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' SUPPLEMENTAL RESPONSE IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION AND SUMMARY OF ARGUMENT

In February 2012, at the outset of a tough reelection campaign and a battle for control of Congress, President Barack Obama's official campaign committee threw its support behind Priorities USA Action, a "super PAC" supporting Democratic candidates. "[T]op campaign staff and even some Cabinet members [would] appear at super PAC events," and they helped Priorities USA Action raise millions that it spent in support of Democratic candidates.[1]

[redacted] Defendants have the law precisely backwards. And if that weren't bad enough, this new "crime" they say supports their decision to target conservative activists across Wisconsin does not even exist in Wisconsin law. They made it up to target Plaintiffs and their allies.

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[1] *See generally* Glenn Thrush, *Obama super PAC decision: President blesses fundraising for Priorities USA Action*, Politico, February 6, 2012, available at http://www.politico.com/news/stories/0212/72531.html; Kenneth Vogel and Tarini Parti, *Democratic super PACs get jump on 2014, 2016*, Politico, November 26, 2012, available at http://www.politico.com//news/stories/1112/84205.html.

[2] The defined term "Defendants" does not include Gregory Peterson, who is referred to separately and is named as a defendant only in his official capacity. *See* Doc. 1, Compl. at 2 n.1.

Defendants' other legal theories fare no better. [redacted] None of these things can be reconciled with the First Amendment, and Defendants do not even attempt to do so.

These legal flaws render Defendants' long-awaited "evidence" of wrongdoing by Plaintiffs irrelevant in all but one respect: those materials show that Defendants are animated not only by a hostility to conservative views, but also by disdain for individuals who choose to lawfully exercise their First Amendment rights outside the system of campaign-finance regulation that Defendants favor. Their supplemental briefing actually embraces this retaliatory purpose, as if they expect the Court to hold that this petty end somehow justifies their lawless means.

It does not. Defendants have absolutely no legitimate interest in enforcing made-up "laws" to silence political speech—whether because they disagree with its substance or because they would prefer it was made in some other manner that is subject to regulation. But unless and until Defendants' inquisition is stopped, they will continue to achieve their goal of chilling Plaintiffs' exercise of their First Amendment rights of association and advocacy. That ongoing irreparable injury is compounded every day the Club is prevented from acting to inform and persuade the Wisconsin public. An injunction is necessary to vindicate Plaintiffs' fundamental rights and the public interest.

ARGUMENT

I. Defendants Cannot Salvage Their Rejected Legal Theory, Confirming Their Bad Faith

The first factor evidencing Defendants' bad faith is their pretextual and plainly unconstitutional theory of criminal liability. [redacted] n short, the complete failure and obviously pretextual nature of Defendants' new theory only confirms that bad faith motivates their conduct in targeting Plaintiffs.

A. [redacted]

[redacted]

[redacted]

[redacted]

Wisconsin law does regulate candidate solicitations in other contexts. For example, Wisconsin Statute § 11.36(4) bars solicitations for campaign contributions in state-owned facilities. Notably, no similar restriction applies to solicitations for groups like the Club. And Wisconsin Statute § 11.16(5) regulates how candidates and their campaigns may engage in joint solicitations for campaign contributions (i.e., raising money for more than one campaign at once) and distribute the funds so raised. Also of note, the law does not take the next logical step of limiting or regulating fundraising that candidates and office-holders may do on behalf of other candi-

dates, while not also raising funds for their own campaigns. And so it should be no surprise that the Wisconsin Code does not go several steps beyond that to attempt to limit or otherwise regulate candidates' and office-holders' fundraising on behalf of independent groups like the Club.

By contrast, Wisconsin law does restrict such solicitations by a single class of candidates: those seeking judicial office. Wis. Sup. Ct. R. 60.05(c)(2)(a). That ban provides, in relevant portion, that a judge or candidate for judicial office "may not personally participate in the solicitation of funds or other fund-raising activities." No analogous restriction applies to any other candidates for elected office in Wisconsin, including those running to be members of the Wisconsin Assembly, state senators, or governor.

In sum, Defendants' new theory of criminal liability violates the First Amendment and finds no support in Wisconsin law. It is a pretext adopted solely for the purpose of targeting Plaintiffs and others who speak out in ways of which Defendants disapprove.

B. [redacted]

[redacted][3] Under well-established law, Defendants could have had no reason at all to suspect that the Club was engaged in any impropriety.

[redacted]

[3] In addition, Plaintiffs have presented with this filing Exhibit H in support of their preliminary-injunction motion, which is a chart addressing each item of evidence in Defendants' filing that supposedly shows [redacted]

[redacted][4] [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

C. Defendants Still Refuse To Address the Fatal Consequences of Their [redacted] Theory

In three separate filings so far, Plaintiffs have spelled out the blatantly unconstitutional consequences of Defendants' theory of criminal liability [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[4] [redacted]

[redacted]

- [redacted]

So how do Defendants respond to these specific points? They don't.[5] Rather than address the consequences of their view of the law—that is, the myriad ways that their legal contortions would cause Wisconsin law to violate the First Amendment—they simply restate their fatally flawed theory, as if sufficient repetition might somehow cure its legal deficiencies. To Defendants, speech and association may presumptively be regulated by the government unless they "qualify for a 'free-speech safe harbor.'" Chisholm Supp. at 5. But that's not the law. *See, e.g., Clifton*, 114 F.3d at 1313 ("[G]overnment agencies are not normally empowered to impose and police requirements as to what private citizens may say or write.").

[redacted]

[5] For example, the Milwaukee Defendants (Chisholm Supp. at 5) continue to rely upon *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 496 (7th Cir. 2012), without addressing the fact, previously noted by Plaintiffs, that the Seventh Circuit's decision rejects their position [redacted] *See* Reply at 4–5.

[redacted] Defendants have had every opportunity to address these points, but refuse to do so.

In sum, Defendants still cannot explain how to square their [redacted] theory of liability with the requirements of the First Amendment and the Due Process Clause. That's because it cannot be done. Defendants' theory is not merely incorrect, but outrageously so, because it would ban broad swaths of core political speech and give prosecutors a free hand to tar-

get nearly any person participating in the political process for speech crimes. It is proof positive of Defendants' bad faith.

II. Defendants' Supplemental Filings Confirm that Their Investigation Is Undertaken in Retaliation Against Plaintiffs' Exercise of Their First Amendment Rights

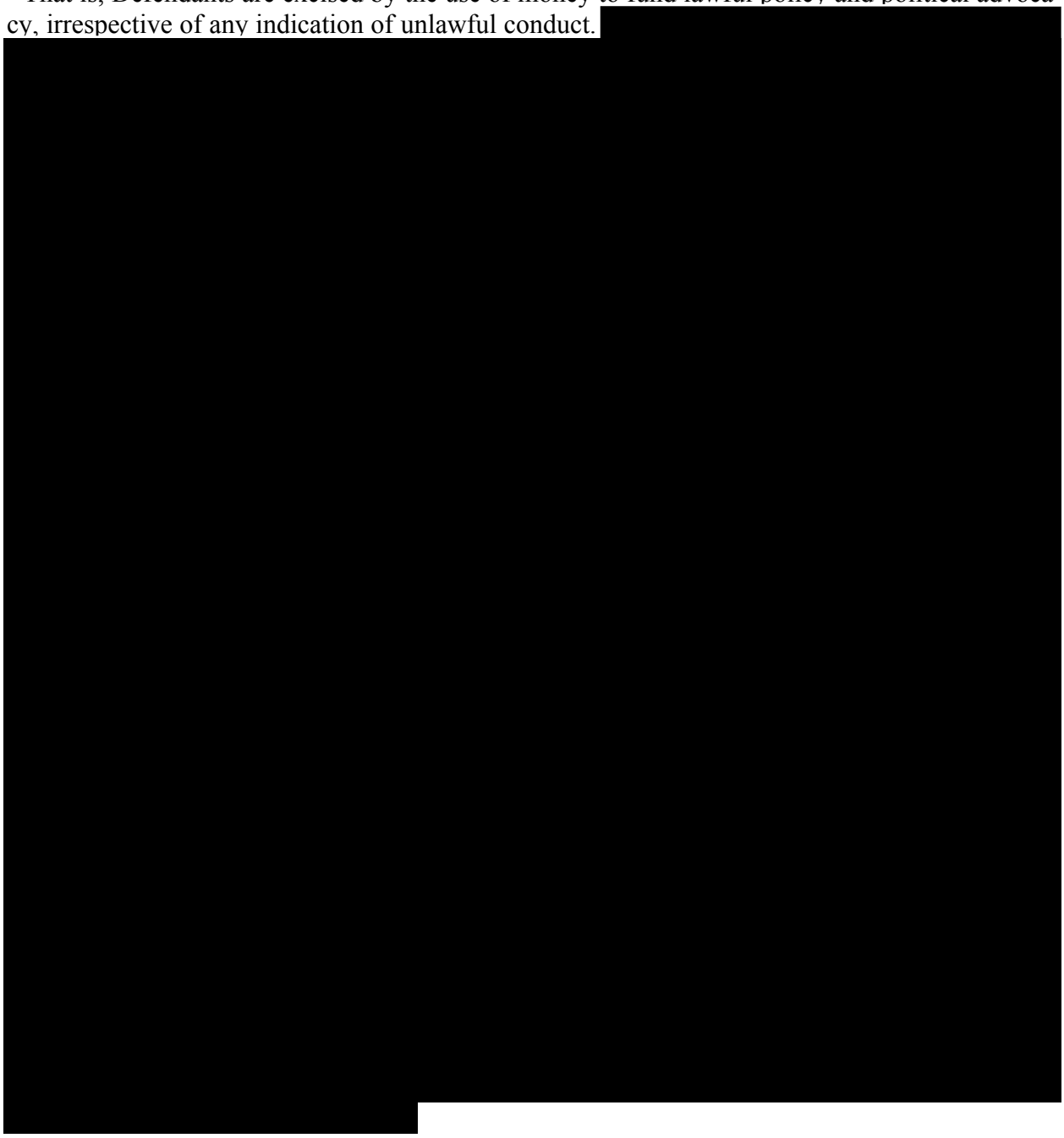
Defendants' voluminous supplemental filings actually support Plaintiffs' likelihood of success on the merits and entitlement to relief. Defendants' supplemental filings (A) confirm that Defendants are targeting Plaintiffs for their First Amendment-protected speech and association, (B) refuse to address evidence that the Court's April 8 ruling considered legally probative of Defendants' bad faith, (C) demonstrate that Defendants' actions against Plaintiffs and others are likely to deter free speech, and (D) reveal prior misrepresentations about the nature of the secret criminal investigation that underscores Defendants' bad faith. Because Plaintiffs' evidence demonstrates that Defendants' conduct is retaliatory in nature, and Defendants' filings actually confirm that point, Plaintiffs are likely to succeed on the merits and are therefore entitled to injunctive relief at this time.

A. Defendants Concede Their Investigation Is Retaliation Against First Amendment-Protected Advocacy and Association

Defendants' supplemental responses express significant dissatisfaction with the right of social-welfare organizations like the Wisconsin Club for Growth to engage in robust political speech that is beyond the regulatory scope of the Wisconsin Election Code. In other words, their defense is that they targeted the Plaintiffs for secret criminal investigation, not because of the viewpoint of their protected speech on issues of public interest in Wisconsin, but because of the very fact that Plaintiffs dared to vigorously exercise their First Amendment rights in a lawful

manner *not* subject to regulation under Wisconsin law.[6] But launching a secret criminal investigation against social-welfare organizations for exercising their right to speak is no less First Amendment retaliation than targeting groups based on viewpoint. *See* Compl. ¶¶ 16–20 (noting animosity towards social-welfare organizations and the *Citizens United* ruling as part of the

[6] That is, Defendants are excised by the use of money to fund lawful policy and political advocacy, irrespective of any indication of unlawful conduct.



background motivating Defendants' efforts here). It also constitutes an unconstitutional prior restraint on speech. *See, e.g.*, *Bantam Books v. Sullivan*, 372 U.S. 58 (1963) (enjoining investigation that attempted to informally extend the reach of statutes beyond what was constitutionally admissible). Far from being a defense to Plaintiffs' allegations, Defendants' latest explanation for their conduct only confirms Plaintiffs' retaliation claims and likelihood of success on the merits.

1. [redacted]

There is no question that fundraising to support issue advocacy is First Amendment-protected activity, and Wisconsin law does even not purport to prohibit candidates from assisting in fundraising for a social welfare organization. *See supra* § I.A; *see also* Ex. A, Declaration of Rivkin Ex. ("Rivkin Ex.") 48, [redacted]

[7] [redacted]

[redacted] At no time was such conduct illegal, and, if it were, perhaps the majority of politicians in Wisconsin and across the nation would be at risk of prosecution and conviction.

2. [redacted]

[redacted]

[8] Walker was first elected governor on November 2, 2010. The recall petition drive was commenced and a recall committee formed on November 15, 2011, with the recall election occurring on June 5, 2012. [redacted]

[redacted]

[redacted]

3. [redacted]

[redacted]

4. [redacted]

[redacted]

[redacted] [9]

[9] One wonders whether Defendants would concede, as did the losing party in *Citizens United*, that their legal theory would allow them to censor books and newspapers. Oral Argument Transcript, *Citizens United v. FEC*, No. 8–205 at 27:12–30:24 (March 24, 2009).

[redacted] No reasonable person, understanding the import of these allegations and relevant law, could believe these allegations were made in good faith.

5. [redacted]

[redacted]

[10] [redacted]

[redacted]

[redacted][11]

7. Defendants' Frivolous Factual Theory Undermines Their Representations of a Non-Partisan Purpose

The cumulative impact of the forgoing unconstitutional targeting discredits Defendants' conclusory representations of impartiality. Not only have Plaintiffs demonstrated that Defendants' legal theory falls woefully short of constitutional scrutiny, but Plaintiffs have demonstrated that Defendants' *factual* theories do not even match their supposed legal theory. *See also* MTD Response at 18. These theories thus begin to look more and more like the pretexts used to open

[11] [redacted]

the investigation initially in 2010, which Defendants do not dispute. *See infra* § II.B. The Court should reject Defendants' self-serving statements of impartiality in favor of the compelling weight of the evidence contradicting these statements, and should find that the Plaintiffs are likely to prevail on the merits.

B. Defendants Do Not Dispute that the John Doe Investigation Was Launched and Carried Out Under a Pretext for Political Purposes

Beyond the individual Defendants' conclusory and self-serving statements that they were not motivated by animus towards the Plaintiffs, Chisholm Dec, ¶ 5, Schmitz Dec. ¶¶ 17–19, Landgraf Dec. ¶ 4, Robles Dec. ¶ 3, Nickel Dec. ¶¶ 11, 13, Defendants do not attempt to contest the Plaintiffs' compelling evidentiary showing that their secret criminal investigation began in 2010 for retaliatory purposes. Instead, all Defendants begin their story with the commencement of the 2012 Milwaukee proceeding, Chisholm Supp. at 2, Schmitz Supp. at 3; Nickel Supp. at 2 (adopting Schmitz's facts). Plaintiffs' evidence between April 2009 and August 2012 is thus *uncontroverted*, demonstrates Defendants' bad-faith purpose, and thereby gives Plaintiffs a substantial likelihood of success on the merit. Mot. at 13–18.

1. Defendants Do Not Contest Evidence Showing Bias and Bad Faith Abuse of Law Enforcement Proceedings

[redacted]

[redacted]

And Defendants do not contest Plaintiffs' compelling showing that the timing and conduct of the first John Doe proceeding were intended to influence the 2010 and 2012 elections. Mot. at 16–18. They enter no evidence contesting that they were responsible for the leaks to the press and aggressive use of public filings to disclose damaging information about their targets.[12] They present no evidence calling into doubt Plaintiffs' showing of their improper tactics in jailing witnesses who lacked helpful information. [redacted] Accordingly, Defendants have presented no meaningful evidence calling into doubt Plaintiffs' showing that the investigation was always a pretext for a fishing expedition [redacted]

2. [redacted]

[12] Defendants have continued this pattern just this week by publicly disclosing the identity of Plaintiffs' state-court counsel, which had not previously been disclosed publicly, in their motion for protective order. Doc. 119, Motion for Protective Order. *See infra* § II.D.

[13] [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

14 [redacted]

[redacted][15] [redacted]

[redacted]

[redacted]

[15] [redacted]

[redacted]

[16] [redacted]

[redacted]

[redacted]

3. Defendants' Selectivity Counter-Arguments Miss the Point

Defendants' only other attempt to contest Plaintiffs' overwhelming likelihood of success is to challenge Plaintiffs' showing of selectivity. But their evidence only lends further credibility to this showing, because, through the hundreds of new pages of evidence presented, they have not shown anything remotely along the lines of a four-year, wide-ranging, all-encompassing inquiry into left-leaning individuals or organizations in the state. In fact, their evidence of other investigations demonstrates a baseline status quo for these inquiries that looks nothing like the actions they have taken against Plaintiffs.

Consider, for example, the GAB investigation of Shelly Moore, which Defendant Nickel contends is analogous[redacted]. Declaration of Reid Magney ("Magney") Exs. at 19–23, Preliminary Findings of Fact and Conclusions. After receiving a verified complaint from the Republican Party for possible misuse of public equipment for campaigning, GAB conducted an "investigation," which consisted of an informal request to Ms. Moore for emails. *Id.* at 19. The investigators trusted Ms. Moore's representation that GAB had received "all 'salient' e-mails" from the Republican Party, despite that the Republican Party obviously had no subpoena or warrant power over her. After trusting Ms. Moore's representation as to what information GAB should and should not review, GAB conducted an

informal discussion with her by phone, again trusting her representations of the relevant factual matter and concluded that "the evidence obtained" did not merit further review. *Id.* at 19–20. No further attempt was made to check the accuracy of her representations or to obtain materials in her possession by other means.[17] This was the basic course of action taken in all the GAB materials in Nickel's supplemental filing. *See, e.g.*, *Id.* at 44–47 (reflecting informal interviews and requests to witnesses whether they had information, trusting their responses).

In contrast, the Milwaukee Defendants, immediately after opening the 2010 John Doe proceeding, raided the County Executive's Office and, without delay, had a preservation request issued against Darlene Wink's *private* email account. Rivkin Ex. 14, Wink Criminal Complaint, at 4. Wink would later testify willingly about the Operation Freedom funds.[18] Rivkin Ex. 13, Kavanuagh Complaint at 12–13. No one asked her what evidence she believed would be relevant. Nor did Defendant Landgraf trust Christopher Brekken's representation that he was not in possession of information sought in a subpoena; he was thrown in jail. O'Keefe Dec. ¶ 47 & Ex. 29,

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[17] To be clear, Plaintiffs are not suggesting that GAB or Defendants should have been raiding the personal materials of Democrats or left-leaning individuals or associations across Wisconsin. Rather, Defendants' own submissions demonstrate that GAB and Defendants knew how to conduct a correctly-tailored inquiry that did not trample the constitutional rights of the targets. They have chosen not to conduct that form of investigation here.

[18] For that reason, the Milwaukee Defendants' contention that they investigated Chris Leibenthal is also off the mark. Chisholm Supp. at 2. Defendants do not dispute Plaintiffs' showing that they elected to treat the Leibenthal incident as a "personnel" matter. Rivkin Ex. 24, CRG Press Release. To say that Wink's and Rindfleisch's treatment was different is a gross understatement. And their "investigation" of Wisconsin Jobs Now! ended in five months with no attempt to probe the entire left-leaning movement in Wisconsin. *See* Daniel Bice, *Groups Accused of Voter Bribery Cleared by DA's Investigation* (Dec. 6, 2011), available at http://www.jsonline.com/watchdog/noquarter/groups-accused-of-voter-bribery-cleared-by-das-investigation-953bdus-135147838.html. Likewise, their investigation into recall petition fraud was not anything like the all-encompassing statewide campaign of harassment at issue in this case. That their conduct there was not analogous to their conduct in this four-year-long investigation only *bolsters* Plaintiffs' showing of selectivity.

M.D. Kittle, *Vendetta Justice? Criticism Growing About John Doe Prosecutor Bruce Landgraf*, Wisconsin Reporter (Nov. 15, 2013); *see also* O'Keefe Ex. 28, Daniel Bice, *Real Estate Broker Exonerated in John Doe Probe*, Milwaukee Journal Sentinel No Quarter Blog (April 19, 2012). The Wink episode turned out to be the launch of a rabbit trail of inquiries against her, against other employees, against Walker, against his associates, [redacted] It is simply fantastic to assert that Plaintiffs have received treatment resembling the treatment given to Ms. Moore.

[redacted]

The Milwaukee Defendants identify only two 2009 prosecutions of Democratic Milwaukee officials or left-leaning organizations and have specifically identified *no investigations* since

then.[19] In other words, while chasing ghosts of wrongdoing by right-leaning individuals and organizations that they concede did not even occur in Milwaukee, Rivkin Ex. 32, [redacted] they have not specifically identified a *single investigation* of a Democratic politician since 2009 either in Milwaukee or anywhere else in the state, much less a statewide probe into the entire left-leaning movement in Wisconsin. That speaks volumes about their priorities, and contradicts their self-serving representations that their actions are unbiased.

At base, Defendants are comparing apples to oranges, in that neither they [redacted] have attempted to apply their incredibly broad theories [redacted] to any party on the left side of the political spectrum. The activities Defendants target in their investigation here are the heart and soul of lawful and effective political engagement. Defendant Chisholm, for example, does not deny that he personally campaigned on behalf of Mayor Tom Barrett, but there is no investigation into his activities analogous to the investigation [redacted] despite the obvious "value" that Mr. Chisholm brought to Mr. Barrett's campaign. There is no investigation into United Wisconsin, [redacted] *E.g.*, Rivkin Ex. 41, Rally to Recall Walker. And there is no investigation into the numerous other candidates and organizations that undertake similar activities on a day-to-day basis. [redacted]

[19] The Milwaukee Defendants suggest that there were unidentified investigations during this period, but this statement is supported by no factual evidence or explanation why the Milwaukee Defendants cannot identify those investigations. It is entitled to no weight.

[redacted] That Defendants may have pursued charges against left-leaning individuals for non-speech-related crimes does nothing to contradict or undermine that fact.

4. Plaintiffs' Evidence Is Corroborated by the First-Hand Testimony of [redacted] and No Attempt at Rebuttal Has Been Offered

[redacted]

[redacted]

In light of these very specific first-hand statements corroborating Defendants' overwhelming bad faith, it is telling that Defendants have not so much as referenced them. Unlike Defendants' submissions, this un-contradicted testimony is hardly self-serving [redacted] It thus provides the best testimony as to the nature of the investigation and its purpose. It shows that, far from being the unbelievable conspiracy theory the Milwaukee Defendants make it out to be, Chisholm Supp. at 1, Plaintiffs' allegations of constitutional violations are real and pressing, and Defendants' actions must be enjoined immediately.

C. Plaintiffs Easily Meet Their Burden To Demonstrate That Defendants Acted To Deter Plaintiffs' Exercise of Their First Amendment Rights

The Milwaukee Defendants' emphasize at length the standards for selective prosecution while generally ignoring the thrust of Plaintiffs' case, which is First Amendment retaliation.[20] Chisholm at 18–19. Likelihood of success on that count alone would support a preliminary injunction, and the standard is not nearly so high as Defendants suggest. As the Seventh Circuit has explained, "[a]ny deprivation under color of law that is likely to deter the exercise of free

[20] In fact, Defendants' discussion of selectivity amounts to a concession that they are likely to lose on their Equal Protection count as well, because, as they concede, their discretion only extends as far as they have *probable cause*. Chisholm Supp. at 18. Plaintiffs have shown several times over that there was no probable cause to investigate them, nor was there reason to believe a crime was committed—especially in Milwaukee. [redacted]

speech…is actionable…if…the circumstances are such as to make such a refusal an effective deterrent to the exercise of a fragile liberty." *Power v. Summers*, 226 F.3d 815, 820 (7th Cir. 2000). This includes "even something as trivial as making fun of an employee for bringing a birthday cake to the office to celebrate another employee's birthday." *Id.* (citing *Bart v. Telford*, 677 F.2d 622, 624 (7th Cir.1982)). And it includes "'a campaign of petty harassment' and 'even minor forms of retaliation,' 'diminished responsibility,' or 'false accusations.'" *Id.* (quoting *DeGuiseppe v. Village of Bellwood*, 68 F.3d 187, 191 (7th Cir. 1995)).

Accordingly, the mere *threat* of increased government scrutiny can violate the First Amendment, as exemplified in *Blankenship v. Manchin*, 471 F.3d 523, 525 (4th Cir. 2006). In that case, the Governor of West Virginia advocated a constitutional amendment regarding coal severance taxes for the purpose of funding workers' compensation benefits plans. The president of a coal company opposed the measure. The Governor said in a speech that, given its decision to be involved in political speech, the government should apply extra scrutiny to the company's operations and ordered staff members to have a meeting with the company's officials about certain compliance issues. The district court held that these minimal facts could arise to a First Amendment violation, and the Fourth Circuit agreed.[21] *Id.* at 529–32.

The facts on record here demonstrate a four-year-long campaign of harassment and intimidation that far exceeds the standard set forth in these cases, as explained already in Plaintiffs' briefing. Mot. at 13–26; Reply at 7–17. In fact, Defendants' submissions confirm and expand upon the scope and intensity of retaliation previously demonstrated. [redacted]

[21] The court went on to deny qualified immunity, as the law prohibiting retaliation was well established. *Id.* at 533.

[redacted]

D. Defendants' Misrepresentation, Concealment, and Misconduct Further Support Plaintiffs' Showing of Bad Faith

After years of misconduct—much of which stands uncontested on the record—Defendants ask the Court to believe their self-serving and conclusory statements that animus has nothing to do with this investigation. Chisholm Dec, ¶ 5, Schmitz Dec. ¶¶ 17–19, Landgraf Dec. ¶ 4, Robles Dec. ¶ 3, Nickel Dec. ¶¶ 11, 13. *But see, e.g.*, *Ferguson v. Med. Coll. of Wis.*, 471 F. Supp. 2d 901, 916 (E.D. Wis. 2007) (striking "self serving and conclusory" affidavits); *Hosick v. Chicago State Univ. Bd. of Trustees*, 924 F. Supp. 2d 956, 968 (N.D. Ill. 2013) (disregarding conclusory affidavits with "bare assertions" that did not establish facts). [redacted]

Defendants have had two opportunities at this stage of litigation to address this evidence and present counter-evidence. They have not done so.

Nor have Defendants entered any evidence supporting their denial that their office is responsible, through various means, for leaking damaging information to the media. Mot. at 17 (citing articles). In fact, their recent conduct lends further support to this allegation. Just this past week, Defendant Schmitz filed a motion to prevent Plaintiffs' state-court counsel from receiving information disclosed in this litigation—a questionable course of conduct that Plaintiffs will oppose in due course. In so doing, Schmitz disclosed to the public for the first time the identity of Plaintiffs' state-court counsel, which had heretofore been a secret and which had been maintained as such by the various attorneys in the John Doe proceeding. Doc. 119, Motion for a Protective Order. The next day, the information was published by Daniel Bice of the Milwaukee Journal Sentinel in an article favorable to Defendant Schmitz. *See* Daniel Bice, *John Doe Special Prosecutor Says He Voted for Scott Walker in Recall*, No Quarter Blog, Milwaukee Journal Sentinel (April 16, 2014), available at http://www.jsonline.com/blogs/news/255433971.html.

This was reminiscent of the special prosecutor's supposedly inadvertent disclosure several months ago of the identify of Plaintiff O'Keefe and Ms. Rindfleisch as targets of the John Doe probe, which had before then been secret information.[22] *See* Daniel Bice*, Rindfleisch, O'Keefe Identified as Subjects in John Doe Probe*, No Quarter Blog, Milwaukee Journal Sentinel (Feb. 10, 2014), available at http://www.jsonline.com/blogs/news/244737031.html. In that incident, not only were the documents with O'Keefe and Rindfleisch's initials leaked, but "[s]ources" informed the reporter whose initials they were; common sense would dictate that these sources

[22] In fact, a central purpose of secrecy in John Doe proceedings is to protect the targets from improper speculation as to possible wrongdoing. *In re John Doe Proceeding*, 660 N.W.2d 260, 277 (Wis. 2003).

(a) had inside information on the investigation and (b) were not allies of the targets. Indeed, information damaging to targets has somehow come to public light time and again since 2010, often at politically inconvenient times for the targets and their allies. [redacted] Mot. at 17. By contrast, information that Defendants want to remain secret has been tightly concealed, including, most prominently, [redacted][23] *See supra* § II.B.2.

All of this shows that Defendants have engaged in selective disclosure and selective concealment of information. On that basis, the Court should credit Plaintiffs' evidence regarding the selective leaking of politically sensitive information, as well as their other evidence of bad faith. And it should decline to believe Defendants' brief, conclusory, and self-serving statements that animus is not behind their actions.[24] *See, e.g., Burks v. Wisconsin Dept. of Transp.*, 464 F.3d 744, 756 (7th Cir. 2006) (giving no weight to "bald and self-serving assertions in affidavits"). Moreover, because Defendants have control over much of the relevant information and because the information presented already shows Plaintiffs' significant likelihood of success, the Court should assume that, if anything, the undisclosed information and unanswered questions are only likely to provide further support for Plaintiffs' claims.

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[23] Defendants' candor to this court regarding the extent of their secrecy obligations has been questionable as well. Doc. 48, Opposition to PI Motion at 3 (representing that all Defendants were bound by GAB secrecy statute); Doc. 67, Opposition to Motion to Amend the Scheduling Order (representing that Defendants never said all Defendants were covered by GAB secrecy statute); Doc. 68, Reply in Support of Motion to Amend the Scheduling Order (pointing out that discrepancy).

[24] It bears noting that Defendant Schmitz's and Nickel's representations that they personally do not have animus towards the plaintiffs or knowledge of any animus by other parties does not affect Plaintiffs' ability to obtain preliminary injunctive relief to halt the investigation, based on Plaintiffs' conclusive and effectively unrebutted of showing of retaliatory animus on the part of the Milwaukee Defendants. *See, e.g.*, *supra* § II.B.1.

III. Plaintiffs Suffer a Concrete Irreparable Injury—Suppression of Their Right To Speak Out on Issues of Public Interest—Every Single Day the Investigation Continues

Defendants do not seriously challenge Plaintiffs' ongoing irreparable injury—the deprivation of their right to speak out on the issues of the day—nor could they. As a factual matter, the Club is off the air in Wisconsin for fear that it, its officers and staff, its vendors, its donors, and its other associates will suffer further retribution by Defendants for resuming its activism in support of free-market causes. O'Keefe Dec. ¶¶ 48–53. During a typical legislative session, the Club would be airing television commercials, putting up billboards, and undertaking other mass communications to inform and persuade thousands of Wisconsinites every single today. Instead, this year, the Club is silent, able to do little more than send an email newsletter to its supporters and update its weblog. It lacks the resources to run ads, due to the disabilities imposed on it by the John Doe investigation. And even if it had the necessary resources, it couldn't put them to use: [redacted]. So the Club keeps silent, even as politics and policy in Wisconsin march on. This injury will only worsen as the election season approaches and the public turns its attention to issues of economic policy core to the Club's beliefs and mission.

In these circumstances, the equities require an injunction. Every day that the Club is kept quiet causes it irreparable harm and wrongly deprives the public of an important voice on some of the most urgent matters in this state. *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012).[25] Moreover, a showing of bad faith abuse of law enforcement proceedings

[25] Defendant Schmitz argues (Schmitz Supp. at 23) that an injunction is not in the public interest [redacted]

that is sufficient to overcome *Younger's* bar "will…as a matter of law cause irreparable injury" sufficient to support an injunction. *Wilson v. Thompson*, 593 F.2d 1375, 1383 (5th Cir. 1979). This Court held that Plaintiffs' complaint "easily satisfies" the bad faith standard because it "precisely alleg[es] that the defendants have used the John Doe proceeding as a pretext to target conservative groups across the state." Doc. 83, Decision and Order at 6. Plaintiffs' evidence, in turn, supports the Complaint's allegations of bad faith, showing how Defendants transformed a minor investigation over missing charitable funds into a full-scale assault on conservative political activism in Wisconsin. And Defendants' own filings confirm that Plaintiffs' First Amendment-protected activities are the motivation for their retaliatory conduct. *See supra* § II.A.2. Defendants' conduct furthers no valid state interest and should be enjoined.

IV. Plaintiffs' Requested Injunction Is Necessary To Cure Their Irreparable Injury

Contrary to the Milwaukee Defendants' contention, Plaintiffs' request for relief is precisely tailored to relieve the ongoing injury inflicted on Plaintiffs' by Defendants' unlawful conduct. *See* Chisholm Br. at 23–26.

First, Plaintiffs' requested relief is not "vague as to whom it applies to." *Id*. It applies to "Defendants"—Francis Schmitz, John Chisholm, Bruce Landgraf, David Robles, and Dean Nickel. Doc. 4, Plaintiffs' Proposed Findings and Order Granting Preliminary Injunction, at 3.

Second, Plaintiffs' requested relief is not "non-specific." *See* Chisholm Br. at 23–24. Plaintiffs have asked the Court to "enjoin Defendants' investigation" and, in particular, to order Defendants to "cease all activities related to the investigation, return all property seized in the

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But "the public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional." *Alvarez*, 679 F.3d at 589–90. Moreover, the public interest is not served by a state agency's actions to curtail First Amendment-protected speech on matters of public interest.

investigation from any individual or organization, and permanently destroy all copies of information and other materials obtained through the investigation." *Id*. The "investigation" is the one underlying and encompassing the current John Doe proceedings, which Plaintiffs describe at length in their Complaint, at ¶¶ 54–195, and preliminary-injunction briefing, at 18–26. As the Wisconsin Court of Appeals explained, while there may be multiple John Doe *proceedings*, "it is certainly fair to characterize the investigation…as a single coordinated effort." Ex. G, Declaration of Richard Raile Ex. 3, *State Ex rel. Three Unnamed Petitioners v. Peterson*, 2013AP2504-W, 2013AP2505-W, 2013AP2506-W, 2013AP2507-W at 4 (Wis. Ct. App. Jan. 30, 2014). Plaintiffs seek to halt that effort, not to play a shell game where Defendants may continue their unlawful conduct in other fora and proceedings.

Third, Plaintiffs' requested relief is not "overly broad," in that it corresponds precisely with Plaintiffs' ongoing injury. *See* Chisholm Br. at 23, 25. As Plaintiffs have shown, Defendants are targeting Plaintiffs, [redacted] for retaliation based on Plaintiffs' First Amendment advocacy. The predictable and intended result is to curtail Plaintiffs' exercise of their First Amendment rights of association and advocacy. An injunction addressing only conduct specifically directed at Plaintiffs would not relieve that injury, because Plaintiffs would still not be free to resume and engage in First Amendment-protected political associations and would still be unable, as a practical matter, to carry out First Amendment-protected advocacy. For example, just as a newspaper needs a printing press to publish, the Club has no ability to engage in advertising without the ability to work with advertising vendors. In light of the fact that Defendants have broadly targeted an entire political movement for what amount to "speech crimes," a narrow injunction that only exempts Mr. O'Keefe and the

Club from this unlawful conduct would be insufficient to allow them to resume their speech and associations and thereby remedy their injuries.

Fourth, Defendants rehash their "indispensible parties" argument that the Court already rejected. *See* Doc. 83, Decision and Order at 18–19. As the Court recognized, "O'Keefe is trying to stop a John Doe investigation that happens to encompass Iowa County, but the Iowa County District Attorney has no control over the direction and conduct of the investigation." *Id*. Instead, Defendants are the ones conducting this investigation, and it is within their power to cease doing so, thereby providing relief to Plaintiffs.

CONCLUSION

Plaintiffs respectfully request that the Court enjoin Defendants' bad-faith conduct so that Plaintiffs may resume full exercise of their First Amendment speech and associational rights pending final adjudication of their claims on the merits.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Plaintiffs' Supplemental Response in Support of Their Motion for Preliminary Injunction was served on April 20, 2014, upon all counsel of record by the United States District Court's ECF system.

/s/ David B. Rivkin, Jr.
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