on the theory that the cost and travail of litigation are irreparable injury." *Id*. *See also Sherwood v. Marquette Transp. Co., LLC*, 587 F.3d 841, 844–45 (7th Cir. 2009) (labeling such arguments "frivolous").

C. *Any* Further Delay Would Irreparably Injure Plaintiffs

By contrast, Plaintiffs are already suffering irreparable injury—the denial of their First Amendment rights of association and free speech due to Defendants' retaliatory conduct—and that injury would only be prolonged by any delay in the adjudication of their preliminary-injunction motion. As a matter of law, delay inflicts *per se* irreparable injury on Plaintiffs: "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012).

But as described above and in Plaintiff's memorandum in support of their preliminary-injunction motion, this injury is concrete and not in any respect abstract or nominal:

> But for Defendants' conduct, Plaintiffs would be engaging right now in multiple issue-advocacy campaigns. Instead they are silenced, [redacted] And Plaintiffs' injury grows by the day, as they are prevented from speaking out on the issues during the Wisconsin legislative session and as the 2014 election—a time of high public interest in matters of policy—approaches. Absent an immediate injunction, Plaintiffs' fundamental right to participate in the debates of the day will be snuffed out a day at a time, with no adequate remedy for that injury possible.

Doc. 5-1, Plaintiffs' Memorandum in Support of Preliminary Injunction at 44.

Defendants' assertion that Plaintiffs already obtained relief [redacted] misses the point entirely. *See* Mot. at 5. [redacted] The Plaintiffs' injury here is not merely that they were served with subpoenas, but that the Defendants are targeting them in a long-running campaign to harass and silence political opponents through the abuse of law-enforcement proceedings—which, quite predictably, chills Plaintiffs' exercise of their First Amendment rights.

D. The Public Interest Requires Immediate Adjudication of Plaintiffs' Preliminary-Injunction Motion

Under Seventh Circuit law, "injunctions protecting First Amendment freedoms are always in the public interest." *Am. Civil Liberties Union of Ill.*, 679 F.3d at 590 (quoting *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006)). The Plaintiffs having shown a likelihood of success on the merits in their preliminary-injunction papers, delay in adjudicating their claims would only harm the public interest, by denying the public access to voices and perspectives that are presently chilled due to Defendants' retaliatory conduct. Even if Plaintiffs' motion were to fail, delaying action on it would certainly not further the public interest in any respect.

II. Prudential Considerations Do Not Support Any Delay

In addition to the standard stay factors discussed above, "[c]ourts often consider the following factors when deciding whether to stay an action: (1) whether the litigation is at an early stage; (2) whether a stay will unduly prejudice or tactically disadvantage the non-moving party; (3) whether a stay will simplify the issues in question and streamline the trial; and (4) whether a stay will reduce the burden of litigation on the parties and on the court." *Grice Eng'g, Inc. v. JG Innovations, Inc*. 691 F. Supp. 2d 915, 920 (W.D. Wis. 2010) (citation omitted). Only an "exceptional" showing will support a stay, *id*., and Defendants' hollow assertion that "efficiency and economy concerns" merit delay does not come close. *See* Mot. at 4–5.

While this litigation is at an early stage, that in itself does not support stay of proceedings pending decision on a motion to dismiss. "Although this Court cannot grant a preliminary injunction unless it has jurisdiction, this does not necessitate a stay on the briefing of Plaintiffs Motion. The Court can always consider the jurisdictional issues prior to considering the preliminary injunction without granting a stay." *GoEngineer, Inc. v. Progression Techs., Inc.*, No. 12-930, 2012 WL 5187777, at *1 (D. Utah Oct. 18, 2012). Nothing prevents the Court from entertaining Defendants' motion to dismiss arguments and the preliminary injunction issues simultaneously. That course of action is particularly appropriate here, where any challenge to the Court's jurisdiction would border on frivolous.

Delay would also not advance efficiency. As described above, none of the doctrines cited by Defendants would "streamline" the issues under consideration at the preliminary-injunction stage. Most are inapplicable to claims for injunctive relief. The

chief exception, *Younger* abstention, is part of the merits under Plaintiffs' theory of the case. *Collins*, 807 F.2d at 98. In other words, that issue will have to be briefed and decided whether or not the Court stays proceedings on Plaintiffs' preliminary injunction motion. And Defendants' suggestion that this action might be rendered moot by the Wisconsin courts is both legally impossible—the bad-faith claims raised here are not before any Wisconsin court—and "simply too speculative to support a stay." *Grice*, 691 F. Supp. 2d at 921.

Finally, *Grice*, which concerned a business dispute, recognized that the "plaintiff would be prejudiced by a stay because it is uncertain when [a related state-court] appeal will be resolved" and because it "would not be able to prosecute this case and [] would be deprived of the ability to obtain a judgment and injunctive relief…." *Id*. Plaintiffs here would suffer the same prejudice and more, due to Defendants' continuing violation of their civil rights.

III. Defendants' "Confidentiality Concerns" Are Meritless

Defendants' stated "confidentiality concerns" provide no basis to delay on Plaintiffs' preliminary-injunction motion. *See* Mot. at 4.

As an initial matter, Plaintiffs have repeatedly informed Defendants that they will not only honor any sealing order entered by this Court but will also (1) treat any materials subject to a pending motion to seal as confidential and (2) uphold their own obligations under the John Doe secrecy orders. Defendants' counsel has never suggested—even in response to an inquiry by Plaintiffs' counsel—that any additional measures are required to maintain the confidentiality of the John Doe proceedings pursuant to the secrecy orders.

Defendants' claim that Plaintiffs have sought to limit Defendants' "access to relevant information" that would assist in their defense is disingenuous in the extreme. *See* Mot. at 4. [redacted] This is only common sense—for example, it is no defense to a claim of an unlawful search and seizure that the defendant police officer actually found illegal drugs. This principle has been recognized specifically in cases challenging bad-faith abuse of law-enforcement proceedings. "A showing that a prosecution was brought in retaliation for or to discourage the exercise of constitutional rights 'will justify an injunction regardless of whether valid convictions conceivably could be obtained.'" *Lewellen v. Raff*, 843 F.2d 1103, 1109–10 (8th Cir. 1988) (quoting *Fitzgerald v. Peek*, 636 F.2d 943, 945 (5th Cir. 1981)). [redacted][1]

[1] Even were these materials relevant, it wouldn't make a difference. Defendants have recourse to the same tools of discovery as any other federal litigant.

Defendants' claim that the Wisconsin Government Accountability Board's "strict confidentiality requirements" may impede their defense is simply audacious. *See* Mot. at 4. [redacted] The Defendants should not now be heard to complain that the GAB, [redacted] holds the key to their defense. It doesn't: Plaintiffs' claims challenge Defendants' conduct and motivations, not GAB's.

IV. The Court Should Reject Defendants' Delay Tactics and Hold Them to the Schedule Provided by the Local Rules

The pretextual nature of Defendants' stated bases for their motion—*e.g.*, even cursory research would have revealed that their three immunity-based defenses have no conceivable bearing on Plaintiffs' preliminary-injunction motion—suggests their real motive: delay. Why else would Defendants wait until the Friday afternoon before their papers were due to seek additional time? Why else would they seek relief to which they

are plainly not entitled—relief which they do not even attempt to show that they are entitled—other than to make their fallback position, a 40-day extension, appear more reasonable by comparison?

It is not reasonable. Defendants have been on notice of the Plaintiffs' claims since January 15. Defendants Chisholm, Landgraf, Robles, and Nickel were served with the complaint and preliminary-injunction motion on February 12—nearly a month ago—and could have moved that very week for additional time. They didn't. Defendant Schmitz was served on February 19 and could have moved that week for additional time. He didn't. Instead, they all waited until the last possible moment to request an extension, seeking to force the Court's hand.

Mr. O'Keefe and the Club have been reasonable. They notified the Defendants of their claims nearly a month before bringing suit, seeking to resolve this dispute without litigation. Despite their ongoing injuries, they did not seek to expedite Defendants' responses to their preliminary-injunction motion, so as to afford Defendants a reasonable amount of time to prepare their briefing. And when Defendants Landgraf, Robles, and Nickel requested an additional week for their responses—which would align their deadlines with Schmitz's—Plaintiffs' counsel consented within the hour.

The Court should reject Defendants' attempt to hold Plaintiffs' reasonableness on matters of timing against them. Defendants have known for weeks when their motion responses were due and have had more than sufficient time to prepare their briefing. They should be held to that deadline.

CONCLUSION

Defendants' motion should be denied in its entirety.

Dated: March 10, 2014

Respectfully submitted,

/s/ David B. Rivkin, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Plaintiffs' Response in Opposition to Defendants Motion To Stay Briefing was served on March 10, 2014, upon all counsel of record by the United States District Court's ECF system.

/s/ David B. Rivkin, Jr.
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