No. 14-872

IN THE
SUPREME COURT OF THE UNITED STATES

ERIC O'KEEFE, ET AL.,
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 AND BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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

Pursuant to Supreme Court Rule 37.2(b), the Cato Institute respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioners. All parties were provided with timely notice of *amicus*'s intent to file as required under Rule 37.2(a). Counsel for the Petitioners consented to this filing. Counsel for Respondents have withheld consent.

The interest of the Cato Institute arises from its mission to advance and support the rights that the Constitution guarantees to all citizens. The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato conducts conferences, publishes books, studies, and the annual *Cato Supreme Court Review*, and files *amicus* briefs.

Cato has participated in numerous cases of constitutional significance before this and other courts, and has consistently worked in defense of the constitutionally guaranteed rights of individuals and organizations throughout its activities. This case is important to Cato because it concerns the abuse of government power.

This brief will discuss why federal court intervention in state proceedings is justified where state officials retaliate against individuals and

organizations for the exercise of First Amendment rights by pursuing a bad-faith investigation to harass, discourage and disrupt protected activities. Providing a federal forum and remedy for the victims of such retaliatory investigations is compelled by this Court's decision in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), as well as a long line of cases holding that "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

The Cato Institute has no direct interest, financial or otherwise, in the outcome of this case. Its sole interest in filing this brief is to ensure the availability of a remedy for those subject to retaliatory investigations.

For the foregoing reasons, the Cato Institute respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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QUESTION PRESENTED

Petitioners alleged that they were victims of an investigation carried out to retaliate against and suppress their First Amendment speech and association activities. The district court reviewed the evidence and enjoined the investigation. The contortions adopted by the panel to foreclose any federal court remedy for petitioners raise the important question: Is the long line of cases starting with *Dombrowski v. Pfister*, 380 U.S. 479 (1965), which grants victims of retaliatory law enforcement tactics access to federal courts, still good law?

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato conducts conferences, publishes books, studies, and the annual *Cato Supreme Court Review*, and files *amicus* briefs. This case is important to Cato because it concerns the abuse of government power through retaliation for the exercise of constitutional rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Complaint in this case, and the evidence submitted in support of the preliminary injunction, reveal a multi-year investigation aimed at retaliating against petitioners for exercising their First Amendment speech and association activities in a manner repugnant to the prosecutors. Since *Dombrowski v. Pfister*, 380 U.S. 479 (1965), this Court has recognized that victims of retaliatory government proceedings have access to federal court remedies, even while the underlying state proceedings are pending. Indeed, the district court specifically found that *Dombrowski*'s "bad faith"

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[1] Rule 37 statement: No party's counsel authored any part of this brief and no person other than amicus funded its preparation and submission. Parties were timely notified and petitioners consented, though respondents withheld consent. A motion for leave to file has been included with this brief.

exception to ordinary principles of abstention mandated exercise of federal jurisdiction. Pet. App. 22a. But the Seventh Circuit's federalism-based decision denied petitioners access to a federal court remedy in a way that leaves no room for legitimate *Dombrowski* claims to proceed. The petition should be granted to affirm that *Dombrowski* still affords retaliation victims a federal court remedy.

The petition should further be granted to remove any lingering question whether "investigations" as such can give rise to federal retaliation claims. *See Hartman v. Moore*, 547 U.S. 250, 262 n.9 (2006). The same constitutional harm suffered by victims of retaliatory prosecutions—namely suppressed First Amendment activity—befalls victims of retaliatory investigations, particularly those, like here, adorned with leaks and coordinated pre-dawn raids.

Moreover, the risk for abuse that caused the Court to adopt *Dombrowski*'s rule have grown exponentially in recent years. Campaign-finance interest groups now call for the use of "enforcement" power to silence political speech activities throughout the Nation; indeed, this case serves as a perverse model for future abuse. And the recent dispersal of discretionary law enforcement authority throughout government agencies underscores the growing risks of abuse in other settings. At base, the petition should be granted to affirm the remaining vitality of federal claims against retaliation for First Amendment activities.

BACKGROUND

The Seventh Circuit described the secret "John Doe" proceedings in this case as if District Attorney John Chisholm and his colleagues were simply trying

to get to the bottom of a thorny campaign finance question: When a group that engages in issue advocacy (which cannot be regulated under *Federal Election Comm'n v. Wisconsin Right to Life*, 551 U.S. 449 (2007)) also engages in "coordinated fund-raising" with an elected official, does that "coordination" make their issue advocacy subject to regulation? *O'Keefe v. Chisholm*, 769 F.3d 936, 940-41 (7th Cir. 2014), Pet. App. 9a-11a. With a simple set of quote marks, the panel dismissed the Petitioners' "retaliation" theory, claiming that it turned on the validity of the high-browed legal question that Chisholm was supposedly pursuing. 769 F.3d at 941-42, Pet. App. 11a-12a.

The pleadings and record in this case tell a very different story. The Complaint and the evidence submitted in support of the preliminary injunction motion document a four-year effort by Chisholm and his confederates to locate and stop anyone who was willing to donate money and time to support issue advocacy on one side—and one side only—of a hotly contested public policy dispute in Wisconsin.

To this end, the defendants here:

- Initiated an all-out dragnet of advocacy organizations supporting public union reform in Wisconsin, peering into these organizations throughout Wisconsin and beyond, operating under the cover of exceptionally broad authority claimed by the state's election authority, Pet. App. 41a-43a.
- Conducted coordinated early-morning armed raids targeting conservative activists statewide. Sheriff's deputies "used bright floodlights to illuminate the targets' homes,"

and targets were denied the ability to contact with attorneys during the search and seizure, Pet. App. 43a-44a. Making sure not to miss an opportunity to intimidate, the officers even seized a child's iPad.[2]

- Relied on broad, secret subpoenas targeting "all or nearly all right-of-center groups and individuals in Wisconsin," Pet. App. 44a, as well as national conservative advocacy groups, to demand disclosure of donor information, financial information, and internal communications, Pet. 6-7, Pet. App. 44a-45a.
- Failed to apply their "coordination" theory to any organization supporting the other side of the public policy dispute, despite numerous indications that such organizations used fundraising techniques similar to those attributed to Petitioners. Br. of Appellees at 46-47, *O'Keefe v. Chisholm* (Sept. 2, 2014), 769 F.3d 936 (7th Cir. 2014) (No. 14-1822); Complaint at 42-48, ¶¶ 140-156, *O'Keefe v. Schmitz*, No. 2:14-cv-00139 (E.D. Wis. Feb. 10, 2014), ECF No. 1.[3]

Petitioners draw the real-world conclusion that the prosecutors' actual aim was retaliation for—and suppression of—their First Amendment activity. If defendants' goal were simply to test the legality of

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[2] Stuart Taylor, Jr., *District attorney's wife drove case against Wis. Gov. Walker, insider says*, Legal Newsline, Sept. 9, 2014, online at http://bit.ly/1FE2sj8.

[3] *See also* Colin Roth & Brian Fraley, *Lawsuit Highlights Selective Prosecution in John Doe Probe Of Conservatives, Right Wisconsin*, Feb. 10, 2014, online at http://bit.ly/1Mh8BGx.

supposed "coordinated fund-raising and issue advocacy," 769 F.3d at 941, Pet. App. 10a, their Gestapo tactics would have been unnecessary. The narrow issue supposedly in question could have been presented to a Wisconsin court—likely on stipulated facts—and decided. And when it was finally presented to a Wisconsin court, it was rejected in short order, Pet. App. 68a-72a, and has subsequently been repudiated by the state in unrelated federal litigation.[4]

Instead of seeking an answer at the outset, defendants "investigated." And investigated some more. And they let it be known through leaks that those supporting Governor Walker's policies were being investigated. After all, they were getting far more effective results in suppressing Petitioners' issue advocacy through the investigation than if they actually asked a judge to be the first court to ever adopt their novel theory and lost. Donors tend to be less enthusiastic about participating in issue advocacy when they hear that a donation could cause their home to be raided. When Respondents had an opportunity to rebut plaintiffs' evidence at the preliminary injunction stage, the district court accepted plaintiffs' proof and issued the injunction.

The Seventh Circuit ignored all of this and alchemized a new "objective theory," apparently derived from *Younger* abstention doctrine, to control the question of whether *any* federal remedy for

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[4] *See* Plaintiffs and Defendants' Proposed Judgment, ECF No. 130-2, at 2, *Wisconsin Right To Life, Inc. v. Barland*, No. 10-cv-669 (E.D. Wis. filed Nov. 24, 2014); Final Judgment, ECF No. 133, at 2, *Wisconsin Right To Life, Inc. v. Barland*, No. 10-cv-669 (E.D. Wis. filed Jan. 30, 2015).

Respondents' conduct exists at all. 769 F.3d at 940 (citing *Mitchum v. Foster*, 407 U.S. 225 (1972), *Younger v. Harris*, 401 U.S. 37 (1971), and *Perez v. Ledesma*, 401 U.S. 82 (1971)), Pet. App. 9a; *id.* at 942, Pet. App. 12a-13a. Under this unique theory, Petitioners would be shut out of federal court unless "no reasonable person could have believed that the John Doe proceeding could lead to a valid conviction" as a matter of federal law. 769 F.3d at 940, Pet. App. 9a. Since there was supposedly no clear answer to the campaign finance question posed above under federal law, the immediate effect was to shield this debacle from any federal court review.

The longer-term effect, however, is to give prosecutors carte blanche to do exactly what these politically-inspired prosecutors did: "investigate" perceived political threats for the very purpose of suppressing political speech. So long as arrests are never made and claims are never brought, the prosecutors are in the clear and no federal court can do anything about it. That cannot be the law.

ARGUMENT

I. The Court Long Ago Resolved The Federalism Concerns That Animated The Lower Court's Novel Approach.

In *NAACP v. Alabama*, 357 U.S. 449 (1958), the Alabama Attorney General's office said it needed to gather information about the NAACP's members in the course of its investigation into whether the nonprofit advocacy group should be registered as a foreign corporation under Alabama law. In language that reads more like a ruling on a motion to compel than a groundbreaking constitutional opinion, a unanimous Court indulged Alabama's investigatory

justification for its subpoenas, but it concluded that the intrusive demands were unnecessary to achieve the stated goals. *Id.* at 464. Although the Court did not come right out and say so, it plainly saw the state's "investigation" of the NAACP for what it was: a transparent effort at intimidation and retaliation for First Amendment activities.

While *NAACP v. Alabama* involved a review following proceedings in the Alabama courts, this Court confirmed just a few years later that federal courts have a role to play in redressing the retaliatory use of state and local law enforcement proceedings *while they are pending*, so long as plaintiffs can allege and show that the proceedings were instituted to harass and retaliate against them for First Amendment activity. In *Dombrowski v. Pfister*, civil rights activists sought injunctive relief to prevent a group of Louisiana officials from prosecuting or threatening to prosecute them under anti-Communist laws, which were being used as a pretext to retaliate against the activists for advocating for the constitutional rights of black citizens. 380 U.S. at 482-83. The activists were arrested, their offices were raided and files seized, and the state authorities repeatedly announced that their organizations were subversive and under investigation. *Id.* at 487-89. The authorities held their course even after a judge quashed the arrests and held that the arrests were illegal. *Id.* As here, these events had a substantial chilling effect on the groups' protected activities: the investigation "frightened off potential members and contributors," and the seizure of records "paralyzed operations and threatened exposure of the identity of adherents to a locally unpopular cause." *Id.* at 488-89 (citing

NAACP v. Alabama). Under these circumstances, the Court recognized the propriety of federal intervention where state officials invoke a statute in bad faith or for the purpose of harassment in order to discourage or disrupt protected activities. *Id.* at 490.

Perhaps most importantly here, *Dombrowski* signaled that the Court was no longer willing to indulge pretextual claims that prosecutors were just applying their state law: When faced with an allegation of bad-faith enforcement of a statute, the ultimate validity of the government's legal theory is "irrelevant," because it "would not alter the impropriety of [the government] invoking the statute in bad faith to impose continuing harassment in order to discourage [the organization's] activities …." 380 U.S. at 490. In other words, a bad faith retaliation claim turns on the improper purpose driving the action. *Cf. Fitzgerald v. Peek*, 636 F.2d 943, 945 (11th Cir. 1981) (a showing of bad faith or harassment can support federal court intervention "regardless of whether valid convictions conceivably could be obtained."); *Lewellen v. Raff*, 843 F.2d 1103, 1109-10 (8th Cir. 1988) (adopting *Fitzgerald*); *Wilson v. Thompson*, 593 F.2d 1375, 1383 (5th Cir. 1979) (because a state "does not have any legitimate interest in pursuing a bad faith prosecution brought to retaliate for or to deter the exercise of constitutionally protected rights," the "justification for comity disappears"); *Diamond "D" Constr. Corp. v. McGowan*, 282 F.3d 191, 200 (2d Cir. 2002) (the "subjective motivation of the state authority in bringing the proceeding is critical to, if not determinative of" the bad faith inquiry).

Despite this plain teaching, the panel below granted bewildering deference to the Wisconsin

prosecutors' state-law justification for their thuggery. Worried that pre-dawn raids on the homes of political activists signal something more than an investigation about campaign-finance theory? Not a problem that a federal court should concern itself with in light of federalism and comity. So long as no court has held that the theory of the state investigation is untenable under federal law, the door to the federal courthouse is closed—for any type of relief. Indeed, for good measure, the panel not only reversed the injunction on Anti-Injunction Act grounds that no one argued, Pet. 17, it threw out every claim in the case.

But *Dombrowski* and *Younger* have already settled the issue: providing a federal forum for victims of retaliatory investigations does not offend federalism concerns. *See Dombrowski*, 380 U.S. at 485-86 (considerations of federalism do not prevent federal intervention where state proceeding "will not assure adequate vindication of constitutional rights," particularly where there is a "substantial loss of or impairment of" First Amendment freedoms); *Younger*, 401 U.S. at 47-49 (relying on *Dombrowski* to carve out of its abstention rule "bad faith, harassment or any other unusual circumstance that would call for equitable relief"). In his dissent from the lower Court's decision in *Dombrowski*, Judge Wisdom explained how federal intervention in such circumstances makes federalism "workable":

> [T]he crowning glory of American federalism is not States' Rights. It is the protection the United States Constitution gives to the private citizen against all wrongful governmental invasion of fundamental rights and freedoms.

> When the wrongful invasion comes from the State, and especially when the unlawful state action is locally popular or when there is local disapproval of the requirements of federal law, federal courts must expect to bear the primary responsibility for protecting the individual.

Dombrowski v. Pfister, 227 F.Supp. 556, 570 (E.D. La. 1964) (Wisdom, J., dissenting). The panel's novel theory opens a gaping exception to the *Dombrowski* doctrine that cannot be justified under general federalism concerns—to the contrary, in properly plead "bad faith" cases, federal concerns must be respected.

II. Law Enforcement Attorneys Must Not Be Given An "Investigatory" Loophole That Green-Lights Retaliation For First Amendment Activity

Retaliation for protected First Amendment activity can take countless forms, and government enforcement attorneys have many means of retaliating at their fingertips. The petition should be granted to confirm that *Hartman v. Moore*, 547 U.S. 250 (2006), provides no shelter for enforcement attorneys who retaliate through abusive investigations but do not take the step of arresting or formally charging their victims (whether because they have no intention of ever doing so or they get exposed before such steps are taken). *See id.* at 262 n.9 (reserving the question of "[w]hether the expense or other adverse consequences of a retaliatory investigation would ever justify recognizing such an investigation as a distinct constitutional violation").

An investigation pursued for an improper purpose is simply a species of bad-faith harassment and retaliation for the exercise of constitutional rights. As in *Dombrowski*, the prosecutors here have used enforcement as a means to "to harass appellants and discourage them and their supporters from" exercising their constitutional rights, which has substantially disrupted their political activity. 380 U.S. at 482. There is no compelling reason to distinguish between the constitutional injury suffered as a result of a retaliatory investigation on the one hand and the injury suffered as a result of a retaliatory prosecution. While there is generally a higher degree of *reputational* harm associated with being charged, the harm to speech interests are the same regardless of whether charges have been filed: in both instances, the target and their associates suffer a chilling effect on speech and interference with associational activities.

Providing a federal forum for victims of retaliatory investigations thus fits comfortably within the Court's long line of cases forbidding retaliation for protected activity, regardless of the particular means chosen to accomplish the retaliation. *See, e.g.*, *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("[F]or an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'") (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 32-33, n.20 (1973)); *United States v. Goodwin*, 457 U.S. 368, 372 (1982) ("To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'") (quoting *Bordenkircher*). *See also Bates v. City of Little Rock*,

361 U.S. 516, 523 (1960) (First Amendment freedoms "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.").

Notwithstanding *Hartman*'s cautious footnote, the cases establishing the general prohibition against retaliation already outlaw the sort of abuse inflicted here. "Bad-faith harassment can, of course, take many forms," including "a pattern of discriminatory enforcement designed to inhibit the exercise of federal rights." *Perez v. Ledesma*, 401 U.S. 82, 118 n.11 (1971); *see also id.* at 117-18 ("[I]f in order to discourage conduct protected by the First Amendment or by some other provision of the Constitution, a State brings *or threatens to bring* a criminal prosecution in bad faith for the purpose of harassment, the bringing of the prosecution *or the threat is itself* a constitutional deprivation since it subjects a person to a burden of criminal defense which he should not have to bear.") (citing *Dombrowski*) (emphasis added). Indeed, *Hartman* itself recognized that "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out." 547 U.S. at 256. And the Court also noted that, even where First Amendment retaliation was *not* alleged, "[a]n action could still be brought against a prosecutor for conduct taken in an investigatory capacity, to which absolute immunity does not extend." *Id.* n.8 (citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 274-76 (1993), and *Burns v. Reed*, 500 U.S. 478, 492-95 (1991)).[5]

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[5] *Buckley* involved alleged fabrication of evidence, rather than retaliation. There, the author of the panel opinion here

In a closely related context, this Court has recognized that bad-faith investigatory tactics implicate First Amendment concerns. "[G]rand jury investigations *if instituted or conducted other than in good faith*, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification." *Branzburg v. Hayes*, 408 U.S. 665, 707-08 (1972) (footnote to *Younger*, 401 U.S. at 49, 53-54) (emphasis added). And in *Branzburg*, the Court highlighted the risk posed by abusive investigative tactics that "expose[] for the sake of exposure" or "prob[e] at will and without relation to existing need." *Id.* at 700 (quoting *Watkins v. United States*, 354 U.S. 178, 200 (1957), and *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825, 829 (1966)). *Cf. O'Keefe*, 769 F.3d at 943 (noting close analogy between Wisconsin's John Doe investigations and grand jury proceedings).

To a similar end, the D.C. Circuit has explained:

> When used in good faith, investigative techniques . . . are all proper police activities that violate no constitutional rights of the suspects involved. However, all investigative techniques are subject to abuse and can conceivably be used to oppress citizens and groups, rather than to further proper law enforcement goals. In some cases, bad faith use of these techniques may constitute an

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used another "unprecedented theory" to shield the prosecutors from liability, and the Court reversed. 509 U.S. at 265.

> abridgment of the First Amendment rights of the citizens at whom they are directed, be they "journalists" or less exalted citizens.

Reporters Comm. for Freedom of Press v. Am. Tel. & Tel. Co., 593 F.2d 1030, 1064 (D.C. Cir. 1978).

In short, the Court's precedents point unmistakably in one direction: When government actors abuse their investigative powers for the purpose of harassment, or to retaliate for or discourage activity protected by the First Amendment, the targets of such bad-faith investigations have suffered a constitutional injury that can be vindicated in federal court.

III. Confirming A Federal Court Remedy For Retaliatory Investigations Poses No Risk Of Inviting A Torrent Of New Lawsuits, But Denying Such A Remedy Poses The Risk Of Escalated Abuse

Some lower courts have expressly refused to draw distinctions between retaliatory investigations and other retaliatory tactics used by the government. *See Smith v. Plati*, 258 F.3d 1167, 1176 (10th Cir. 2001) ("Any form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment, constitutes an infringement of that freedom.") (citation omitted); *Izen v. Catalina*, 398 F.3d 363, 367 n.5 (5th Cir. 2005) (quoting *Smith*); *Lacey v. Maricopa Cnty.*, 649 F.3d 1118, 1132-33 (9th Cir. 2011) (acknowledging the burdens imposed by bad-faith investigatory tactics and allowing claim to proceed against special prosecutor); *cf. Smart v. Bd. of Trustees of Univ. of Ill.*, 34 F.3d 432, 434 (7th Cir. 1994) ("Any form of official retaliation for exercising

one's freedom of speech is actionable as an infringement of that freedom.").

There are no reports that these courts have faced an unusually large number of cases alleging retaliation through investigation. Whether through adoption of a no-probable-cause requirement or otherwise,[6] there is no reason to believe that suitable "screens"—including the basic requirement that plaintiffs plausibly allege an entitlement to relief, *Ashcroft v. Iqbal*, 556 U. S. 662 (2009)—cannot be used to prevent frivolous claims by frustrated citizens. *See Crawford-El v. Britton*, 523 U.S. 574, 597-601 (1998) (discussing the "various procedural mechanisms [that] already enable trial judges to weed out baseless claims" even before *Iqbal* and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)); *cf. Hartman*, 547 U.S. at 258-59 ("Nor is there much leverage in the fear that without a filter to screen out claims federal prosecutors and federal courts will be unduly put upon by the volume of litigation.").

The far greater risk lies with allowing the Seventh Circuit's ruling to stand, thereby intimating that victims of retaliatory investigations suffer no cognizable First Amendment injury. As the 2016 election cycle gears up, government lawyers offended by center-right issue advocacy will take note of this case and ponder whether some "investigating" might be in order in their jurisdiction as well.

Indeed, there is a growing chorus of campaign finance interest groups that urge "enforcement"

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[6] *See* Pet. 28 n.7 (noting circuit split as to whether plaintiffs must plead and prove lack of reasonable suspicion or probable cause).

aimed at "coordination" as a remedy to the evils they perceive following the Court's decision in *Citizens United v. Federal Elections Comm'n*, 558 U.S. 310 (2010). The Brennan Center for Justice stands front and center in this effort, even while it acknowledges that "[m]any of the [coordination] methods do not quite violate existing coordination laws." Chisun Lee et al., *After* Citizens United*: The Story In The States* 8 (Brennan Ctr. for Justice at N.Y.U. Sch. of Law 2014), online at http://bit.ly/1KQWz3l. The Brennan Center laments that "outside spending has skyrocketed" since *Citizens United* and concludes that any degree of coordination between independent issue advocacy groups and candidates poses unacceptable risks of corruption. *Id.* at 1.[7] "[A]cross the states, a wide range of approaches to regulating coordination—from dated and myopic to new and imaginative—have shown the current limits and potential future for deterring coordination between outside spenders and candidates throughout the country." *Id.* (emphasis added). "Even in states without the strongest rules," it concludes, "a robust enforcement approach can catch violations." *Id.* at 2.

The Brennan Center filed an *amicus* brief in the court below, where, notwithstanding its endorsement

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[7] Another campaign finance interest group has very publicly accused both 2012 presidential campaigns of similar offenses and called for a federal investigation. *See* Democracy21, *Democracy 21 Calls on Justice Department to Investigate Whether Super PACs Supporting Obama and Romney are Engaged in Massive Campaign Finance Violations*, Feb. 15, 2012, online at http://bit.ly/1zPuvLS (requesting that the Attorney General investigate President Obama and Mitt Romney for "massive violations of the campaign finance laws" by coordinating with Super PACs).

of "robust enforcement" to stamp out any coordination, it notably refused to "address the particular facts upon which this case is based" and took "no position on whether the investigation at issue in this case should have been commenced or should continue." Br. for the Brennan Ctr. as *Amicus Curiae* at 2 (Aug. 8, 2014), *O'Keefe v. Chisholm*, 769 F.3d 936 (7th Cir. 2014) (No. 14-1822).[8]

The use of heavy-handed law-enforcement tactics to retaliate against political opponents is not limited to campaign-finance investigations. *E.g.*, *Donahoe v. Arpaio*, 986 F.Supp.2d 1091 (D. Ariz. 2013) (sheriff and county attorney investigated and arrested former member of county board of supervisors in retaliation for public criticism); *Zherka v. Ryan*, --- F.Supp.3d ----, 2014 WL 4928956 (S.D.N.Y. Sept. 30, 2014) (IRS employees hindered organization's application for tax-exempt status and initiated investigation based on activity as members of the "Tea Party"); *Denney v. Drug Enforcement Admin.*, 508 F.Supp.2d 815 (E.D. Cal. 2007) (agency initiated undercover investigation into physician's practice in retaliation for his exercise of his First Amendment speech rights as proponent of medical marijuana). The risk of retaliatory investigations exists across a wide gamut of law-enforcement settings.

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[8] This disavowal appears to have been short-lived, however, as the Brennan Center celebrated the Seventh Circuit's decision and vowed to "continue working to defend and strengthen such common-sense measures to protect the integrity of our democracy." Daniel I. Weiner, *A Dose of Sanity from the Seventh Circuit in* O'Keefe v. Chisholm, Brennan Center for Justice Sept. 25, 2014, online at http://bit.ly/1F31ijX.

The Court must continue to ensure that the abuse of official power to interfere with and stifle protected activity does not go unchecked.

IV. The Proliferation Of State And Federal Enforcement Laws Increases The Risk Of Abuse

In 1940, then-Attorney General Robert Jackson famously observed that because a "prosecutor has more control over life, liberty, and reputation than any other person in America," special care should always be taken to guard against the "most dangerous power of the prosecutor":

> [T]hat he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing

> group, [or] being attached to the wrong political views.

Robert Jackson, *Address at the Second Annual Conference of United States Attorneys: The Federal Prosecutor*, (Apr. 1, 1940).[9]

Dombrowski was decided in April 1965, during an era when Justice Jackson's admonitions were not so distant, and when state and federal law enforcement was still performed mainly by traditional prosecutors. But the landscape has shifted. The "law books filled with a great assortment of crimes" have grown exponentially. Enforcement power has massively expanded to agencies in the federal government[10] and in the states.

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[9] Justice Scalia, before quoting Justice Jackson's address at length in his dissent in *Morrison v. Olson*, similarly acknowledged "the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation." 487 U.S. 654, 727-29 (1988) (Scalia, J., dissenting).

[10] As examples, the EEOC, created by Title VII of the Civil Rights Act of 1964, was created in late 1965. The EPA came along in 1970. Reorg. Plan No. 3 of 1970, 40 C.F.R. 1.1 (1970). But the mass diffusion of federal law enforcement powers to agencies has rapidly accelerated in recent years with the creation of bodies such as the Public Company Accounting Oversight Board (created with the Sarbanes Oxley Act in 2002, *see Free Enter. Fund v. Public Co. Acc'ting Oversight Bd.*, 561 U.S. 477, 484 (2010)), and the Consumer Financial Protection Bureau (authorized by the Dodd-Frank Wall Street Reform and Consumer Protection Act, in 2010). In 2013, Congress enacted 72 laws, while federal agencies issued 3,659 rules, 77 of which were so-called "major" rules, meaning they either have an "annual effect on the economy of [$100 million] or more," or are otherwise likely to result in a substantial impact on the economy, 5 U.S.C. § 804(2). Clyde Wayne Crews Jr., *Ten*

This scattering of investigatory authority has consequences that the Court should consider. Government lawyers in administrative agencies face fewer institutional and political checks on the exercise of their discretion. (Even here, while the lawyers in this case were Milwaukee County prosecutors, they were essentially operating as special prosecutors under the broad authority delegated by the State's election authority.) Accordingly, the risk of retaliatory prosecutions is much higher now than it was when *Dombrowski* permitted federal intervention to stop retaliatory state investigations. And, to be sure, the risks of retaliation have grown at the federal level too.

CONCLUSION

Violations of federal rights should have federal remedies, even when perpetrated by state actors. For these reasons, and those stated by petitioners, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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