

NO. 14-872

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In the  
**Supreme Court of the United States**

ERIC O'KEEFE and  
WISCONSIN CLUB FOR GROWTH,  
Petitioners,

v.

JOHN T. CHISHOLM, et al,  
Respondents.

On Petition for a Writ of Certiorari to the United  
States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE*  
BRIEF AND BRIEF OF THE  
WISCONSIN INSTITUTE FOR LAW & LIBERTY  
IN SUPPORT OF PETITIONERS

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February 20, 2015

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**MOTION FOR LEAVE TO FILE AS  
*AMICUS CURIAE*  
IN SUPPORT OF PETITIONERS**

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Pursuant to Rule 37.2 of the Rules of this Court, the Wisconsin Institute for Law & Liberty (“WILL”) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioners.

All parties were timely notified of this *amicus’s* intent to file the attached brief as required by Rule 37.2(a). Petitioners have consented to the filing of this brief. However, counsel for the various Respondents have each denied consent. Therefore, this motion is necessary, and for the reasons set forth more fully below and in the brief, should be granted.

Wisconsin Institute for Law & Liberty (“WILL”) is a public interest law firm dedicated to advancing the public interest in limited government, free markets, individual liberty, and a robust civil society. Founded in June of 2011, it has represented individuals and organizations seeking to speak or to associate with others for the purpose of speech, including the petitioners in *Wisconsin Prosperity Network v. Myse*, 2012 WI 27, 339 Wis.2d 243, 810 N.W.2d 356, a challenge to certain Wisconsin regulations restricting and burdening independent express and issue advocacy. WILL has also

represented parties challenging various parts of Wisconsin's campaign finance law. Its President, General Counsel and Founder, Richard M. Esenberg, has taught Election Law at Marquette University Law School and is an Academic Advisor to the Center for Competitive Politics. His scholarship argues for less regulation and more freedom for those who wish to speak about politics and matters of public policy, whether individually or in association with others.

WILL represents issue advocacy groups including 501(c)(4) groups who face unique issues under Wisconsin's existing regulatory framework because, although they engage in issue advocacy, the State seeks to regulate their speech as if it were express advocacy. The Seventh Circuit's holding below strips those groups of recourse to the federal courts to assert their First Amendment right to express themselves on political issues without being subject to retaliation and harassment from partisan prosecutors who seek to suppress the speech of their opponents. This has a substantial chilling effect on the speech of groups that are entitled to full First Amendment protection. WILL – and its clients – lived through many of the events at issue here. What happened in this case is an example, even if an extreme one, of that these groups face. Therefore, WILL has a critical interest in seeing the Seventh Circuit's decision reversed, and should be permitted to support Petitioners as Amicus.

**Corporate Disclosure Statement**

Pursuant to Rule 29.6 of the Rules of this Court, the Wisconsin Institute for Law & Liberty states that it is a non-stock corporation, has no parent corporation, and no publicly held company owns more than 10% of its stock.

Respectfully submitted,

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*AMICUS CURIAE* BRIEF OF THE  
WISCONSIN INSTITUTE FOR LAW & LIBERTY  
IN SUPPORT OF PETITIONERS

**Interest of Amicus**

Amicus Wisconsin Institute for Law & Liberty<sup>1</sup> is a public interest law center dedicated to advancing the public interest in limited government, free markets, individual liberty, and a robust civil society. Founded in June of 2011, it has represented individuals and organizations seeking to speak or to associate with others for the purpose of speech, including the petitioners in *Wisconsin Prosperity Network v. Myse*, 2012 WI 27, 339 Wis.2d 243, 810 N.W.2d 356, a challenge to certain Wisconsin regulations restricting and burdening independent express and issue advocacy. Amicus has also represented parties challenging various parts of Wisconsin's campaign finance law. Its President, General Counsel and Founder, Richard M. Esenberg, has taught Election Law at Marquette University Law School and is an Academic Advisor to the Center for Competitive Politics. His scholarship argues for less regulation and more freedom for

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<sup>1</sup> As required by Supreme Court rule 37.6, Amicus states that no counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Amicus, its members, or its counsel, made such a monetary contribution. Timely Notice: All parties were timely notified of this *amicus's* intent to file this brief as required by Rule 37.2(a). Petitioners have consented to the filing of this brief. Counsels for the Respondents have each denied consent.

those who wish to speak about politics and matters of public policy, whether individually or in association with others.

Amicus represents issue advocacy groups including 501(c)(4) groups who face unique issues under Wisconsin's existing regulatory framework because, although they engage in issue advocacy, the State seeks to regulate their speech as if it were express advocacy. These regulations are often applied to speakers who are unlikely to have the resources to seek federal review, including grass roots groups, tea party groups, and other small 501(c)(4)s. This has a substantial chilling effect on the speech of groups that are entitled to full First Amendment protection. Amicus – and its clients – lived through many of the events at issue here. What happened in this case is an example, even if an extreme one, of what these groups face.

### **Summary of Argument**

This case seeks to address an extraordinary assault on freedom of speech and association during a critical period in Wisconsin's political history. The District Court found that "[t]he defendants are pursuing criminal charges through a secret John Doe investigation against the plaintiffs for exercising issue advocacy speech rights that on their face are not subject to the regulations or statutes the defendants seek to enforce." *O'Keefe v. Schmitz*, 19 F.Supp. 3d 861, 869 (E.D. Wis. 2014). The Petitioners allege that this was done by partisan officials under color of state law to suppress speech and gain a political advantage.

But the Court of Appeals denied them a chance to make their case in federal court. It held that even when partisan prosecutors are alleged to have conducted a multi-year inquest into the activities of their political opponents as a political weapon against those opponents, there is no federal remedy as long as there may be – at some time – some form of state remedy. It held this to be the case even if that remedy might not be available until after the damage to First Amendment freedoms has been done. This cannot be the law.

First, the Petitioners’ claim under 42 USC § 1983 is an exception to the anti-injunction statute. *Mitchum v. Foster*, 407 U.S. 225, 242-43, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972).

Second, as held by this Court in *Sprint Communications, Inc. v. Jacobs*, 134 S.Ct. 584, 187 L.Ed.2d 505 (2013), *Younger*<sup>2</sup> abstention is inapplicable to proceedings that do not rise to the level of criminal prosecutions (which is true of the John Doe investigation in this case), and it is also inapplicable where, as here, state officials’ retaliatory conduct evidences their “bad faith” abuse of state criminal proceedings.

As recognized in *Mitchum* and *Sprint* and by a majority of circuits that have considered the relationship between the Anti-Injunction Act, 28 USC § 2283 and Section 1983, there is a federal remedy available against investigations motivated

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<sup>2</sup> *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

by a desire to retaliate and punish the targets for their exercise of First Amendment rights.

## **Argument**

### **I.**

#### **The Complaint Alleges that the John Doe Investigation Was in Bad Faith and Was Politically Motivated.**

Because this case was resolved on a motion to dismiss, the allegations of the Petitioners' Complaint have to be taken as true. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). They allege that partisan prosecutors conducted a multi-year investigation into the activities of their political opponents in bad faith and as a political weapon against those opponents. What happened in Wisconsin was an extraordinary assault on freedom of expression. Petitioners seek federal relief for these state abuses, advancing a claim under 42 U.S.C. § 1983.

The details alleged in the Complaint include the following:

In November, 2010, candidates of the Republican Party won control of all branches of the Wisconsin government for the first time since 1998. Contributing to this success was the growing influence of conservative independent advocacy organizations, including those that were targeted in the investigations at issue here. These "social welfare organizations" (organized under Section

501(c)(4) of the Internal Revenue Code) do not typically engage in what this Court has called “express advocacy”; they do not expressly call for the election or defeat of candidates. Rather, they seek to advance the debate by educating the public on issues related to their mission. The educational efforts of these groups, including the Club, often consist of mass media communications often run during an election. Around the time of the 2010 Wisconsin gubernatorial race, independent interest groups spent a combined \$6.08 million on issue advocacy. Wisconsin Democracy Campaign, *Record \$37.4 Million Spent in Governor’s Race*, February 8, 2011, available at <http://www.wisdc.org/pr02081.php> (last accessed February 18, 2015).

This Court’s jurisprudence has extended robust constitutional protection to this type of “issue advocacy.” Most significantly, in *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (“*WRTL II*”), it held that the government may not limit the source or amount of contributions for independent issue advocacy. “[T]he Constitution,” it has said, “embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment,” *id.* at 469, quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). It made clear that speech cannot not be considered express advocacy or its functional equivalent unless it is “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Id.* at 469-70. The intent of the speaker or effect of the speech

does not matter. The status of a communication as issue advocacy is to be made objectively, based on the substance of the communication, without a fact-intensive analysis or complex balancing of factors. *Id.* at 469.

On both sides of the political spectrum, partisans have sought to limit opposing issue advocacy by attempting to use the concept of “coordination” to characterize expenditures for independent issue advocacy as contributions to a candidate. Relying on language in earlier decisions of this Court, *see, e.g., Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *FEC v. Colo. Republican Federal Campaign Comm.*, 553 U.S. 431, 121 S.Ct. 2351, 150 L.Ed.2d 461 (2001), they say that if these groups “coordinated” with a candidate, their expenditures become contributions to that candidate. The concept is not new and not itself objectionable, but its application can be enormously troubling and, intended or not, can serve as a powerful tool for suppressing speech. Such was the case here.

This Court has never defined “coordination” or held that it may be applied to issue advocacy. Because the conduct that might be considered “coordination” has not been constitutionally delineated and the content of speech that might be regarded as coordination has not been specified, speakers are hard pressed to know what they can and cannot do. Independent issue advocacy groups are especially vulnerable. These groups are frequently in contact with elected officials and

potential candidates for public office who share their policy interests. They lobby legislators and work with office-holders or people who may run for office to promote – not candidacies – but common causes. Such groups, however, have a significant concern – if they speak during an election period, the exercise of their constitutional associational and expressive rights could turn into allegations of criminal conduct, and at a minimum, trigger an onerous criminal investigation into their actions. As the First Circuit has observed “it is beyond reasonable belief that, to prevent corruption or illicit coordination, the government could prohibit voluntary discussions between citizens and their legislators and candidates on public issues.” *Clifton v. FEC*, 114 F. 3d 1309, 1314 (1st Cir. 1997).

Overzealous complainants and regulators feel free to “poke around” the activities of their political opponents, claiming that all sorts of connections between advocacy groups and candidates might be regarded as “coordination” and a variety of activities by these groups might be transformed into “contributions.” While, after *WRTL II*, such groups might have thought issue advocacy to be safe, they may still be subject to harassment – particularly where, as in Wisconsin, a state has not clearly and adequately defined the conduct and content of coordination, *see* Part II.A., *infra*, and prosecutors such as the Respondents here are not respectful of First Amendment freedoms.

Even if such prosecutors cannot hope to obtain a conviction, much damage can be done to disfavored



speakers. “The investigation can include extensive rifling through the [targets’] files, public revelations of internal plans and strategies, depositions of group leaders, and the like. Such allegations and investigations may be avoided only by completely avoiding all contact with candidates, because even minimal contact could trigger a credible allegation.” Matter of The Coalition, MUR 4624, Commissioner Bradley A. Smith Statement for the Record, available at [http://www.fec.gov/members/former\\_members/smith/smithreason6.htm](http://www.fec.gov/members/former_members/smith/smithreason6.htm) (last accessed February 18, 2015). An improperly-limited concept of coordination “treads heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office,’ and is therefore, ‘patently offensive to the First Amendment.” *Id.*, quoting *Clifton*, 114 F.3d at 1314.

At the same time, the *in terrorem* effects of such investigations can be profound. Speakers who “guess wrong” about whether they have “coordinated” will not have reported their expenditures as contributions to the “coordinating” candidate. This failure may, as was the case here, be treated as a crime. Thus regulators – particularly partisan elected prosecutors – who abuse the concept of coordination can subject speakers to protracted and virtually unlimited inquests placing them and their associates at enormous risk. They can fuel innuendo and speculation about their political opponents, distorting the political process and considerably raising the costs of speaking out.

That is what happened here. If a conservative organization engaged in issue advocacy in Wisconsin during 2011 and 2012, it almost certainly became a target of these inquests. Although these investigations were ostensibly “secret” – those involved were subject to orders forbidding them to speak about how or whether they were being investigated – they were beset by leaks and became fodder for political attacks and intimidation.

The last few years have been an extraordinary time in Wisconsin politics. In order to address a massive budget deficit, in early 2011 Governor Scott Walker introduced legislation, now known as “Act 10,” that would, among many other things, limit collective bargaining by most public employees to base pay (and limit permissible increases in such pay to the rate of inflation). This was intended to reduce personnel costs and give both state and local government extra flexibility to manage their employees in a way that would minimize the impact of the inevitable budget cuts.

In response, Wisconsin exploded. The state seemed to be at war as thousands of protestors “occupied” the capitol building and grounds in Madison. Tales of the ensuing chaos have already become legend, and the controversy attracted the attention of advocacy groups of all stripes. Money came from across Wisconsin and the nation and the state’s airwaves were flooded with advertisements for and against Act 10. For the budget battle alone – no elections involved – opponents of the Walker budget spent an estimated \$1.8 million and

supporters spent \$1.7 million. Many of the organizations that were targeted in the John Doe investigations at issue here engaged in issue advocacy about the need for public sector labor law reform.

Act 10 was ultimately passed. While a flurry of litigation continued, elections began. Following passage of the bill, Wisconsin experienced an unprecedented round of recall elections. In 2011, Democrats attempted to recall six Republican Senators, while Republicans targeted three Democrats. Governor Walker was not subject to recall during this period (state law does not permit recall of an elected official during his or her first year in office). However, he and some additional Republican Senators were subjected to recall elections the next year. Issue advocacy groups on both sides of the political spectrum remained active during this period, spending millions. In the end, Governor Walker survived.

In addition to litigation and recall elections, accusation and investigation became part of Wisconsin's political warfare. Throughout this period, both sides levied allegations that the other was misusing public resources for political purposes or that independent groups were improperly "coordinating" with candidates. But the Respondents here set up a standing inquest into the activities of only one side of the political spectrum. To do so, they used Wisconsin's peculiar John Doe statute, Wis. Stat. § 968.26. It permits a prosecutor to compel testimony and subpoena witnesses in secret.

Witnesses need not be advised of the nature of the proceeding or that the witness is a “target” of the investigation. *Ryan v. State*, 79 Wis.2d 83, 96, 255 N.W.2d 910 (1977). While a witness summoned before a John Doe proceeding may bring counsel, her lawyer has no right to speak. § 968.26(3). As noted above, the presiding judge may (and normally does) order not only the prosecutor, but witnesses to not discuss what has occurred during the proceeding – or even that there is a proceeding. In other words, everything that happens to them is subject to a gag order.

It is hornbook law in Wisconsin that orders issued by a John Doe judge are not considered orders of a “court.” *In re John Doe Proceedings*, 2003 WI 30, ¶23, 260 Wis.2d 653, 660 N.W.2d 260 (“[A]n order issued by a judge in a John Doe proceeding is not a judgment or order of a circuit court); *Wis. v. Washington*, 83 Wis.2d 808, 814, n.2, 266 N.W.2d 597 (1978) (“The order of a John Doe judge is not an order made by the court within the meaning of [the statute providing for appeals of court orders]”) As such, they may not be appealed. *In re John Doe*, 2003 WI 30, ¶23. An aggrieved party may seek review by supervisory writ, although, of course, the burden of obtaining such relief is high. *Id.*, ¶48. “A writ of supervision is not a substitute for appeal” and “is to be issued only upon some grievous exigency.” *Wis. ex rel Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶17, 271 Wis.2d 633, 681 N.W.2d 110. The standards for issuing a supervisory writ are harsh:

A petition for a supervisory writ will not be granted unless: (1) an appeal is an inadequate remedy; (2) grave hardship or irreparable harm will result; (3) the duty of the trial court is plain and it must have acted or intends to act in violation of that duty; and (4) the request for relief is made promptly and speedily.

*Id.* As the “duties” of judges in John Doe proceedings are minimal and their discretion large, *see* Wis. Stat. § 968.26, the third prong will rarely be met.

Thus, the target of a John Doe has few legal rights. This is doubly so if he or she is a politician or public figure and, if as here, the “secret” investigation is leaked. In that instance, the target is subject to public innuendo to which he or she may be unable to respond without violating the Doe’s “gag order.” That is precisely what happened here.

As noted in the petition, the investigation continued for years. The first phase – call it Doe I – was commenced in 2010 at a time when then-Milwaukee County Executive Scott Walker was running for Governor. The investigation was opened by Democratic District Attorney John Chisolm, a political opponent of Walker. Prosecutors said that they wanted to investigate the theft of funds that Walker’s office had donated to a veteran’s fund called Operation Freedom.

Petitioners allege that this was a subterfuge to launch a roving<sup>3</sup> investigation into Walker. Whether this was the prosecutors' intention, the investigation was repeatedly expanded and became a semi-permanent Board of Inquiry into, as the District Court put it, "all things Walker-related." *O'Keefe v. Schmitz*, 19 F.Supp. 3d at 865. Homes and offices were raided. Witnesses who would not tell prosecutors what they wanted to hear were arrested and, in one instance, publicly humiliated.

Not much about this was secret. Doe I was subject to numerous leaks and produced breathless headlines and speculation about what would happen next. (Almost nothing did.) It became fodder, during both the 2011 and 2012 recalls, for political attack ads. Some likened "Walkergate" to "Watergate" and asked what the Governor knew and when he knew it.<sup>4</sup> The Chairman of the state Democratic Party screamed that "Walker will see the inside of a jail cell before he sees the inside of a second term."<sup>5</sup>

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<sup>3</sup> When asked how much it had spent on the John Doe investigations, Chisholm's office claimed they did not know because they did not track that information. MacIver Institute, *MacIver's Request for Cost and Time Spent on Doe Denied*, March 5, 2013, <http://www.maciverinstitute.com/2013/03/taxpayer-money-and-time-spent/> (last accessed February 18, 2015).

<sup>4</sup> John Nichols, *Wisconsin 'John Doe' Probe: What Did Walker Know? When Did He Know It?*, THE NATION, Jan. 16, 2012, available at <http://www.thenation.com/blog/165896/wisconsin-john-doe-probe-what-did-walker-know-when-did-he-know-it#> (last accessed February 18, 2015).

<sup>5</sup> Bob Hague, *Dems Look to November at Convention*, WISCONSIN RADIO NETWORK, Jun. 9, 2012, available at

Walker, subject to the gag order, could say little in response.

In the end, the Milwaukee prosecutors labored mightily and brought forth a mouse. They found absolutely no wrongdoing by Walker. Two aides were convicted of embezzling from Operation Freedom. The domestic partner of another aide was convicted of sexually propositioning an underage boy. Two other aides pled guilty to fundraising (not for Walker) on “county time.” A local businessman pled guilty to making an unlawful contribution to the Walker campaign.

The District Attorney announced the conclusion of Doe I in 2013 – following the recalls. But the Milwaukee prosecutors were not finished with Walker and his conservative allies. As recited in the petition, much of the information gathered in Doe I was enrolled into a new investigation, Doe II, that Petitioners allege was initiated, controlled and conducted by the Milwaukee District Attorney’s office, notwithstanding the appointment of an ostensibly independent prosecutor. The focus turned to Walker’s campaign and the activities of independent advocacy organizations during the 2011 and 2012 recalls.

The scope of the ‘new’ inquiry was extraordinary. Its tactics resembled an investigation of a drug ring or terrorist conspiracy:

Early in the morning of October 3, 2013, armed officers raided the homes of R.J. Johnson, WCFG advisor Deborah Jordahl, and several other targets across the state. Sheriff deputy vehicles used bright floodlights to illuminate the targets' homes. Deputies executed the search warrants, seizing business papers, computer equipment, phones, and other devices, while their targets were restrained under police supervision and denied the ability to contact their attorneys.

*O'Keefe v. Schmitz*, 19 F.Supp. 3d at 866 (citations omitted). At the same time, kitchen-sink subpoenas and gag orders were served on virtually every conservative advocacy organization in the state. What did you do? Who paid for it? And, of course, don't tell anyone we asked.

But the probe soon became public and, like Doe I, Doe II would become a political weapon in the 2014 gubernatorial election. But the breadth of the inquiry – no conservative stone was left unturned – and the amorphous nature of the inquiry – who could tell what these prosecutors thought was illegal – had and continues to have a chilling impact on freedom of speech and association. As petitioners alleged, the John Doe investigation “devastated” the Club for Growth, normally a major player in Wisconsin politics, with an estimated \$2 million loss in fundraising that would have been committed to issue advocacy.



## II.

**The John Doe Investigation Violates the  
Constitutional Rights of O’Keefe and Everyone Else  
Being Investigated.**

## II. A.

*The Activity Investigated Was Not Criminal.*

The Seventh Circuit concluded that the prosecutors had a good faith basis for their investigation. *O’Keefe v. Chisholm*, 769 F.3d 936, 940-41 (7th Cir. 2014). That conclusion is erroneous for at least four reasons, none of which were addressed by the Court of Appeals.

First, Wisconsin statutes do not even ban the coordination of issue advocacy with candidates. Wisconsin statutes do not define “coordination”; nor do GAB regulations. At most, Wis. Stat. § 11.06(7) requires committees that engage in *express advocacy* to file an “oath for independent disbursements,” affirming that they do not act “in cooperation or consultation” or “in concert with or at the request or suggestion of” a candidate. The issue advocacy engaged in by the groups investigated by the Respondents cannot have violated this provision.

Second, as noted in the Petition, the basis of the investigation was the theory that independent advocacy by the Club for Growth and other organizations became “contributions” to the Walker campaign because they were somehow “coordinated” with his campaign. But, under Wisconsin law, nothing can be considered a “contribution” unless it

is undertaken for a “political purpose.” Wis. Stat. § 11.01(6). Wisconsin defines this as anything done “for the purpose of influencing an election.” § 11.01(16).

That definition is constitutionally inadequate. In *WRTL II*, this Court made clear that an “intent-based” definition for what can and cannot be regulated is unconstitutionally vague and overbroad. 551 U.S. at 467-69. In 2010, Wisconsin’s chief regulatory agency in this area, the Government Accountability Board, announced that, in regulating campaign communications, would restrict the definition of “political purpose” to express advocacy, *i.e.*, communications that are susceptible of no reasonable interpretation other than as a call to elect or defeat a candidate. *See Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 827 (7th Cir. 2014) (“*Barland II*”) (noting that the GAB retreated from a new regulation expanding “political purpose” to include issue advocacy within weeks of a lawsuit being filed challenging the regulation). In *Barland II*, the Seventh Circuit held that this definitional limitation was a constitutionally required “saving” construction. It said that, to save Wisconsin law from complete invalidation, “political purpose” must be restricted to express advocacy or its functional equivalent. *Id.* at 833-34. The court also noted that the Wisconsin Supreme Court and Attorney General had for over a decade recognized that the definition of “political purpose” must be limited to express advocacy. *Id.* at 833 (citing *Elections Bd. of Wis. v. Wis. Mfrs. & Commerce*, 227 Wis.2d 650, 597 N.W.2d 721 (1999) and 65 Op. Wis. Atty. Gen. 145).

If this is so, it is hard to see how Wisconsin might have constitutionally applied its law to Petitioners' issue advocacy. Indeed, in quashing subpoenas and warrants issued in Doe II, Judge Gregory Peterson seems to have reached precisely that conclusion – that what the prosecutors believed the independent groups had done (and which, despite the extensive investigation, the prosecutors had found no evidence for) violated no criminal law.

Third, Petitioners allege that almost all – if not all – of the issue advocacy communications that might have been “coordinated” were conducted during the recall elections of state Senators in the summer of 2011 and, to the extent they mentioned candidates, mentioned persons running in those races and not Walker. Indeed, Walker was not on the ballot during this time period. Apparently, the prosecutors believed that these could nevertheless be considered contributions to the Walker campaign because the Governor “wanted” the Republican candidates in these recalls to win.

That is a theory of coordination heretofore unknown in the annals of “coordination” theory and broad enough to ensnare any politician who seeks to raise money for – or even render advice to – another candidate.

Finally, as noted above, Wisconsin's statutes do not contain an adequate definition of the conduct that might constitute coordination. Simply referring

to “coordination” and “consultation” or “suggestion” is too vague.

Conducting a Doe investigation on such tenuous grounds, all the while embarrassing and intimidating one side of the political spectrum, was a serious constitutional violation. The Doe process offered no way to end it. It could only be waited out.

## *II. B.*

### *The Seventh Circuit Ignored the Petitioners’ Subjective Bad Faith Claim.*

But the weakness of the prosecutors’ theory did not preclude the effectiveness of their tactics. The Petitioners allege that this activity was *intended* to disable the conservative advocacy infrastructure in Wisconsin and suppress speech. They have certainly alleged sufficient facts on this question to survive a motion to dismiss under the standard articulated by *Twombly*, 550 U.S. 544, and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). If, as Petitioners alleged, the Respondents’ objective was to retaliate against Walker’s supporters and suppress their speech, the ability to issue charges or obtain a conviction was irrelevant. The fact of an extensive and intrusive investigation would be enough to silence a great deal of speech and Petitioners allege it did precisely that.

Targets and witnesses were told that they could not discuss what was being done to them. This made it difficult to explain the meritless nature of the investigation. All that the public knew (thanks to

prodigious leaks) was prosecutors were conducting a major investigation with pre-dawn execution of search warrants and subpoenas directed to numerous persons with various connections to O’Keefe and the Club. Conservatives in the state knew that the breadth of the investigation was extraordinary. For all they knew (and all O’Keefe and the Club could tell them), the “shoe could drop any day,” and anyone who made common cause with those who seemed to be targets could themselves become targets.

That any attempt to prosecute the Petitioners would ultimately fail is of no matter. Prosecution was unnecessary because the process would be the punishment. The process was enough to accomplish the alleged goal of suppressing conservative speech. Thus, the ability – ultimately, somewhere down the line – to raise statutory and constitutional defenses is of no matter. If 42 U.S.C. § 1983 is designed for anything, it was designed for this.

The Seventh Circuit mentioned this “subjective” bad faith claim, but inexplicably ignored it. The Seventh Circuit merely assumed that the District Court did not rest its injunction on that claim *because the court did not hold a hearing* on it. 769 F.3d at 940. But that could only have related to the grant of injunctive relief. Inexplicably, the court ordered *the entire complaint* dismissed, including the bad faith claim, which it never addressed. In deciding upon the motion to dismiss that claim, the court was required to assume that facts pled in the complaint were true. The court failed to do so, and at

the very least should have preserved the subjective bad faith claim.

The court's failure to address the subjective bad faith claim also resulted in an erroneous decision on qualified immunity. The Seventh Circuit, while concluding that the coordination of issue advocacy was an open question, ignored whether it is well established that prosecutors may not retaliate against people for their political speech or discriminate on the basis of that speech. *Id.* at 940-42.

As the District Court noted in its initial decision denying the Respondents' motion to dismiss, "the defendants cannot seriously argue that the right to express political opinions without fear of government retaliation is not clearly established." *O'Keefe v. Schmitz*, 2014 WL 1379934, Apr. 8, 2014 Decision and Order at \*8 (E.D. Wis.).

If Petitioners are correct (and their allegations must be accepted at this stage of the litigation), then, neither qualified immunity nor, as noted below, *Younger* abstention would be available, and their personal capacity claims should be reinstated.

### **III. The Seventh Circuit's Decision Erroneously Preserves an Unconstitutional System.**

In dismissing the Complaint, the Court of Appeals relied on the Anti-Injunction Act. But by its

terms and the interpretation of this Court, the AIA does not apply here. Indeed, the Respondents never argued that the AIA was the basis for dismissal. As this Court has made clear, Section 1983 is a “statutorily authorized exception” to the AIA’s proscription. *Mitchum*, 407 U.S. at 242-43. The Seventh Circuit avoided this restriction by finding a jurisdictional “wild card” unmoored from the AIA or this Court’s abstention jurisprudence. 769 F. 3d at 939. That wild card was the “principles of equity, comity, and federalism” as stated in *Mitchum*. But those are merely the principles that form the *basis* for the *Younger* abstention doctrine developed by this Court, and *Mitchum* merely recognized that Section 1983’s exception to the AIA did not trump *Younger* abstention where it would otherwise be applicable. Lower courts cannot take those same principles and extend them beyond where the Supreme Court has says they go.

### *III. A.*

#### *Younger Abstention Is Inappropriate.*

The Court of Appeals expressly disclaimed reliance on *Younger* abstention. 769 F.3d at 939. That is not surprising. As recently summarized in *Sprint Communications*, *Younger* abstention applies only in “exceptional circumstances” in which the exercise of federal jurisdiction would intrude into or interfere with: 1) ongoing state criminal prosecutions, 2) certain “civil enforcement proceedings,” and 3) pending “civil proceedings involving certain orders . . . uniquely in furtherance of the state courts’ ability to perform their judicial

functions.” 134 S.Ct. at 591. Those three “exceptional categories . . . define *Younger’s* scope.” *Id.*

Wisconsin’s John Doe proceeding is none of these things. It is a vehicle for *investigating* crimes, not *prosecuting* them. It is “not so much a procedure for the determination of probable cause, as it is an inquest for the discovery of a crime.” *Washington*, 83 Wis.2d at 828. It is the exercise of an executive power overseen by a judge acting with some judicial and some executive authority. *Id.* at 827. Because a John Doe inquiry is investigatory in nature, the John Doe judge is not acting as a “court.” *Id.* at 838 (“A John Doe judge is not the equivalent of a court, and a John Doe proceeding is not a proceeding in a court of record.”). The idea of federal courts refusing to enjoin executive action in derogation of individuals’ constitutional rights is beyond foreign, it is alien.

Although the comparison is imprecise,<sup>6</sup> a John Doe proceeding shares some similarities with a grand jury. *See Id.* at 818-20. As the Seventh Circuit noted, there is a circuit split over whether *Younger* abstention applies to grand jury proceedings. 769 F.3d at 939. As the Third Circuit noted in *Monaghan v. Deakins*, 798 F.2d 632, 637–38 (3d Cir. 1986), vacated in part on other grounds, 484 U.S. 193 (1988), abstention is inappropriate because a grand

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<sup>6</sup> Although a John Doe proceeding can, like a grand jury, end with a finding of probable cause and lead to the issuance of criminal charges, the John Doe proceeding begins earlier in the process, effecting even very preliminary investigations. *See generally Washington*, 83 Wis.2d at 817-25.



jury can adjudicate nothing. Other circuits have differed, although the Fourth and Eighth Circuits engaged in the most cursory of discussions, merely assuming without analysis that grand jury proceedings were “criminal proceedings” under *Younger*. *Craig v. Barney*, 678 F.2d 1200, 1202 (4th Cir. 1982); *Kaylor v. Fields*, 661 F.2d 1177, 1182 (8th Cir. 1981).

In any event, *Younger* abstention would not be appropriate here because it is well recognized that it does not apply where the state proceeding is brought in bad faith or as part of a pattern of harassment against an individual. *Younger*, 401 U.S. 37; *Collins v. Kendall Cnty., Ill.*, 807 F.2d 95, 98 (7th Cir. 1986). Even *Kaylor v. Fields*, the Eighth Circuit case concluding that a grand jury proceeding *was* a “criminal proceeding” to which *Younger* abstention could apply, concluded that harassment and retaliation claims were not subject to *Younger* abstention. 661 F.2d 1177, 1183 (8th Cir. 1981).

### *III. B.*

#### *The Seventh Circuit’s Novel Approach to Abstention Is Inappropriate.*

Whatever the reason, the Court of Appeals did not abstain under *Younger*, but on some free floating and reserved notion of “equity, comity, and federalism” that, in its view, permits a federal court to decline to exercise jurisdiction it would otherwise have. This is flatly inconsistent with this Court’s recent admonition in *Sprint* that federal courts do not have broad discretion to decline jurisdiction:

Federal courts, it was early and famously said, have “no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.” Jurisdiction existing, this Court has cautioned, a federal court’s “obligation” to hear and decide a case is “virtually unflagging.” Parallel state-court proceedings do not detract from that obligation.

*Sprint*, 134 S.Ct. at 590-91 (citations omitted).

Reduced to its essence, the Seventh Circuit’s argument is that abstention is warranted because, eventually, the Petitioners would be able to present their claims in state court. 769 F.3d at 939-40. But they had no right to do that in the John Doe proceeding, which is what they seek to end. To be sure, they could – and did – seek to quash the warrants and subpoenas directed to them, but that did not end the investigation itself. Moreover, because of the gag order, targets could not even publicly explain how and why they were vindicated. The Seventh Circuit misstated the effect of the decision quashing the subpoenas when it claimed that “Judge Peterson had already concluded that the investigation should end as a matter of state law.” *Id.* at 940. The decision did not end the investigation.

A John Doe proceeding simply provides no avenue for the target to force its “dismissal.” The

Petitioners had no right to challenge the theory under which the Doe was being conducted – or the evidence which prompted it – because the prosecutors had no obligation to tell them what it was. While the presiding judge can entertain arguments from witnesses and targets, he is under no obligation to do so. *See* Wis. Stat. § 968.26. Should the judge decline to act or reject any arguments that he might permit to be made, his decision may not be appealed and, as noted above, can be reviewed only by the daunting prospect of seeking a supervisory writ.

The Seventh Circuit's miscomprehension of the nature of a John Doe proceeding is further demonstrated by the fact that the court calls the proceeding a "case" that "might be over today had the district judge allowed it to take its course." 769 F.3d at 939. It is most certainly not a "case," and it can stay open as long as the judge and/or prosecutors want it to. The only way the Petitioners can seek to force an end to it is through the federal courts. In other words, as long as no arrests were made or charges brought, the investigation could continue and state law guaranteed no effective right to be heard. That is what happened here. Despite the quashing of subpoenas, conservative groups (and donors) remained "spooked."

**Conclusion**

For the reasons set forth above, Amicus respectfully requests that this Court grant the Petition for Certiorari.

Respectfully submitted,

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