No. 14-872

In The
Supreme Court of the United States

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

Petitioners,

v.

JOHN T. CHISHOLM, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE MACIVER INSTITUTE FOR PUBLIC POLICY AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION OF THE MACIVER INSTITUTE FOR PUBLIC POLICY FOR LEAVE TO FILE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, The MacIver Institute for Public Policy ("The MacIver Institute" or "Institute") respectfully moves for leave to file the attached Brief as *amicus curiae* in support of Petitioners.

All parties were timely notified of the intent of this *amicus* to file the attached brief as required by Rule 37.2(a). Petitioners consented to the filing of this brief, and that letter of consent is on file with the Clerk of Court. Each Respondent was timely requested to consent to the filing of this brief. Counsel for Respondents John T. Chisholm, Bruce Landgraf, David Robles and Francis Schmitz declined to consent and Respondent Dean Nickel's counsel did not respond. Accordingly, this Motion is being filed.

The John K. MacIver Institute for Public Policy is a Wisconsin-based think tank that promotes free markets, individual freedom, personal responsibility and limited government. The Institute plays an active and ongoing role in Wisconsin legislative policy debate at every level. The Institute conducts extensive research on public policy issues including school choice, the impact of government employee unions, open records and freedom of speech, and, as relevant to this case, the reforms contained in Wisconsin's Act 10. *See*, *e.g.*, Nick Novack, "UPDATE: Act 10

Savings up to $2.7 Billion," October 24, 2013, http://maciverinstitute.org/research/2013/10/update-act-10-savings-up-to-27-billion/. It publishes research and commentary, and it provides ongoing media coverage of government actions and actions of those involved in government. *See* www. MacIverInstitute.org (provides numerous items and summaries about the work of the Institute). It has undertaken litigation to address matters of free speech and open records. *See Wis. Prosperity Network v. Myse*, 2012 WI 27, 339 Wis. 2d 243, 810 N.W.2d 356 (GAB Rule 1.28 enjoined, later dismissed); *The MacIver Institute for Public Policy v. Erpenbach*, 2014 WI App 49, 354 Wis. 2d 61, 848 N.W.2d 862 (ordering disclosure of e-mails received during Act 10 protests).

The Institute's work has been recognized by others as important to protecting individual freedom as well as understanding limited and open government. Awards and recognition for its work include awards from Wisconsin Freedom of Information Council, The State Policy Network and Atlas Economic Research Foundation. Its work has been cited nationwide, including in *The Wall Street Journal*, *The Washington Post*, *Los Angeles Times* and *The Milwaukee Journal-Sentinel.* Its video coverage and staff interviews have appeared on ABC, CBS, CNN, Fox News and NBC. Its website coverage and stories have had page views of more than 2.3 million. MacIver's YouTube channel has been viewed over 3.2 million times.

The MacIver Institute agrees with Petitioners and supports their petition for a Writ of Certiorari. The Institute will not repeat the arguments made by Petitioners; rather, it will add both argument and information that will assist the Court. The Institute has a real and abiding interest in the outcome as it will affect its ability to speak freely on the issues without fear of retaliation. Accordingly, the Court may be assured that it will receive a distinct and independent *amicus*.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether considerations of "equity, comity, and federalism" insufficient to support abstention can override *Mitchum*'s holding that 42 U.S.C. § 1983 is an "expressly authorized" statutory exception to the Anti-Injunction Act.

2. Whether, as this Court left unresolved in *Hartman v. Moore*, 547 U.S. 250, 262 n.9 (2006), government officials may be held liable for subjecting citizens to investigation in retaliation for First Amendment-protected speech and association, particularly where non-retaliatory grounds are insufficient to support the investigation.

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INTEREST OF *AMICUS CURIAE*[1]

The MacIver Institute is a Wisconsin-based think tank that promotes free markets, individual freedom, personal responsibility and limited government. As a not-for-profit 501(c)(3) organization, the Institute has played an active role in public policy debate since its founding in 2008, conducting extensive research, investigation and publication on virtually every major public policy debate in Wisconsin. *See* www.MacIver Institute.org (Institute website with links to stories, research and materials). *See*, *e.g.*, Brett Healy, Editorial, "A growth agenda for Wisconsin," GREEN BAY PRESS GAZETTE, December 17, 2014, http://www.greenbaypressgazette.com/story/opinion/2014/12/17/growth-agenda-wisconsin/20566053/ (describing numerous legislative/policy issues); Christa Westerberg, Editorial, "Lawmakers should retain and release records," THE MILWAUKEE JOURNAL-SENTINEL, May 1, 2014, http://www.jsonline.com/news/opinion/lawmakers-should-retain-and-release-records-b99259959z1-257577491.html (describing MacIver's efforts at open government and legislators' emails); *Report: Wisconsin Union Changes Saving Schools Millions* (KSTP

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. Petitioner has consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae,* its members, or its counsel made a monetary contribution to its preparation or submission.

television August 4, 2011, http://westernwisconsin.kstp.com/news/schools/96994-report-wisconsin-union-changes-saving-schools-millions; www.MacIverInstitute.org (website of the Institute with links to issues and work). When appropriate, the Institute brings or supports legal action particularly on matters involving freedom of speech and openness in government. *See Wis. Prosperity Network v. Myse*, 2012 WI 27, 339 Wis. 2d 243, 810 N.W.2d 356 (GAB Rule 1.28 enjoined, later dismissed); *The MacIver Institute for Public Policy v. Erpenbach*, 2014 WI App 49, 354 Wis. 2d 61, 848 N.W.2d 862 (ordering disclosure of e-mails received during Act 10[2] protests).

The MacIver Institute is the recipient of numerous awards for its activities, including awards for its role in Wisconsin's recent public policy Act 10 debates which, according to the underlying District Court Complaint, are at the heart of this litigation. Those awards include:

> – **Opee Award 2013** – The MacIver Institute received the Citizen Openness Award for 2012-2013 from the Wisconsin Freedom of Information Counsel – a non-partisan group dedicated to open government – for its

[2] The 2011 Wisconsin Act 10 ("Act 10"), also known as the Wisconsin Budget Repair Bill, was passed into law in 2011. The purpose of Act 10 was to address a state budget deficit. The passage of Act 10 was contentious, garnered national media attention and led to several years of litigation. In 2014, the Wisconsin Supreme Court upheld Act 10.

successful work, including pursuit of open records litigation directed at a Wisconsin State Senate member who had fled the State of Wisconsin in order to prevent a quorum needed to pass Act 10. The Council noted, "It is through such battles that the records law stays strong."

– **Network Award 2012** – The State Policy Network, a national network of State-based think tanks, honored the Institute, noting, "It was important to celebrate the pivotal role Brett Healy [MacIver's Executive Director] and the MacIver Institute played in Wisconsin's recent victories. Our network recognizes that Wisconsin is gaining ground toward becoming the freest and most prosperous state in the country."

– **Atlas 2011 Award** – The nonpartisan Atlas Economic Research Foundation, an organization connecting free-market organizations in over 80 countries, highlighted the MacIver Institute media/video work related to the Act 10 protests. The Foundation's Chief Executive Officer explained, "We congratulate the leadership and staff of the MacIver Institute for their tremendous achievements in reaching large audiences through video communications and for the critical role they continue to play educating citizens of Wisconsin and the nation."

The MacIver Institute believes its role in the ongoing debate on limited government and free markets is critically impacted by the outcome of this

litigation. In particular, as more fully explained in the Argument, this litigation is, at its core, about the right of every citizen to be free from government intimidation. It poses a critical issue for resolution regarding the role of the federal courts in ensuring that free and unfettered debate.

The District Court injunction and ongoing proceedings are particularly directed at Wisconsin officials and relate specifically to Wisconsin laws. The MacIver Institute is based in Wisconsin, and its work relates primarily to that State. It is subject to the same Wisconsin laws and actions, or potential actions of the Respondents – each Respondent is a Wisconsin official. As a result, as an *amicus*, the Institute is seriously affected by this litigation and is qualified to provide insight for the Court.

The MacIver Institute has played a vital role in the debate about freedom and limited government in Wisconsin, including a pivotal role in the Act 10 legislation. It has entered into litigation on its own to address the right of every citizen and organizations to participate in the debate. *See Wis. Prosperity Network* and *Erpenbach*. This litigation pursues those same ends.

Moreover, the John Doe proceedings, Wis. Stat. § 968.26 (hereinafter "John Doe" or "John Doe proceedings"), that are the subject of this litigation had a direct impact on the Institute's work. As described in Section II, below, the Institute was required to scale-back its publications on the positive results of the

Wisconsin reforms for fear of being itself subjected to that same investigation. In that way, there was, and continues to be, a direct impact on the Institute, and likely others similarly situated. The Institute intends to describe that impact for the benefit of the Court and thereby illustrate the ways in which retaliatory investigation chills the exercise of First Amendment rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Seventh Circuit opinion presents an opportunity for this Court to squarely address the split of authority regarding the application of *Younger v. Harris*, 401 U.S. 37 (1971) to investigatory proceedings. The Wisconsin John Doe that is the subject of this Section 1983 action is "primarily an investigative device." *State ex rel. Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 376, 166 N.W.2d 255, 259 (Wis. 1969) and as such poses the issue with clarity.

This Court's recent decision in *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584, 591 & 594 (2013) emphasized that abstention is limited to three explicit groups of cases. The Seventh Circuit ignored that mandate by reinterpreting the Anti-Injunction Act using virtually the same original principles of *Younger*, "equity, comity and federalism" to hold that the Anti-Injunction Act prohibited a Section 1983 injunction that addressed the abuses of a Wisconsin

John Doe proceeding. Such an end-run around the principles of *Younger* and the explicit holdings of *Sprint* and *Mitchum v. Foster*, 407 U.S. 225 (1972) leaves an enormous gap in Section 1983 jurisprudence and in so doing, leaves this retaliatory and abusive investigation without a prospect of relief.

The impact of failing to correctly address the jurisdictional predicates is far reaching. For the MacIver Institute and others, the prospect of ongoing investigations, and future investigation, of non-express advocacy and policy oriented speech, has caused it to change the topics on which it will speak and to limit the extent of its speech on those topics. This matter provides a clear backdrop for understanding the chilling impact of an abusive investigation as its origins lie in the enactments of far-reaching governmental reforms by the Wisconsin Legislature and Governor Scott Walker.

It is important that the Petition be granted.

REASONS FOR GRANTING THE PETITION

I. The Court Should Resolve the Important and Recurring Question of the Application of *Younger* Abstention to State Investigatory Proceedings.

This case presents the Court the opportunity to resolve the longstanding split in authority among the courts of appeals on the application of *Younger* abstention to investigatory proceedings like grand juries

and John Does by applying the principles enunciated in its recent decision in *Sprint*. In an apparent attempt to circumvent *Sprint*, the court below held that Section 1983 claims challenging, among other things, a criminal investigation conducted under Wisconsin's John Doe statute are subject to the Anti-Injunction Act for reasons of "equity, comity, and federalism." Although that is what it said it was doing, as a practical matter it abstained, relying on the exact principles – "equity, comity, and federalism" – that this Court has said define the purpose and scope of *Younger* abstention. *See Mitchum*, 407 U.S. at 243 (citing *Younger*). Accordingly, a decision considering the application of those principles in the instant case, and the lower court's attempt to circumvent *Sprint*, would also address the important and recurring question of federal-court abstention in deference to state investigatory proceedings. The Court should take this welcome opportunity to clarify that it meant what it said in *Sprint* and that *Younger* abstention extends "no further" than the three "exceptional circumstances" identified there. *Sprint*, 134 S. Ct. at 594.

A. A Wisconsin John Doe Proceeding Is Simply a "One-Man Grand Jury."

The investigatory proceeding at issue here was conducted pursuant to Wisconsin's John Doe statute. As the Seventh Circuit observed, Wisconsin's John Doe proceeding finds its closest parallel in the grand jury process. App. 6a; *State v. Washington*, 83 Wis. 2d

808, 822, 266 N.W.2d 597, 602 (Wis. 1978) ("This court has characterized the John Doe as 'primarily an investigative device' . . . .") (citing *State ex rel. Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 376-77, 166 N.W.2d 255, 259 (Wis. 1969)); App. 17a-18a ("This procedure, unique under Wisconsin law, is an 'independent, investigatory tool used to ascertain whether a crime has been committed and if so, by whom.'" (citing *In re John Doe Proceeding*, 2003 WI 30, ¶ 22, 260 Wis. 2d 653, 669, 660 N.W.2d 260, 268)). Indeed, the Wisconsin Supreme Court has recognized that the John Doe proceeding is akin to Michigan's "judge grand-jury," which this Court has described and regarded as a "one-man grand jury." *See In re Oliver*, 333 U.S. 257 (1948); *In re Murchison*, 349 U.S. 133 (1955). It is, in other words, nothing more than an investigatory proceeding.

A John Doe proceeding begins with a petition directed to the Chief Judge of a Wisconsin circuit court (a trial court), alleging that a crime was committed in that court's jurisdiction. Wis. State § 968.26(1). If the petition is filed by a district attorney, the Chief Judge must commence a proceeding by assigning the case to a "John Doe judge."[3]

[3] A petition may also be filed by a private citizen, in which case the Chief Judge screens the petition, and, if it properly alleges reason to believe a crime was committed, the Chief Judge forwards it to the district attorney (or a special prosecutor in some instances) for commencement of the proceeding. *E.g.*, *State ex rel. Williams v. Fiedler*, 2005 WI App 91, 282 Wis. 2d 486, 698 N.W.2d 294.

The John Doe judge, who does not act on behalf of the circuit court but exercises "inherent" judicial power, is responsible for examining witnesses, issuing subpoenas and warrants, taking possession of subpoenaed records, and otherwise "fulfill[ing] the jurisdictional mandate." *In re John Doe Proceeding*, 2003 WI 30, ¶ 54, 260 Wis. 2d 653, 684-85, 660 N.W.2d 260, 275-76 (quotation marks omitted). However, the prosecution team typically undertakes these tasks subject to the John Doe judge's oversight. *See State v. Hoffman*, 106 Wis. 2d 185, 204, 316 N.W.2d 143, 155 (Wis. Ct. App. 1982). If the John Doe judge is satisfied that probable cause is established to bring a prosecution, he or she issues a criminal complaint, which commences a formal prosecution on an open record before a circuit court judge, acting for the court. The complaint is subject to be tested for probable cause at a preliminary examination in that separate proceeding. *State v. Doe*, 78 Wis. 2d 161, 165, 254 N.W.2d 210, 212 (Wis. 1977). If no probable cause is found or the proceeding otherwise reaches its termination, the John Doe judge is responsible for adjourning it. *In re John Doe Proceeding*, 2003 WI at ¶ 54, 260 Wis. 2d at 669, 660 N.W.2d at 276.

The John Doe proceeding is similar to a grand jury in most respects. Consistent with the John Doe's status as an investigatory, rather than adversarial, proceeding, Wisconsin courts have held, often following federal grand-jury law, that witnesses and targets

do not have a right to present arguments,[4] *In re John Doe Proceeding*, 2003 WI at ¶ 51, 260 Wis. 2d at 683, 660 N.W.2d at 275; to be advised of the privilege against self-incrimination, *Ryan v. State*, 79 Wis. 2d 83, 94-95, 255 N.W.2d 910, 916 (Wis. 1977) (following *United States v. Washington*, 431 U.S. 181 (1977)); to be informed of target status, *id*. (*compare United States v. Bollin*, 264 F.3d 391, 414 (4th Cir. 2001)); or to be informed of the subject matter of the investigation, *State ex rel. Jackson v. Coffey*, 18 Wis. 2d 529, 544, 118 N.W.2d 939, 948 (Wis. 1963); *compare In re Sinadinos*, 760 F.2d 167, 170 (7th Cir. 1985) *and In re Hergendroeder*, 555 F.2d 686, 686 (9th Cir. 1977). The rights available to witnesses are (with minor exceptions) defined by federal Fourth and Fifth Amendment precedent. *See, e.g., Doe*, 78 Wis. 2d at 163 & 169, 254 N.W.2d at 212 & 214 (following *United States v. Mara*, 410 U.S. 19 (1973), to conclude that a John Doe judge lawfully ordered a witness to provide handwriting exemplars). Indeed, Wisconsin appellate courts have advised John Doe judges to look to federal grand jury case law in assessing the scope of inquiry as to pending prosecutions, *Hoffman*, 106 Wis. 2d at 205, 316 N.W.2d at 155, and in assessing the proper scope of John Doe process, *In re Doe Proceeding Commenced by Affidavit Dated July 25, 2001*,

[4] Although the John Doe judge in the case at issue here appears to have entertained briefing and argumentation by parties moving to quash the subpoenas and warrants, this review was an exercise of discretion and was not required.

2004 WI 149, ¶ 54, 277 Wis. 2d 75, 77-78, 689 N.W.2d 908, 909 (following *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946)).

The John Doe procedure differs from that applicable to a grand jury only in its insistence on absolute secrecy, not merely by those conducting the proceeding but by the investigation targets, witnesses and all others associated with it. Wis. Stat. § 968.26(3); *State ex rel. Jackson*, 18 Wis. 2d at 546, 118 N.W.2d at 948. *Compare with* Fed. R. Crim. P. 6 advisory committee's note (e)2 ("The rule does not impose any obligation of secrecy on witnesses . . . . The seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate.").

But in all relevant aspects, with respect to the question of abstention, a John Doe is identical to a grand jury. *Cf. Oliver*, 333 U.S. at 264-73 (treating one-man grand jury as identical to multi-member grand jury for constitutional purposes).

B. The Decision Below Is Inconsistent with *Sprint*'s Implication that Criminal Investigations Like Grand Juries and John Does Are Not Subject to *Younger* Abstention.

Younger teaches that a certain limited group of matters may avoid federal court oversight. After years of confusion among the lower courts, and the spread of abstention in deference to state proceedings

that do not implicate *Younger*'s core concerns, *Sprint* made clear that abstention is appropriate *only* if there is an "ongoing state criminal prosecution," "certain 'civil enforcement proceedings'" or if there are "pending 'civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions.'" *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584, 591 & 594 (2013) (citing *New Orleans Pub. Serv. Inc. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989)). Importantly, this Court concluded that "these three 'exceptional' categories . . . define *Younger's* scope." *Sprint*, 134 S. Ct. at 591.

In recent years, this Court has been clear that attempts to expand the reach of *Younger* abstention will not be tolerated. Federal courts are "obliged to decide cases within the scope of federal jurisdiction" and abstention is the "exception." *Sprint*, 134 S. Ct. at 588. The mere fact that there is a state proceeding, here a John Doe investigation, cannot be a reason to abstain. As this Court has recognized, where there is not an actual criminal (or certain specific types of civil) proceeding against a specific party, it is inappropriate to abstain under *Younger*. *See, e.g., Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 238-39 (1984) ("Since *Younger* is not a bar to federal court action when state judicial proceedings have not themselves commenced, . . . abstention for . . . administrative proceedings [is] not required."); *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982) (formal disciplinary rules

charges filed at time of federal action, so appropriate to abstain).

The critical component, actual ongoing criminal proceedings, is entirely absent from an *investigatory* proceeding like a grand jury or a John Doe. The John Doe process surely is not an extension of a "state criminal prosecution." It is an investigatory process. *See Washington*, 83 Wis. 2d 808, 266 N.W.2d 597. Accordingly, *Younger* and its progeny cannot be a bar to this action as no court has countenanced abstention from general proceedings by state officers operating under color of state law. Something more is required.

Ironically, the Seventh Circuit appears to agree, by its silence in failing to address it, that *Younger* abstention is inappropriate. It concludes only that it "need not take sides" in the ongoing split of authority over *Younger*'s application to investigatory proceedings "because principles of equity, comity and federalism (*Mitchum*, 407 U.S. at 243) counsel against a federal role here." App. 6a. But such a statement is too facile. It adds nothing, except confusion, to what is at stake because fundamentally the only basis for abstention would be the existence of a prosecution, where comity and federalism concerns are at their highest and defendants have a full opportunity to participate and defend their rights.

The fundamental fallacy in the Seventh Circuit's absolutist view is illustrated in the tortured path it takes through the Anti-Injunction Act ("AIA") that culminates, again, in a mere statement, without

citation to any precedent. That, in the Court's words, "equity, comity and federalism" requires the District Court to dismiss the case, fails to address *Sprint*'s clear overriding rule that federal courts are "obliged to decide cases within the scope of federal jurisdiction" (*Sprint* at 588) and *Mitchum*'s equally emphatic holding that the AIA, standing alone, is never a bar to Section 1983 claims. *Mitchum*, 407 U.S. at 242-43 ("[Section] 1983 is an Act of Congress that falls within the 'expressly authorized' exception of that law."). This is simply an attempt to distort *Mitchum* to circumvent *Sprint*, by applying *Younger* abstention in all but name.

If allowed to stand, the lower court's decision leaves a gaping hole in Section 1983 jurisprudence that denies any possibility of injunctive relief to parties whose federal rights are violated through retaliatory or otherwise abusive criminal investigations. At the same time, it imposes (as Petitioner explains) a whole new set of prerequisites on any Court looking to understand the rights and obligations of the Anti-Injunction Act. Now a Court must determine, from as yet undescribed principles, if "equity, comity and federalism" forbid it from exercising jurisdiction. This is, of course, precisely the kind of multi-factor, open-ended inquiry that this Court so recently rejected in *Sprint*. *Sprint*, 134 S. Ct. at 593 (rejecting abstention based on application of "*Middlesex* conditions").

It is important that this Court grant the Petition in order to squarely address the jurisdictional reach

of the federal courts and not allow abusive tactics under the color of state law to go forward without a remedy.

C. The Court Should Grant the Petition to Definitely Resolve the Confusion in the Lower Courts Over *Younger*'s Application to Investigatory Proceedings.

Certiorari is also warranted to resolve, once and for all, the lingering split in authority among the lower courts over the application of *Younger* abstention to criminal investigatory proceedings. The court below noted this split and declined to expressly "take sides," instead doing so in a *sub rosa* fashion by claiming to rest its decision, which involved a *Younger*-type analysis, on the AIA instead. In the course of rejecting the lower court's reliance on the AIA as a replacement for *Younger* – which is an important issue in itself – the Court would naturally address the subsidiary question of *Younger*'s application to investigatory proceedings.

As described above, *Sprint* appears to have resolved, once and for all, that state investigatory proceedings provide no ground for abstention under *Younger*, because they are not one of the three "exceptional circumstances" where a federal court may abstain from exercise of its jurisdiction in deference to state proceedings. *Sprint*, 134 S. Ct. at 594. The decision below, however, illustrates that the pre-*Sprint* split in authority on this issue persists and

that *Sprint*'s holding, simple and clear though it is, has only deepened the lower courts' confusion.

The lower courts have staked out three separate positions on whether investigatory proceedings like grand jury investigations provide a basis for *Younger* abstention. Several have held that, yes, *Younger* applies and a federal court must abstain in deference to a state criminal investigation. *See Texas Ass'n of Bus. v. Earle*, 388 F.3d 515, 520-21 (5th Cir. 2004); *Fieger v. Cox*, 524 F.3d 770, 775 (6th Cir. 2008); *see also Kaylor v. Fields*, 661 F.2d 1177, 1182 (8th Cir. 1981) (suggesting that *Younger* would apply); *Notey v. Hynes*, 418 F. Supp. 1320 (E.D.N.Y. 1976). The Third Circuit has held the opposite. *See, e.g., Monaghan v. Deakins*, 798 F.2d 632, 637 (3d Cir. 1986), *aff'd in part, vacated in part*, 484 U.S. 193 (1988). *See also Westin v. McDaniel*, 760 F. Supp. 1563 (M.D. Ga. 1991), *aff'd*, 949 F.2d 1163 (11th Cir. 1991). And still others have held that *Younger* applies only where there are parallel "formal enforcement proceedings," without specifically resolving the application of that rule to criminal investigations. *Telco Commc'ns, Inc. v. Carbaugh*, 885 F.2d 1225, 1229 (4th Cir. 1989); *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 519 (1st Cir. 2009). *See also id*. at 520 n.16 (expressly reserving question of application to "the grand jury proceedings stage of a criminal investigation"). In short, prior to *Sprint*, confusion reigned.

It still does, if the decision below is any guide. Judge Easterbrook is widely recognized as one of the foremost experts on federal practice and procedure,

and even he declined to "take sides" in this ongoing dispute, despite recognizing the relevance of *Sprint* to "the current state of *Younger's* abstention doctrine." *See* App. 6a. And Judge Easterbrook is not the only one still confused. Even in the wake of *Sprint*, leading treatises still treat the question of *Younger*'s application to investigatory proceedings as an open one. *See*, *e.g.*, MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION CLAIMS AND DEFENSES § 14.03 (2015-1 Supp.).

The Court should grant certiorari to resolve this question once and for all.

II. The Actions of the Respondents Through the Wisconsin John Doe Proceedings Have Had, and Continue to Have, a Chilling Impact on Free Speech, Including the Public Policy Discussions of The MacIver Institute.

A. For The MacIver Institute and Similarly Situated Organizations, Participation in the Public Policy Debate Over Act 10 Was Critical to Positive Reform.

The MacIver Institute has participated in the public debate over policies ranging from simple budgetary matters, to school choice, to welfare reform, to the importance of open government. *See* www.MacIverInstitute.org/research/. More broadly, the Institute's research, reports and news coverage have been a key element to a host of changes to Wisconsin state law, and its publications have been cited widely in support of government reform. *See,*

e.g., Healy, *supra* (describing numerous legislative/policy issues); Westerberg, *supra*; Blake Neff, "Report Finds Little Link Between Teacher Pay, Test Scores," September 3, 2014, http://dailycaller.com/2014/09/03/report-finds-little-link-between-teacher-pay-test-scores/; Jason Stein, "Secretive paper ballots regaining hold in Wisconsin Legislature," THE MILWAUKEE JOURNAL-SENTINEL, February 3, 2013, http://www.jsonline.com/news/statepolitics/secretive-paper-ballots-regaining-hold-in-wisconsin-legislature-lk8k3c2-189592811.html (citing MacIver Institute president on making government more open). Since its introduction in 2011, the reform of public employee contracts has been a central focus of the Institute's work. Against that backdrop, the Institute was expected to, and did, play a major role in the initial battle over Act 10 and the subsequent evaluation of its success.

Following the passage of Act 10, the Institute undertook a series of studies to determine what, if any, impact the legislation would have. Those rigorous studies disclosed that, despite the dire predictions of many within the labor movement, the Act caused nearly immediate *positive* results. Among its findings:

> – Enormous financial savings at every level of government. Nick Novack, "UPDATE: Act 10 Savings up to $2.7 Billion," October 24, 2013, http://www.maciverinstitute.org/research/2013/10/update-act-10-savings-up-to-27-billion/
>
> – School saving are being put back into the classrooms. *Report: Wisconsin Union Changes Saving Schools Millions*, *supra* (describing how jobs of teachers are saved by

incorporating value into financial decision-making); Scott Bauer, "Report: Cuts to teachers offset aid reduction," LACROSSE TRIBUNE, January 7, 2014, http://lacrosse tribune.com/news/report-cuts-to-teachers-offset-aid-reduction/article_9d83f81e-774d-11e3-9965-001a4bcf887a.html ($450 million in school savings statewide).

– Dramatic savings improve the economic climate of the State. *See* MacIver Institute, *It's Working Wisconsin* (a website category), www.MacIverInstitute.org/its-working-wisconsin/.

Then, having determined that Act 10 had achieved many of its goals, the Institute disseminated those findings through a variety of media – print, television, internet. The video presentations, distributed both online and in paid media, were particularly effective in the Institute's view because they reached a much broader audience. The public debate that ensued at the local level, once stripped of the vitriol of early 2011 at the State Capitol, supported by real-world findings, has led to stronger local control of schools and government. It will substantially improve, over time, Wisconsin's educational system by emphasizing merit in the compensation process. Those positive results, arising from legislation enacted after open and unfettered debate, demonstrate the essential elements of a free society made possible by unhindered speech.

B. The John Doe Investigation Predictably Chilled the Speech of The MacIver Institute and Other Policy-Oriented Organizations.

As noted earlier, the Institute participated in a host of public activities in 2011 and 2012 to publicize its findings and conclusions about Act 10's impact. MacIver Institute, *It's Working Wisconsin*, *supra* (contains materials including particularly a nine minute video published in 2012 titled "It's Working Wisconsin" broadcast in whole or in part nationally and in the state). It intended to continue that level of public participation in 2014 through video and paid media, just as it had in 2012. However, in 2013, there was a single dramatic event that caused it to alter its course: the Institute learned that a John Doe proceeding (the subject of this litigation) had been undertaken targeting Wisconsin Club for Growth and other conservative advocacy groups. The asserted basis appeared to be that their support of policy initiatives also supported by Governor Walker violated campaign finance laws.

The MacIver Institute was not new to actions intended to limit its participation in public policy debates, nor was this the first time Wisconsin's election oversight bureaucracy had attempted to limit non-express advocacy. In 2010, the Wisconsin Government Accountability Board ("the GAB") passed what

is infamously known as "Rule 1.28."[5] That "emergency" rule was administratively passed by the GAB to address the Tea Party movement and third party spending in Wisconsin. In the GAB's view, the Tea Party and other third party groups had made, or would make, a difference in elections by forcefully supporting policies also supported by Republican candidates. That participation, in the GAB's view, needed to be regulated. *See Wisconsin Right to Life v. Barland*, 751 F.3d 804 (7th Cir. 2014) (discussing the regulatory background of GAB Rule 1.28).

In the GAB's view, the limitation to express advocacy, as defined by explicit terms of support or opposition, restricted the GAB's regulatory oversight too tightly. So, consistent with expanding its regulatory role, the GAB passed revisions to GAB Rule 1.28 that severely limited independent expenditures by redefining activities as "express" advocacy that had not previously fallen within that category. The Seventh Circuit summarized the change and process:

> As we've explained, the 2010 version of GAB § 1.28 deleted the express-advocacy limitation in the old rule and added language specifically designed to bring issue advocacy within the scope of the state's PAC regulatory system. That was the explicit goal; the

[5] GAB 1.28 outlines the scope of regulated activity as it relates to the election of candidates. The rule attempts to define and regulate "political committee," "communication," "contributions for political purposes" and the like.

> Board sought to do by regulation what state lawmakers had failed to do by legislation. Under GAB § 1.28, all independent political speakers – individuals and all types of organizational associations – are "subject to the applicable requirements of ch. 11, Stats, [Wisconsin's campaign-finance system] when they . . . [m]ake a communication for a political purpose." GAB § 1.28(2)(c). The rule defines "communication" and "political purpose" quite expansively.

Wisconsin Right To Life, at 834. The rule "creates a conclusive presumption that almost anything said about a candidate at election time triggers all the restrictions and requirements of [Wisconsin's campaign-finance system]." *Id*. at 826.

The MacIver Institute, fearful that such a regulatory expansion would affect its ability to speak on public policy issues, brought an Original Action in the Wisconsin Supreme Court to halt implementation of the Emergency Rule. The Wisconsin Supreme Court immediately enjoined the Rule. *See Wis. Prosperity Network*. Shortly after that 2010 Injunction, with active participation by the Tea Party and other groups in the electoral process, Scott Walker was elected Governor, and Republicans took control of both houses of the state legislature. (While the Wisconsin Supreme Court subsequently dismissed the case that initially resulted in the 2010 Injunction (*id*.), the Seventh Circuit Court of Appeals later reviewed that same GAB Rule 1.28 and struck it down as patently contrary to the First Amendment.

Wisconsin Right to Life, 751 F.3d at 835 ("Regulations on speech . . . must meet a higher standard of clarity and precision. In the First Amendment context, 'rigorous adherence to [these] requirements is necessary to ensure that ambiguity does not chill protected speech.'" (citing *FCC v. Fox Television Stations, Inc*., 132 S. Ct. 2307, 2317 (2012))).

As we now know, having failed to openly prevent Tea Party and other groups from speaking out on public policy matters through rulemaking, the Government Accountability Board secretly sought a different path: these John Doe proceedings. Using the same justifications it had used during its Rule 1.28 debacle, the GAB secretly took steps, with the full aid of the Respondents, to prevent the participation of conservative organizations in public debate through the improper use of the governmental authority of their offices. The District Court Complaint details that abuse and retribution.

In 2013, it was widely rumored that the Milwaukee County district attorney, and others on behalf of the GAB, were conducting a secret proceeding against conservative groups. While the specifics were not known as a consequence of the John Doe secrecy orders, the fact of an investigation was widely reported. (*See generally*, M.D. Kittle, "Wisconsin's Secret Wars (Series)," WISCONSIN REPORTER, 2011-2014, watchdog.org/author/m-d-kittle/.

Following the success of the earlier 2012 television advertising about Act 10, in 2014, American's for

Prosperity approached the Institute to again participate in a television buy in 2014 to tout the successful results. The MacIver Institute Board met on April 9, 2014 to address whether it would do what it had done two years before: participate in paid media publication of its Act 10 findings. Fearful that it would be drawn into an investigation, the Institute chose not to participate or even to sanction use of its name in video presentations or paid commercials about the impact of Act 10.

It is hard to imagine a more direct chilling impact than what The MacIver Institute experienced as a consequence of Respondents' acts. While it openly spoke to the Act 10 issues through television and other media in 2011-2012 (*see* MacIver Institute, *Its Working Wisconsin*, *supra* (contains the 2012 video in its entirety), it chose not to speak to those same issues in that way in 2014 for fear it would be subject to an investigation. Such investigations inevitably create fear in the donors on whom the Institute relies, and any investigation would have sapped the Institute of resources by requiring it to address the governmental authorities.

So, while the danger to Wisconsin Club for Growth may be described, in part, in monetary terms, as it is in their underlying Section 1983 action, the most sinister and irreparable harm caused by the Respondents' actions was the impact it had on The MacIver Institute and similarly situated organizations. The speech never given; the debate that never was and the legislative action never undertaken are

necessarily unquantifiable. As this Court has so often said, such an impact in a free society is more devastating than any monetary cost. *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) ("The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68 (1963) ("People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around . . . ."); *National Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963) ("The threat of sanctions may deter [First Amendment Freedoms'] exercise almost as potently as the actual application of sanctions." (citations omitted)). *See also Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); *New York Times Company v. Sullivan*, 376 U.S. 254, 270 (1964) ("[A] profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . .").

The Seventh Circuit's failure to recognize the critical role of the federal courts here – in terms of both official-capacity and personal-capacity remedies – should be reversed.

CONCLUSION

The MacIver Institute for Public Policy respectfully requests that the Petition for Certiorari be granted.

Respectfully submitted,

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