No. 14-1822

Consolidated with Nos. 14-1888, 14-1899, 14-2006, 14-2012, 14-2023

In the United States Court of Appeals for the Seventh Circuit

ERIC O'KEEFE, et al.,

Plaintiffs–Appellees

v.

JOHN T. CHISHOLM, et al.,

Defendants–Appellants.

On Appeal from the United States District Court for the
Eastern District of Wisconsin
No. 2:14-cv-00139
The Honorable Rudolph T. Randa

Brief of Plaintiffs–Appellees Eric O'Keefe and Wisconsin Club for Growth, Inc.

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Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the undersigned counsel of record for appellees Eric O'Keefe and Wisconsin Club for Growth, Inc. ("Plaintiffs") hereby certifies that Baker & Hostetler LLP is the only law firm whose attorneys have appeared for Plaintiffs in this case, that the Wisconsin Club for Growth, Inc., has no parent corporation, and that no publicly held company owns 10 percent or more of its stock.

Dated: September 2, 2014

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Introduction

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

Defendants launched and aggressively pursued a secret criminal investigation targeting every major right-of-center advocacy group in Wisconsin on the view that this kind of "coordination" between a candidate and supporters of his policies is illegal. They also claim the power to restrict speech on public-policy issues based on an advocacy group's communications with a candidate, whether or not that speech has anything to do with that candidate's own campaign or election. In short, Defendants claim a *carte blanche* to target more or less every person or group that has ever participated in Wisconsin political or policy debates, to raid their homes, seize their records and personal effects, subpoena their emails and phone records, and threaten them with prosecution—all things that Defendants actually did in this case—merely for speaking out on the issues. It would be difficult to conceive a more offensive disregard for the First Amendment rights of citizens to advocate and associate with oth-

[1] Glenn Thrush, *Obama super PAC decision: President blesses fundraising for Priorities USA Action*, Politico, Feb. 6, 2012; Kenneth Vogel and Tarini Parti, *Democratic super PACs get jump on 2014, 2016*, Politico, Nov. 26, 2012.

ers to advance their beliefs through the political process, the very lifeblood of representative democracy.

Defendants did not adopt this indefensible legal position out of some misplaced zeal to enforce Wisconsin campaign-finance law. The facts show that it was a pretext, contrived to support the latest phase of a years-long crusade against Governor Scott Walker, his associates, and now his philosophical allies. What began four years ago as a routine investigation into missing charitable funds immediately morphed into a pursuit of all-things-Walker, as Milwaukee County District Attorney John Chisholm and his accomplices repeatedly expanded their investigation to pursue new angles and new targets. The latest phase, launched soon after Walker's recall-election victory, targets nearly every right-of-center activist group in Wisconsin, with the only common denominator being their support for Walker's policies. The intended and actual result was to virtually silence one half of policy debate in Wisconsin.

The district court correctly found that Plaintiffs "have been shut out of the political process merely by association with conservative politicians" on the basis of a legal theory that "cannot pass constitutional muster" and has no possibility of ever resulting in a valid conviction, only further harassment. R.181 at 25. And that, it concluded, "cannot square with the First Amendment and what it was meant to protect." *Id.* To vindicate Plaintiffs' First Amendment rights, Defendants' retaliatory investigation must remain enjoined and Defendants must be held liable for their abuse of power.

Jurisdictional Statement

Defendants-Appellants' jurisdictional statements are not complete and correct.

1. This civil action alleges violations of the First and Fourteenth Amendments to the United States Constitution. The district court had jurisdiction over this action pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343.

2. The first order on appeal is the district court's April 8, 2014 order denying Defendants' motions to dismiss. Defendants Chisholm, Landgraf, and Robles (the "Milwaukee Defendants") appealed this order on April 15. Defendants Schmitz and Nickel appealed on April 22. This Court has jurisdiction under 28 U.S.C. § 1291 and the collateral-order doctrine to consider certain appeals of this order, but not others:

a. The Court has jurisdiction to consider the Milwaukee Defendants' and Schmitz's prosecutorial-immunity defenses. *See Van de Kamp v. Goldstein*, 555 U.S. 335, 339–40 (2009).

b. The Court has jurisdiction over the Milwaukee Defendants' *Younger* and *Burford* abstention defenses because they bear upon and are central to the district court's preliminary injunction. *See FreeEats.com, Inc. v. Indiana*, 502 F.3d 590, 595–600 (7th Cir. 2007).

c. The Court lacks jurisdiction over Defendants' sovereign-immunity appeals because they are frivolous. ECF No. 43.

d. The Court lacks jurisdiction over the Milwaukee Defendants' *Pullman* abstention defense because it does not bear upon and is not central to the denial of qualified or prosecutorial immunity, or the district court's preliminary injunction. *See infra* § I.C.

e. The Court lacks collateral-order jurisdiction to consider Defendants' qualified-immunity defenses because they would not "conclusively determine[] the defendant's claim of right not to *stand trial* on the plaintiff's allegations." *Mitchell v. Forsyth*, 47 U.S. 511, 527 (1985). *See infra* § I.E.4.

3. The second order on appeal is the district court's May 6 order granting the Plaintiffs' motion for a preliminary injunction. All Defendants filed notices of appeal on May 7. The Court has jurisdiction to review the May 6 order under 28 U.S.C. § 1292(a)(1).

4. The third order on appeal is the district court's May 8 order reissuing the May 6 preliminary-injunction order in response to this Court's remand order of May 7. All plaintiffs filed premature notices of appeal on May 7. *See* ECF No. 20. The district court's May 6 preliminary-injunction order, not its May 8 order, is the operative preliminary-injunction order because Defendants' frivolous sovereign-immunity appeals did not deprive the district court of jurisdiction to issue the injunction. *See Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989). If the Court determines otherwise, it has jurisdiction to review the May 8 order under 28 U.S.C. § 1292(a)(1).

5. Plaintiffs' official-capacity claims for equitable relief against all Defendants, including non-appealing Defendant Gregory Peterson, are pending in the district court. *See Ruffino v. Sheahan*, 218 F.3d 697, 700 (7th Cir. 2000).

6. No orders of a magistrate judge are on appeal, and no motions to alter a judgment or to reconsider any order under appeal were filed.

Statement of Issues

1. Whether a federal court must abstain under *Younger v. Harris*, 401 U.S. 37 (1971), in light of a state proceeding that is not prosecutorial but instead an "inquest for the discovery of crime."

2. Whether the district court erred by not abstaining under *Younger* when Plaintiffs alleged, in detail, how Defendants' investigation was carried out for the purpose of retaliating against and deterring the exercise of Plaintiffs' constitutionally protected rights of advocacy and association.

3. Whether this Court has jurisdiction over Defendants' appeal of the district court's decision not to abstain under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), when *Pullman* abstention does not bar interim equitable relief.

4. Whether the district court abused its discretion by not abstaining under *Pullman*.

5. Whether the district court abused its discretion by not abstaining under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

6. Whether Defendants forfeited arguments for qualified immunity that they declined to raise before the district court.

7. Whether one's right not to be subjected to abusive criminal investigation and official harassment in retaliation for the exercise of First Amendment rights is clearly established.

8. Whether Defendants are entitled to prosecutorial immunity for alleged conduct that includes the conception, supervision, and execution of an investigation that has not resulted in any probable-cause determination.

9. Whether the district court erred in granting Plaintiffs' preliminary-injunction motion.

Statement of the Case

Plaintiff Wisconsin Club for Growth ("the Club") is a non-profit corporation that is recognized as a social-welfare organization under Section 501(c)(4) of the Internal Revenue Code. It was founded as an independent affiliate of the national Club for Growth in 2004. R.7 Ex. B ¶¶ 5–6. Plaintiff Eric O'Keefe is a political activist who has advocated free-market economic policies and limited government for decades at the state and national levels. R.7 Ex. B ¶¶ 2–3. O'Keefe is one of the Club's directors and its chief fundraiser and strategist. R.7 Ex. B ¶ 5.

Between February 2011 and October 2013—when they learned they were under criminal investigation—Plaintiffs vigorously advocated for pro-growth policies in Wisconsin, including collective-bargaining reforms proposed and signed by Governor Walker. R.7 Ex. B ¶¶ 27–39. They brought this lawsuit on February 10, 2014, alleging that the Defendants, named in their official and personal capacities, targeted them for criminal investigation in

retaliation for that advocacy.[2] R.1. Plaintiffs alleged that the investigation is the latest phase of a four-year-long campaign of harassment and intimidation against Wisconsin conservatives, carried out both under the color of Defendants' statutory authority and, in part, through a series of "John Doe" investigations. R.1 ¶¶ 1–2. Plaintiffs moved for a preliminary injunction the same day. R.5; R.7.

Defendants Chisholm, Landgraf, and Robles are District Attorney and Assistant District Attorneys, respectively, for Milwaukee County (collectively, the "Milwaukee Defendants"). R.1 ¶¶ 10–12. The Milwaukee Defendants initiated the secret criminal investigation in May 2010 to harass and punish Republican officials and conservative political activists. R.1 ¶¶ 62–84. No later than August 2012, Defendants' investigation targeted Plaintiffs, along with the entire center-right movement in Wisconsin. R.1 ¶¶ 85–107. Defendant Schmitz was appointed special prosecutor in 2013 to provide a veneer of impartiality to the retaliatory investigation. R.1 ¶ 91. Defendants revealed for the first time during this litigation that Defendant Schmitz is also an agent of the Wisconsin Government Accountability Board ("GAB"). R.117 ¶¶ 6–7. Defendant Nickel is an investigator who has maintained a lead role in the investigation since 2010. R.1 ¶ 13.

[2] A sixth Defendant, Gregory Peterson, has been John Doe judge since November 2013. Plaintiffs have named him only in his official capacity, he is not part of this appeal, and the defined term "Defendants" does not include him.

A. The "Political Storm"

Walker was elected governor on November 2, 2010, the same day that Republicans won control of both houses of the state legislature. On February 11, 2011, Walker proposed a "Budget Repair Bill" to address the state's budget shortfall by reforming the public-employee collective-bargaining process. R.7 Ex. A Ex. 1.

Opponents responded with a "political storm," as "[m]ass protests were staged on the grounds of the State Capitol, and protesters [were] encamped in the Capitol rotunda." *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 144–45 (7th Cir. 2011) (*Barland I*); *see* R.7 Ex. A Exs. 2–5. Teachers abandoned their classrooms to join the demonstrations, and legislators fled Wisconsin to prevent the quorum necessary to pass the Bill. R.7 Ex. A Exs. 4, 8. Politics became personal as unions and other opponents targeted politicians who supported the Bill, including the Governor, for protests at their private residences. R.7 Ex. A Exs. 5–8. They targeted businesses that supported the Bill (or even declined to speak out against it) for boycotts, vandalism, and other forms of harassment. R.7 Ex. A Ex. 11; Ex. B ¶ 23. O'Keefe and the Club, as well as the Club's supporters, were targets of this harassment and have been concerned for their safety. R.7 Ex. B ¶ 39; R.7 Ex. D ¶ 19.

Opposition efforts escalated after the Bill was enacted as "Act 10" on March 11. Protests grew in size and fervor. R.7 Ex. A Ex. 10. Every state senator eligible for a recall-petition drive faced one, leading to nine senate recall

elections in 2011 and four in 2012. Following GAB's certification of a recall petition in March 2012, Governor Walker also faced a recall election.

During this period, both sides of the political spectrum flooded the airwaves with communications concerning the reforms and the politicians who supported and opposed them. R.1 ¶¶ 27, 45, 52. Spending on advocacy set records, including spending by unions, corporations, and Section 501(c)(4) social-welfare organizations. Plaintiffs alleged and presented unrebutted evidence that both sides engaged in materially identical conduct in organizing these efforts. R.1 ¶¶ 145–56; R.7 Ex. A. Exs. 41–44.

B. Plaintiffs' Issue Advocacy

The Budget Repair Bill presented a unique opportunity for Plaintiffs to advocate their views at a time of high public interest, and they capitalized on it by airing communications in favor of the reforms as the Bill was debated in the legislature. R.7 Ex. B ¶¶ 27–32. After its passage, Plaintiffs continued their advocacy, as the recall of legislators who supported the Bill would undermine Plaintiffs' policy goals. *Id.* ¶ 33. Around the time of the first recalls in summer 2011, Plaintiffs ran issue ads highlighting the Bill's merits and advocating other free-market economic policies. *Id.* ¶ 34. It is undisputed that these communications did not expressly urge the election or defeat of any candidate. R.181 at 3–4. It is also undisputed that Governor Walker was not running for election at this time.

Even after the petition drive to recall Walker commenced in November 2011, Plaintiffs' issue advocacy did not relate to the Walker recall. R.7 Ex.

B ¶ 33. Defendants have not identified a single television or radio communication by Plaintiffs referencing the Governor as a candidate, let alone his recall or election campaign. Instead, their advocacy focused on the policy issues that were in play in the legislative recall races of June 5, 2012. *Id.* ¶¶ 33–34.

In addition to its own advocacy efforts, the Club donated funds to other social-welfare organizations. These organizations published only issue advocacy that did not concern Governor Walker or his recall election, with one exception discussed below. *Id.* ¶ 33.

Beginning in 2011, the Club enlisted the services of Richard "R.J." Johnson, a political consultant with decades of experience in Wisconsin politics. *Id.* ¶¶ 28, 30. Johnson advised the Club regarding the content of its advertising, while O'Keefe took the lead role as fundraiser for the Club. *Id.* ¶¶ 28, 30. Johnson also provided consulting services to Friends of Scott Walker ("FOSW"). *Id.* ¶ 35. This arrangement presented no conflict because Johnson's work with the Club involved only issue advocacy that did not relate to Walker's recall or campaign efforts. *Id.*

C. The Secret Criminal Investigation Begins

1. Pretextual Charity Investigation

The Milwaukee Defendants launched the investigation in May 2010 when Defendant Landgraf petitioned the Milwaukee County Circuit Court to commence a John Doe proceeding.[3] R.7 Ex. A Ex. 12. The stated purpose of

[3] A John Doe investigation is a Wisconsin investigative procedure that allows law enforcement officers "to obtain the benefit of powers not otherwise available to them, i.e., the power to subpoena witnesses, to take testimony under

the investigation was to identify the "origin" of $11,242.24 that went missing from the coffers of a local charity. *Id.*

But that was not the true purpose. R.1 ¶¶ 62–74. The "origin" of the funds was never in doubt: they were donated by the Milwaukee County Executive's Office. The question was where and how the money disappeared. *Id.* ¶ 71. Nor was a John Doe proceeding even necessary, because the testimony against suspect Kevin Kavanaugh, chairman of the local chapter of the Military Order of the Purple Heart, was available all along from willing witnesses. *See* R.7 Ex. A Ex. 13 at 6–13, 15–16. And Chisholm had known about the allegations for over a year, as the Milwaukee County Executive's office had informed him in 2009 that it suspected Kavanaugh of misappropriating the funds. R.7 Ex. A. Ex. 13 at 12; R.7 Ex. C ¶ 7.

What changed is that then-County Executive Walker had become a leading candidate in Wisconsin's 2010 gubernatorial election. R.1 ¶ 68. The Milwaukee Defendants wasted no time in pursuing their intended targets: Walker and his associates. Within a week of the petition, they raided the County Executive's office, focusing their search on Walker's staff members.[4] R.7 Ex. C ¶ 7; R.1 ¶¶ 73–74. They also took control of a GAB investigation led by Defendant Nickel into straw contributions by a Walker donor and in-

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oath, and to compel testimony of a reluctant witness," without the citizen oversight of a grand jury. *State v. Washington*, 266 N.W.2d 597, 604 (Wis. 1978). Instead, a single judge serves in a quasi-prosecutorial role supervising the investigation. *See* Wis. Stat. § 968.26.

[4] It takes up to a month for a John Doe petition to be granted and the proceeding organized. R.53 Exs. J, O. This raid, rather than some action against Kavanaugh, was probably the first act of the investigation.

corporated it into their ongoing investigation. R.7 Ex. A Ex. 16 at 2. The only common denominator between the straw contributions and the charitable-fraud investigation was Walker. R.1 ¶¶ 76–77.

2. The Investigation Expands to All-Things-Walker

Over the next few months, Milwaukee Defendants' and Nickel's investigation of all-things-Walker expanded to include everything from alleged campaign-finance violations to sexual misconduct to alleged public-contracting bid-rigging to alleged misuse of county time and property. Between May 5, 2010, and May 3, 2012, the Milwaukee Defendants filed *at least eighteen* petitions to formally "[e]nlarge" the scope of the John Doe investigation, and each was granted. R.110 Ex. C Ex. 1; R.117 Ex. B at 10. That amounts to a new formal inquiry every five and a half weeks, on average, for two years.

And while the investigation occurred in part through the John Doe procedure, it was by no means limited to it. Many of the interviews were conducted outside the secret proceedings with willing witnesses, R.7 Ex. A Exs. 13 at 6–13, 15–16; 16 at 9, 11–12, and investigative efforts were conducted through various means, including through a surreptitious public-records request by Defendant Robles. R.7 Ex. A Ex. 18. The Milwaukee Defendants intimidated witnesses into providing evidence to support their theories, jailing at least two who did not possess the information they sought. R.1 ¶¶ 114–19. Their misconduct was sufficiently egregious that a Wisconsin judge stated on the record in open court that Defendant Landgraf "was behaving badly, prob-

ably for political reasons" and that "[o]bviously a lot of what happened here was politically motivated." R.1 ¶ 116. They also ordered an unknown number of home raids, most involving private residences of individuals never charged with any crime, their only apparent ties to the investigation being their relationship to Walker. R.1 ¶¶ 119–20.

In their preliminary-injunction filings, Plaintiffs presented evidence of these events, as well as a declaration from Kelly Rindfleisch, former Deputy Chief of Staff for the County Executive. She offered sworn testimony that the investigators working under the Milwaukee Defendants' direction pressured her to offer false testimony against Walker. R.7 Ex. C ¶¶ 12–13. When she would not do so, they charged her with four felonies. *Id.* ¶ 15. The investigators also monitored her private emails and subpoenaed personal friends in an effort to blackmail her. *Id.* ¶ 14. Defendants offered no evidence to rebut this testimony.

3. The Milwaukee Defendants Use Their Investigation for Political Purposes

The Milwaukee Defendants went out of their way to use the investigation for political purposes. They timed raids to coincide with political events (including raiding Walker's office the day before the 2010 gubernatorial election, R.7 Ex. A. Ex. 21 at 5), and leaked details of the probe to the *Milwaukee Journal Sentinel*, R.1 ¶¶ 157–172; *see* R.7 Ex. A Ex. 23. In the middle of the Walker recall-petition drive, the Milwaukee Defendants released criminal complaints against five targets of the investigation. R.7 Ex. A Exs. 13, 14, 19, 21, 22. The complaints disclosed information that was irrelevant to their

charges—for example, that Rindfleisch's office "was located less than twenty-five feet from the office of then County Executive Scott Walker"—in an attempt to tie Walker and his top aides to the charges. R.7 Ex. C ¶¶ 16–19. By the end of the recall-petition drive it became apparent that public opposition to the Budget Repair Bill was not strong enough to unseat Walker, and the John Doe investigation became the "biggest question hanging over the recall election." R.1 ¶ 162.

4. The Investigation Results in a Few Minor Convictions

In April 2011 and January 2012, the Milwaukee Defendants charged six persons with various crimes. Two were charged with embezzlement-related offenses in connection with the missing charitable funds. R.1 ¶¶ 174–75. Two, including Rindfleisch, were charged with government-employment-related offenses. R.1 ¶¶ 177–78. One was charged with sexual misconduct. R.1 ¶ 179. And the Walker donor was charged with making straw contributions. R.1 ¶ 176. Five of the six targets agreed to plea deals, and Kavanaugh was convicted for embezzlement of the charitable funds. R.1 ¶¶ 175–79. Neither Governor Walker, nor any person affiliated with Governor Walker, was charged with any campaign-finance-related offense.

D. The Milwaukee Defendants Launch a Second John Doe Proceeding and Secretly Involve GAB

The Milwaukee Defendants' secret criminal investigation had been examining the inner workings of the Walker campaign since at least October 2011, when Defendant Landgraf deposed R.J. Johnson. R.53 Ex. J Ex. 6. Walker was deposed in March 2012, and the questioning focused on his cam-

paign donors and his knowledge of campaign-finance law. R.53 Ex. J Ex. 4. During the deposition, Defendants Chisholm and Robles unsuccessfully attempted to trick Walker into admitting that his campaign accepted corporate donations. *Id.* at 84:10–85:19.

After Walker defeated Milwaukee Mayor Tom Barrett in the June 2012 special election, the Milwaukee Defendants regrouped and redoubled their efforts, focusing their investigation on Walker's campaigning. First, in August 2012, Defendant Robles petitioned to convene a second John Doe proceeding. R.53 Ex. J. The stated purpose of the proceeding was to investigate alleged coordination involving the Club, 28 other conservative social-welfare organizations, Walker, and FOSW in 2011 and 2012. *Id.* Attachment at 2–3; *see also infra* at § F.1. These were the identical "specific violations" enumerated in the eighteenth enlargement of the first John Doe proceeding, and much of the information supporting the petition was obtained in that proceeding. R.117 Ex. B at 10; R.110 Ex. C Ex. 1. Retired Court of Appeals Judge Barbara Kluka was appointed as John Doe judge. R.53 Ex. P. Judge Kluka provided no meaningful oversight over this John Doe proceeding. In fact, public records indicate that she approved every petition, subpoena, and search warrant sought in the case, and purportedly reviewed hundreds of pages of affidavits and evidence, in just one day's worth of work. R.1 ¶ 128.

Second, the Milwaukee Defendants contacted GAB in August 2012 and shared with it materials discovered in their investigation. R.114 ¶ 13; R.110 Ex. A. GAB staff members began assisting the Milwaukee Defendants

and continued to be privy to secret information. R.114 ¶ 13. These disclosures likely violated the John Doe secrecy order, *see* R.1 Ex. E, and GAB's involvement violated its 2010 settlement agreement with the Club that it would not enforce parts of GAB Rule 1.28, which attempted to expand Wisconsin's definition of express advocacy—and thereby the reach of its campaign-finance regime—to the Club's issue advocacy. R.7 Ex. B ¶¶ 14–15. *See also Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 828–29 (7th Cir. 2014) (*Barland II*) (discussing GAB's representation to this Court that it would "honor the stipulation"); R.1 ¶ 20. The Defendants went to great lengths to hide GAB's involvement in this matter, with GAB's Executive Director Kevin Kennedy even filing an affidavit in the Wisconsin Court of Appeals testifying that the GAB was only a "third party" to the proceedings. R.53 Ex. A ¶ 9.

Having expanded their investigation, the Milwaukee Defendants obtained subpoenas and warrants against numerous targets across Wisconsin in September and December 2012. R.110 Exs. C, D. They made broad requests for email, phone, bank, and other records from Plaintiffs, among many others. *E.g.*, R.110 Ex. C at 44; R.110 Ex. D at 2–3. Plaintiffs did not know, at this time, that they were targets. R.120 Ex. I ¶ 3.

In January 2013, Defendant Chisholm approached Wisconsin Attorney General J.B. Van Hollen with the ostensible concern that the investigation "was leading to subjects outside of [his] office's prosecutorial jurisdiction," and he requested "the assistance of the [Wisconsin] Department of Justice." R.7 Ex. A Ex. 29. This reason was a pretext, as the Milwaukee Defend-

ants had been investigating persons outside their jurisdiction for years and had even obtained at least one conviction of such a person. R.110 Exs. C, D; R.7 Ex. A Ex. 16 at 2.

Recognizing the political nature of the investigation, Van Hollen declined to participate in May 2013, and recommended that Chisholm turn the investigation over to GAB to make it "lead investigator and first decisionmaker" concerning an area of campaign-finance law that "is not a model of statutory precision or consistency." R.7 Ex. A. Ex. 29 at 2–3. GAB "has statewide jurisdiction," said Van Hollen, and would be in the best position to determine whether charges were appropriate and, if so, whether they should be civil or criminal. *Id.* Chisholm did not inform Van Hollen that GAB had been participating in the investigation since 2012.

In June 2013, GAB formally authorized an investigation into the Milwaukee Defendants' coordination allegations and delegated the use of their subpoena powers to unspecified "agents." R.110 Ex. A. Two months later, on August 17, GAB appointed Defendant Schmitz as special investigator to conduct its investigation. R.117 ¶¶ 7, 15.

E. The Milwaukee Defendants Coordinate the Commencement of Four More John Doe Proceedings

In July and August 2013, the Milwaukee Defendants persuaded district attorneys of four other counties to file petitions for John Doe proceedings to pursue the ongoing coordination inquiry. R.53 Exs. B–E. The pleadings were boilerplate statements that incorporated the Milwaukee Defendants' findings and included no independent consideration of the facts or the law. *Id.*

The petitions were granted in late August, and Judge Kluka was appointed to oversee them as well. R.53 Exs. K–N. The petitioning District Attorneys' intent not to be involved in these proceedings is reflected in provisions precluding nearly everyone in their offices from accessing investigatory materials. R.53 Exs. B–E. By contrast, all employees of the Milwaukee County District Attorney's Office were allowed to access secret materials. R.53 Ex. J at 2.

As part of this effort, the Iowa County District Attorney opened a proceeding targeting O'Keefe. R.53 Ex. C. The Iowa County District Attorney stated that, based on an affidavit offered by Defendant Robles in August 2012, "O'Keefe is believed to have coordinated political campaign advertising between the Friends of Scott Walker, a campaign committee, and…Club for Growth–Wisconsin." R.53 Ex. C Affidavit ¶¶ 3, 5. But O'Keefe's name does not actually appear in that affidavit.[5] R.110 Ex. B. Subsequently, Defendant Schmitz represented to both the Wisconsin Supreme Court and Court of Appeals that "the investigation has not developed evidence suggesting that the [Club's] officers and directors"—including O'Keefe—"were anything but figureheads." R.110 Ex. E at 10; R.53 Ex. F at 10.

In late August 2013, Chisholm requested that Judge Kluka appoint Schmitz as a special prosecutor to lead all the John Doe proceedings as "one overall undertaking." R.7 Ex. A. Ex. 28 at 1. Chisholm stated that the Attor-

[5] O'Keefe's name does appear in a different affidavit referenced in the petition, but only with regard to irrelevant facts. *See* R.110 Ex. C at 15 (O'Keefe is "listed as the Director" of the Club); *id.* at 15 n.9 (O'Keefe exchanged emails *in 2010* with R.J. Johnson); *id.* at 18 (O'Keefe is a director of the Club and is involved in fundraising); *id.* at 44 (O'Keefe has two email addresses).

ney General had recommended GAB as the proper authority with statewide jurisdiction but that GAB could not lead the investigation because "this is a *criminal* investigation" and GAB lacks criminal-enforcement authority. *Id.* at 2. Chisholm did not disclose that GAB had been involved for at least a year or that the Board had appointed Schmitz special prosecutor for its investigation four days earlier. R.117 ¶ 16.

The Milwaukee Defendants chose Schmitz as special prosecutor because they could trust that he would allow them to continue to play a significant role in the investigation. R.1 ¶¶ 91–92. Following his appointment, the Milwaukee Defendants and investigators under their direction did just that. R.7 Ex. A Ex. 31 ¶ 14; R.117 Ex. E (subpoenas sought by individual identifying himself as investigator in the Milwaukee County Attorney's Office); R.71 Ex. G Ex. 1 at 1 (Defendant Robles prepared and filed a brief before the John Doe judge). John Doe judge Peterson concluded that the Milwaukee County attorneys' continued involvement "undercut" any claim that Schmitz's appointment resolved the conflict. R.7 Ex. A Ex. 27 at 22 n.11.

F. Defendants Continue Their Secret Criminal Investigation in Advance of the 2014 Elections

1. Defendants Orchestrate a New Round of Home Raids and Subpoenas

Early on the morning of October 3, 2013, armed officers raided the homes of political activists across Wisconsin, including associates of the Club. R.7 Ex. B ¶ 46. Sheriff's deputies' vehicles mobbed targets' homes and illuminated them with bright floodlights. *Id.* Deputies, accompanied in several in-

stances by the Milwaukee County District Attorney's office, 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. *Id.* Among the materials seized were many of the Club's records, which were in the possession of various associates. *Id.* Defendant Nickel signed the affidavits for probable cause. R.117 Ex. D.

Also on October 3, the Club's accountant and directors, including O'Keefe, received subpoenas demanding that they turn over the Club's records from March 1, 2009, to the present. R.7 Ex. A Exs. 34, 35. This included donor information, correspondence with their associates, and all financial materials. The subpoenas revealed that nearly all right-of-center advocacy groups in Wisconsin had been targeted. *Id.* The subpoenas stated that disclosing the content of the subpoenas or the fact of their existence was grounds for contempt under secrecy orders. *Id.* The subpoenas did not, however, provide Plaintiffs with the secrecy orders themselves, leaving them unable to assess the scope of the orders. R.7 Ex. B ¶ 44.

Within the month, the Milwaukee Defendants' contact at the *Milwaukee Journal Sentinel* was reporting on the investigation, despite the secrecy orders. R.7 Ex. A Ex. 30.

Defendants assert on appeal that facts surrounding these events are "hotly-disputed." ECF No. 113 PI Br. 30. They are not. As with most of Plaintiffs' factual evidence and allegations, Defendants declined multiple op-

portunities to introduce any evidence contravening Plaintiffs' evidence of these events.

2. Plaintiffs' Advocacy Ceases Immediately

Plaintiffs' First Amendment injury was immediate. O'Keefe's associates began cancelling meetings with him and declining to take his calls, reasonably fearful that merely associating with him could make them targets of the investigation. R.7 Ex. B ¶ 48. O'Keefe was forced to abandon fundraising for the Club because he could no longer guarantee to donors that their identities would remain confidential, could not (due to the Secrecy Order) explain to potential donors the nature of the investigation, could not assuage donors' fears that they might become targets themselves, and could not assure donors that their money would go to fund advocacy rather than legal expenses. *Id.* ¶ 49. The Club was also paralyzed. *Id.* ¶¶ 50–51. Its officials could not associate with its key supporters, and its funds were depleted. *Id.* It could not engage in issue advocacy for fear of criminal sanction. *Id.* ¶ 51.

G. Defendants' Theory of Criminal Liability

Through filings before the John Doe judge and in district court, Defendants revealed the theories of criminal liability they say support their secret criminal investigation of the Club.[6]

Coordination of Issue Advocacy. Defendants argue that communications between the Club and the Walker campaign regarding issue advocacy could evidence unlawful coordination. Defendants have not argued that the

[6] As discussed above, Defendants have provided no reason for targeting O'Keefe.

Club engaged in express advocacy. *E.g.*, R.110 Ex. C ¶¶ 29, 68; R.1 Ex. C at 28; PI Br. 50.

Communications Regarding Other Candidates. Defendants argue that associations between the Club and the Walker campaign could evidence unlawful coordination with regard to issue advocacy related to the campaigns of senate candidates. In this regard, Defendants have failed to identify a single broadcast advertisement by the Club that so much as referenced Walker during the petition drive and special-election campaign. Their only evidence of Walker-related Club expenditures consists of (1) newsletters purportedly emailed to Club supporters with editorial commentary, which involved minimal or no expense and would be exempt from reporting requirements even if they were expenditures, Wis. Stat. § 11.29; and (2) billboards that thanked Walker's recall opponent Tom Barrett for taking advantage of the Budget Repair Bill.[7] R.110 Ex. C ¶ 75 & Ex. 75. Instead, Defendants' purported evidence of illegal activity includes an April 28, 2011 email (nine months prior to commencement of the Walker special-election campaign) stating that Walker "wants all the issue advocacy efforts run thru one group to ensure correct messaging." R.110 Ex. C Ex. 20. The date and the "Political Background" section of the email clarify that this supposedly illegal "coordination" concerns the "Eight Wisconsin State Senators facing recall elections." *Id.*

[7] Defendants' John Doe affidavits also cite a Pro-Walker web article by the national Club for Growth, which received no funds from the Club. R.110 Ex. C ¶ 75 & Ex. 76.

Communications During Non-Election Periods. Defendants argue that communications the Club made between February and November 2011, months prior to the recall when Walker was not campaigning, could evidence unlawful coordination. *See, e.g.*, R.110 Ex. C ¶¶ 24–41 & Exs. 9, 13, 16, 19.1, 19.2, 20, 21.1, 21.2, 22, 24.1, 27, 28, 29, 74.1, 96; R.117 Ex. B ¶¶ 11–19 & Exs. 1, 2, 7; R.110 Ex. F ¶¶ 21–27. On appeal, for example, they cite a February 2011 advertisement as the basis for their targeting the Club, despite that there was no campaign at this time to coordinate. PI Br. 50 (citing R.110 Ex. C ¶ 40 & Ex. 74.1).

Donations to Social-Welfare Organizations. Defendants argue that the Club's donations to other 501(c)(4) organizations, without any evidence of candidate involvement, could evidence unlawful coordination. They cite evidence that the Club donated funds to Wisconsin Manufacturers and Commerce ("WMC") in April and May of 2012, R.110 Ex. F ¶ 41, which they allege was around the time that WMC was running issue advertisements mentioning Walker. R.110 Ex. F ¶ 42. But they fail to cite any communication between the Club and either WMC or the Walker campaign related to these advertisements. *Id.* Instead, they argue that there might be some "coordination" because of a December 2011 phone call (three months prior to commencement of the Walker special-election campaign) that included 31 participants, including a single WMC representative but *no representative of the Club*, as well as a follow-up email between the WMC representative and Governor

Walker, again with *no representative of the Club involved*. R.110 Ex. F ¶ 41 & Ex. 19.

Solicitations and Fundraising. Defendants argue that fundraising solicitations for the Club involving Governor Walker could evidence unlawful coordination. Defendants have also briefed the Wisconsin Court of Appeals on a theory of "coordinated fundraising," R.110 Ex. E at 12–14; R.109 at 3, 9 ("a candidate is prevented by Wisconsin law from raising funds for an 'independent' organization"), and opened a separate John Doe proceeding against Kelly Rindfleisch for her "fundraising efforts." R.110 Ex. F ¶ 58.

On the basis of this purported evidence, Defendants argue that they had reason to suspect that several criminal violations have occurred. They contend that the Club's issue advocacy may have constituted a corporate expenditure from the Club to FOSW in violation of *per se* prohibitions on corporate donations. *E.g.*, R.110 Ex. A; R.1 Ex. C at 5. They contend that the Club's issue advocacy and fundraising may have rendered the Club a subcommittee of FOSW, subjecting the Club to all restrictions applicable to campaign committees. *E.g.*, R.1 Ex. C at 4–5; R.60 at 20. They also contend that the Club's issue advocacy may have been required to have been reported as in-kind contributions to FOSW, resulting in false statements by FOSW to GAB. *E.g.*, R.110 Ex. A; R.110 Ex. C ¶ 11; R.60 at 20.

H. The John Doe Judge Rejects Defendants' Theory of Criminal Liability

On October 25, 2013, Plaintiffs moved to quash Defendants' subpoenas and to protect seized information, such as donor records, that qualifies for

First Amendment privilege. R.53 Ex. U. Defendant Schmitz opposed the motions and indicated that he had no intention of respecting Defendants' First Amendment privilege. R.1 ¶ 135. Despite presiding over aspects of the secret criminal investigation for over a year, Judge Kluka immediately recused herself for an unexplained "conflict." R.1 ¶ 130.

Retired Court of Appeals Judge Gregory Peterson was assigned as the new John Doe judge. On January 10, 2014, Peterson granted Plaintiffs' motions, quashing Defendants' subpoenas. R.1 Ex. D. Peterson concluded that there was no reason to believe any of the targets had violated Wisconsin law, which requires express advocacy for coordination between candidates and independent organizations to be illegal. *Id.* at 1.

Defendants petitioned the Wisconsin Court of Appeals for a supervisory writ and writ of mandamus. Defendant Schmitz requested that the appeals court vacate Peterson's order and that it "[d]irect the John Doe judge to enforce the subpoenas served upon the Respondents." R.53 Ex. F. at 20. That petition remains pending. Other targets sought relief directly from the Wisconsin Supreme Court. Their petitions remain pending as well.

I. Plaintiffs Bring This Federal Lawsuit To Vindicate Their Constitutional Rights

Plaintiffs filed this lawsuit on February 10, 2014, alleging six counts under Section 1983, including First Amendment Retaliation, selective targeting, bad-faith abuse of law-enforcement proceedings with no expectation of obtaining a valid conviction, and violation of Plaintiffs' First Amendment

privilege. R.1 ¶¶ 196–220. Plaintiffs also sought a preliminary injunction. R.5, R.7.

1. Defendants Seek To Delay Plaintiffs' Preliminary-Injunction Motion Indefinitely

Defendants immediately sought an indefinite stay on briefing the preliminary-injunction motion, contending that the Court should first rule on their forthcoming motions to dismiss. R.34. Plaintiffs opposed this motion, because their First Amendment injury was ongoing and a prompt remedy essential. R.36. The district court (Judge Rudolph Randa) balanced the competing interests by setting a schedule that provided expedited briefing, to accommodate Plaintiffs, while promising a decision on the motions to dismiss before consideration of the preliminary injunction, to accommodate Defendants. R.62. Defendants, who had filed a perfunctory opposition to Plaintiffs' preliminary-injunction motion, were also allowed a second round of briefing on it.

2. The District Court Denies Defendants' Motions To Dismiss

Defendants filed three motions to dismiss, raising largely duplicative arguments, including *Younger*, *Pullman*, and *Burford* abstention; sovereign immunity; prosecutorial immunity; and qualified immunity. R.52; R.43; R.40; R.44; R.54; R.60. The Milwaukee Defendants submitted 24 exhibits in support of their motion, most of which was material from their secret criminal investigation. R.53.

On April 8, the district court denied Defendants' motions to dismiss in their entirety. R.83. It rejected their *Younger* abstention arguments on three grounds: (1) *Younger* abstention did not apply to Defendants' secret criminal investigation because it was not a proceeding to which *Younger* applied under *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584 (2013); (2) the John Doe proceedings did not afford Plaintiffs the opportunity to bring claims for First Amendment retaliation; and (3) Plaintiffs' Complaint "easily satisfies" the *Younger* bad-faith exception by "precisely alleging that the defendants have used the John Doe proceeding as a pretext to target conservative groups across the state." *Id.* at 3–6.

The court rejected Defendants' *Pullman* abstention arguments on two grounds: (1) state-court clarification of Wisconsin campaign-finance law would not dispose of the need to decide Plaintiffs' First Amendment retaliation claim, and (2) the district court chose to exercise its discretion not to abstain given the important First Amendment interests raised by Plaintiffs' claims. *Id.* at 6–9.

The court rejected Defendants' *Burford* abstention arguments on two grounds: (1) Defendants chose not to defer to the GAB for their investigation and so "cannot argue that their investigation implicates an administrative or regulatory scheme," and (2) abstention was inappropriate in light of the Plaintiffs' "important First Amendment rights." *Id.* at 9–10.

The court rejected the Milwaukee Defendants' and Schmitz's sovereign-immunity arguments because Plaintiffs' "complaint rather easily states a claim under *Ex Parte Young*" for prospective injunctive relief. *Id.* at 13–14.

The court rejected the prosecutorial-immunity arguments because the Complaint alleged that Defendants' wrongdoing occurred in the course of their investigative activities, and the court "has no way of knowing if the prosecutors are currently determining whether charges should be brought." *Id.* at 15–16.

The court rejected Defendants' qualified-immunity defenses on two grounds: (1) Plaintiffs stated plausible constitutional violations by Defendants for targeting them on a pretextual basis, and (2) "defendants cannot seriously argue that the right to express political opinions without fear of government retaliation is not clearly established." *Id.* at 17.

3. Defendants Make a Second Effort To Delay Consideration of Plaintiffs' Preliminary-Injunction Motion

Following that decision, Defendants filed supplemental briefs and roughly 1,300 pages of exhibits. Most of the material was seized from the Plaintiffs and their associates in the investigation. *E.g.*, R.117 Exs. B–D. Defendants also filed several conclusory affidavits by themselves and other interested persons, which asserted that they did not act out of animus or with a political motive. R.117 and Exhibits; R.111–13; R.115–16; R.103–04.

That same day, the Milwaukee Defendants filed a notice of appeal, R.92, and a motion to stay consideration of the preliminary-injunction mo-

tion, R.96. They argued that the district court lacked jurisdiction to consider the preliminary injunction in light of their notice of appeal, which they claim vested jurisdiction in this Court. R.97. Plaintiffs opposed Defendants' stay motion and filed a cross-motion to certify the sovereign-immunity appeal and other appeal issues as frivolous. R.157.

The district court postponed the preliminary-injunction hearing for briefing and consideration of the stay motion. R.129. On April 22, the parties filed a motion for a scheduling conference and set out their positions regarding the preliminary-injunction hearing. R.136. Plaintiffs argued that the hearing should be "an oral argument on the Parties' submissions," because the "Parties have submitted extensive declarations and documentary evidence" and "[a]n evidentiary hearing at this time would be cumulative of that evidence or would bring in new evidence, prejudicing Plaintiffs." *Id.* at 2. Defendants argued that an evidentiary hearing was necessary as they would "call witnesses to rebut Plaintiffs' allegations." *Id.* Defendants never informed the district court what further evidence they intended to submit, what witnesses they would call, or the scope of examination.

On May 1, the court denied Defendants' motion to stay. R.171. It found that the defendants were "attempt[ing] to derail [the preliminary-injunction] ruling" through their appeals and determined that it retained jurisdiction to consider Plaintiffs' preliminary-injunction motion despite the sovereign-immunity appeal. *Id.* at 4. The district court also stated it was "in-

clined to agree that the appeals are frivolous," but did not rule on that issue. *Id.* at 2.

4. The Court Issues a Preliminary Injunction

On May 6, the court granted Defendants' preliminary-injunction motion. R.181. The court's order began with factual findings based on the voluminous record. *Id.* at 2–10. Based on Plaintiffs' uncontroverted evidence, the court made findings concerning Plaintiffs' issue advocacy, the activities of R.J. Johnson, the all-things-Walker investigation, GAB's newly disclosed involvement, the armed home raids, and the impairment of Plaintiffs' activities.

The court then analyzed the four preliminary-injunction elements. R.10–24. The district court found that Plaintiffs "are likely to succeed on their claim that the defendants' investigation violates their rights under the First Amendment, such that the investigation was commenced and conducted 'without a reasonable expectation of obtaining a valid conviction.'" *Id.* at 23 (quoting *Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1975)). The court also found that "[w]hile the defendants deny that their investigation is motivated by animus towards the plaintiffs' conservative viewpoints, it is still unlawful to target the plaintiffs for engaging in vigorous advocacy that is beyond the state's regulatory reach." *Id.* at 21. Analyzing various constitutional precedents, the court held that Defendants targeted Plaintiffs even though their advocacy was beyond Defendants' reach.

The court found that the remaining preliminary-injunction factors all weighed in Plaintiffs' favor because (1) loss of First Amendment rights is ir-

reparable injury, (2) damages are an inadequate remedy for First Amendment violations, and (3) injunctions protecting First Amendment freedoms are always in the public interest. *Id.* at 23–24.

Finally, the court preliminarily enjoined the Defendants' secret criminal investigation:

> The Defendants must cease all activities related to the investigation, return all property seized in the investigation from any individual or organization, and permanently destroy all copies of information and other materials obtained through the investigation. Plaintiffs and others are hereby relieved of any and every duty under Wisconsin law to cooperate further with Defendants' investigation. Any attempt to obtain compliance by any Defendant or John Doe Judge Gregory Peterson is grounds for a contempt finding by this Court.

Id. at 25–26.

5. Defendant Schmitz Moves for Clarification of the Preliminary-Injunction Order

On May 28, Defendant Schmitz moved to clarify on the requirement that Defendants cease all activities related to the investigation, as related to his participation in ongoing state-court proceedings and discussions with targets. R.227. The district court granted in part and denied in part the motion. R.229. As to participation in court proceedings, it held that Defendants are prohibited from attempting to obtain compliance with legal process issued in furtherance of the investigation, but are permitted to participate in proceedings that do not seek to enforce compliance. *Id.* at 2. As to discussions with targets, the court clarified that the injunction "does not prevent *all* discussions with subjects of the John Doe investigation," but denied the motion in light of Schmitz's failure to provide sufficient content about the discussions that

would allow the court to offer meaningful clarification. *Id.* at 3. Schmitz never provided this information in response to the district court's order.

6. Defendants Flood This Court with Motions in Another Attempt To Avoid the Preliminary Injunction

Both before and after the district court issued its preliminary injunction, Defendants filed a string of emergency motions in this Court to stay or vacate the preliminary injunction.

On May 5—prior to the preliminary-injunction order—the Milwaukee Defendants filed an emergency motion to stay all proceedings in the district court. ECF No. 13. On May 7, the Milwaukee Defendants filed a second emergency stay motion in light of the injunction. ECF No. 15. The same day, the Milwaukee Defendants filed an "Emergency Motion for Summary Vacation," claiming that the district court lacked jurisdiction to enter the preliminary injunction because of the appeals. ECF No. 17-1.

The Court addressed these motions that day. ECF No. 20. First, it stayed the preliminary injunction and instructed the district court to rule on Plaintiffs' motion to certify Defendants' sovereign-immunity appeals as frivolous. *Id.* If the district court concluded that the sovereign-immunity appeals were frivolous, then district-court proceedings "may resume." *Id.* If not, then "this stay will remain in force until this court has resolved the appeal on the merits." *Id.* Second, the Court stayed the return-and-destroy provisions for the entirety of the appeal. *Id.*

In response to the Court's remand order, the district court ruled that Defendants' sovereign-immunity appeals are frivolous and were nothing more

than gamesmanship intended to capitalize on the district court's decision to honor Defendants' request to decide the motions to dismiss before the preliminary-injunction motion. R.200 at 4. The court found that the Milwaukee Defendants' qualified- and prosecutorial-immunity appeals were also frivolous. Finally, the court reissued the May 6 preliminary injunction, except for the return-and-destroy provisions. *Id.* at 7.

On May 14, the Defendants filed three more motions for a stay of the district court's proceedings, arguing that their appeals are not frivolous. ECF Nos. 26, 28, 30. After briefing, the Court held that Defendants' sovereign-immunity appeals are frivolous and that "[t]he district court therefore had authority, notwithstanding the appeals, to issue an injunction." ECF No. 43 at 2. The Court also required further submissions from Defendants regarding their qualified-immunity appeals and the basis for appellate jurisdiction.

On June 18 and 19, Defendants filed jurisdictional memoranda setting forth their argument that the right to coordinate issue advocacy was not well established and that the district court had improperly considered the Defendants' subjective intent in its decision. ECF Nos. 50, 51, 53. On July 2, the Court allowed these claims to proceed to briefing. ECF No. 57.

Summary of Argument

I. The district court's denial of Defendants' motions to dismiss should be affirmed. First, the district court was not required to abstain. Pursuant to the Supreme Court's decision in *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584 (2013), *Younger* abstention is inapplicable to state criminal proceed-

ings that do not rise to the level of prosecutions, and it is also inapplicable where, as here, state officials' retaliatory conduct evidences their "bad faith" abuse of state criminal proceedings. If this Court has jurisdiction to consider Defendants' appeal of denial of *Pullman* abstention, it should affirm the district court's finding that *Pullman* abstention is inappropriate because no ongoing state proceeding will obviate the need for a federal constitutional ruling on Plaintiffs' retaliation claims and because the district court did not abuse its discretion in concluding that the federal interest in vindicating Plaintiffs' First Amendment rights merited not abstaining. Defendants' unsupported argument that *Burford* abstention precludes nearly any challenge to state campaign-finance laws is entirely without merit.

Second, no immunity bars Plaintiffs' personal-capacity claims. As to qualified immunity, all Defendants' arguments are forfeited except one raised by the Milwaukee Defendants. These defenses fail because Plaintiffs have a clearly established right to be free from a secret criminal investigation targeting themselves and their associates for home raids, subpoenas, and other abuse that is motivated by a desire to retaliate against them for their First Amendment-protected advocacy. Nor are Defendants entitled to prosecutorial immunity, in light of Plaintiffs' plausible (and unchallenged) allegations that Defendants participated in the conception, supervision, and carrying out of an investigation that has never resulted in any probable-cause determination. Even if some aspects of Defendants' conduct (like court appearances) may be

subject to immunity, dismissal is improper because their entire course of conduct is not.

II. The district court did not abuse its discretion when it enjoined Defendants' investigation as retaliation motivated by Plaintiffs' exercise of their First Amendment rights. Plaintiffs are likely to succeed on the merits because the facts show that Defendants targeted Wisconsin conservatives for harassment, threats, and abuse based on a pretextual legal theory under which Defendants never had any hope of obtaining a valid conviction. The law is clear that a state has no sufficient justification to restrict speech on the issues, whether coordinated or not. Nor can Wisconsin law be interpreted, consistent with the First Amendment, to reach coordinated issue advocacy. And even if it could, it still could not reach Plaintiffs' alleged conduct here: coordination with a candidate of issue advocacy that does not concern *that candidate's* campaign or election.

Were there any lingering doubt as to Defendants' true aims, their decision to target nearly all conservative activists in Wisconsin, the timing of investigatory actions to influence key political events, their leaking information to media sources to inflame public opinion, their disparate treatment of conduct by left-leaning activists, the severity of their methods, and their overall course of conduct over a period of nearly four years all evidence their retaliatory motive. The expected and actual result of Defendants' conduct was to deprive Plaintiffs of their First Amendment rights.

The equities require an injunction. Plaintiffs' loss of their First Amendment rights due to Defendants' intimidation and abuse constitutes *per se* irreparable harm under Circuit precedent. In such circumstances, the balance of the equities always supports injunction, because the government has no legitimate interest in deterring the exercise of constitutionally protected rights. Likewise, the public interest supports an injunction, so that the public is not deprived of additional voices and views in policy debates.

Finally, the preliminary injunction entered by the district court is procedurally proper. The court was not required to conduct an evidentiary hearing, as Defendants never identified any issues of material fact requiring a hearing or described what evidence they would seek to introduce. Particularly at the preliminary-injunction stage, the district court's factual findings were more than sufficient, addressing every key issue in the case. And the injunction is sufficiently specific, demarking clearly what conduct is enjoined while containing the breadth necessary to prevent its circumvention by Defendants.

Argument

I. The District Court Correctly Denied Defendants' Motions To Dismiss

A. Standard of Review

This Court reviews *de novo* denial of a motion to dismiss on immunity grounds. *Fields v. Wharrie*, 672 F.3d 505, 510 (7th Cir. 2012). Likewise, a district court's decision whether to abstain under *Younger v. Harris*, 401 U.S. 37 (1971), is reviewed *de novo*, but its decisions not to abstain under the *Pullman* and *Burford* doctrines are reviewed for abuse of discretion. *Trust & Inv. Advis-*

ers, Inc. v. Hogsett, 43 F.3d 290, 294 (7th Cir. 1994); *Int'l College of Surgeons v. City of Chi.*, 153 F.3d 356, 360 (7th Cir. 1998). In conducting *de novo* review, the Court "construe[s] the complaint in the light most favorable to [the plaintiff], accepting as true all well-pleaded facts alleged, and drawing all possible inferences in [his] favor." *Fields*, 672 F.3d at 510 (quotation marks omitted).

B. The District Court Correctly Declined To Abstain Under *Younger v. Harris*

Younger abstention does not apply here. *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584 (2013), clarified that *Younger* abstention does not apply to state criminal proceedings that do not rise to the level of actual prosecutions. Rather than deal forthrightly with the limitations on *Younger* abstention that *Sprint* and this Court's recent decision applying *Sprint*, *Mulholland v. Marion County Election Board*, 746 F.3d 811 (7th Cir. 2014), place on the court's ability to abstain, Defendants rely on non-controlling decisions that are without force following *Sprint* and present arguments at variance with the reality of their secret criminal investigation.

Even if *Younger* abstention potentially were applicable, Plaintiffs' detailed and compelling allegations that Defendants' investigation was brought to retaliate for and deter the exercise of their First Amendment rights satisfies the longstanding exception for "bad faith" proceedings.

And finally, *Younger* abstention does not apply to Plaintiffs' damages claims, making a stay of those claims, not dismissal of the action, the appropriate remedy if Defendants did prevail.

1. Defendants' Secret Criminal Investigation Is Not a State Criminal Prosecution to Which *Younger* Abstention May Apply

In *Sprint*, the Supreme Court considered the applicability of *Younger* abstention to a suit challenging a state public utility commission determination on federal preemption grounds. The Supreme Court carefully reviewed its precedent and clarified that it "ha[d] not applied *Younger* outside [] three 'exceptional' categories": (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, 594 (citing *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 364 (1989)). The Supreme Court coupled this restatement of the law with a directive to the federal courts: these three "exceptional categories…define *Younger*'s scope." *See id.* at 591. And to make sure the message was clear, the Supreme Court repeated it to end the decision: "In short, to guide other federal courts, we today clarify and affirm that *Younger* extends to the three 'exceptional circumstances'…but no further." *Id.* at 593–94. *See also Mulholland*, 746 F.3d at 815 (*Younger* abstention applies in "exactly" these three circumstances).

Under *Sprint*, this case is a simple one. Defendants have continually characterized the John Doe proceedings as an "inquest for the discovery of crime," R.53 Ex. V at 4; R.54 at 4, or simply an "investigative proceeding," R.53 Ex. V at 4, rather than a "criminal prosecution." After four years of investigation, Defendants do not argue that they have probable cause to bring

criminal charges against any current target, including Plaintiffs. In fact, in the case of O'Keefe, Defendant Schmitz made a judicial admission that he has no evidence at all that O'Keefe has committed any crime. R.53 Ex. F at 10. Moreover, Defendants have carried out aspects of their investigation outside the confines of any John Doe proceeding, through other investigatory conduct. *E.g.*, R.7 Ex. A Ex. 13 at 6–13, 15–16. Thus, *Younger* abstention is inapplicable.[8]

The Supreme Court drew a "bright line" between criminal prosecutions, to which *Younger* abstention may apply, and pre-prosecution proceedings, to which *Younger* abstention may not apply, in order to prevent federal plaintiffs from being "placed between the Scylla of intentionally flouting state law and the Charybdis of forgoing what it believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974). For the same reason, this Court has held, in the context of state investigations that could lead to civil enforcement or criminal prosecution, that "the possibility that a state proceeding may lead to a future prosecution of the federal plaintiff is not enough to trigger *Younger* abstention; a federal court need not decline to hear a constitutional case within its jurisdiction merely because a state investigation has begun." *Mulholland*, 746 F.3d at 817.[9]

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[8] Defendants properly do not assert that abstention is warranted to avoid interference with state judicial functions, such as contempt proceedings. *See, e.g.*, *Juidice v. Vail*, 430 U.S. 327, 336 n.12 (1977).

[9] *See also Forty One News, Inc. v. Cnty. of Lake*, 491 F.3d 662, 665–66 (7th Cir. 2007) (describing *Younger*, in the criminal-law context, as limited to "pending

Despite being a civil-enforcement case, *Mulholland* resembles the situation here in that Defendants cannot actually prosecute any conduct they are investigating within the John Doe proceeding. Instead, the process at most could produce a "complaint" that "has no more standing than a complaint issued by a magistrate on the verified oath of any informant, and…is subsequently subject to be tested on the question of probable cause at a preliminary examination prior to the filing of an information." *State v. Doe*, 254 N.W.2d 210, 212 (Wis. 1977). As in *Mulholland*, prosecution can only occur in a subsequent proceeding, and the "possibility that a state proceeding may lead to a *future* prosecution of the federal plaintiff is not enough to trigger *Younger* abstention." 746 F.3d at 817 (emphasis added).

Defendants concede that the John Doe investigatory proceeding is not a criminal prosecution, ECF. No 112 MTD Br. 59, but claim that abstention is warranted nonetheless because a John Doe proceeding under Wisconsin law is a "quasi-criminal" proceeding that is "initiated by 'the State in its sov-

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state *criminal* prosecutions"); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 594 (7th Cir. 2012) (considering the existence of a proceeding in state court where "'the state is seeking *to enforce* the contested law'" in determining the propriety of Younger abstention) (emphasis added) (quoting *Forty One News*, 491 F.3d at 665); *United States v. South Carolina*, 720 F.3d 518, 527–28 (4th Cir. 2013) (drawing "a distinction between the commencement of formal enforcement proceedings, at which point *Younger* applies, versus the period of time when there is only a threat of enforcement, when *Younger* does not apply") (quotation marks, citations, and alterations omitted); *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 519 (1st Cir. 2009) (holding that a "rule[] requiring the commencement of 'formal enforcement proceedings' before abstention is required[] better comports with the Supreme Court's decisions in *Younger* and its progeny, in which an indictment or other formal charge had already been filed against the parties seeking relief at the time the federal action was brought").

ereign capacity.'" MTD Br. 58 (quoting *Sprint*, 134 S. Ct. at 592). This is mixing apples and oranges—the question of whether a proceeding is "quasi-criminal" and was "initiated by the state in its sovereign capacity" is relevant to whether a *civil enforcement proceeding* qualifies for *Younger* abstention. *See Sprint*, 134 S. Ct. at 592. *See also Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (*Younger* barred federal suit seeking injunction of state civil action seeking to abate the showing of obscene films at theater). As Defendant Chisholm informed Judge Kluka in explaining his refusal to refer this matter to the GAB, this assuredly is not a civil-enforcement matter. R.7 Ex. A Ex. 28 at 2.

Nor is Defendants' effort to analogize the John Doe investigatory proceeding to a grand jury persuasive or relevant. *See Monaghan v. Deakins*, 798 F.2d 632, 637 (3d Cir.1986) (state grand-jury proceedings do not implicate *Younger* abstention), *aff'd in part, vacated in part on other grounds*, *Deakins v. Monaghan*, 484 U.S. 193 (1988). Defendants' primary authority for the proposition that *Younger* abstention applies to grand-jury proceedings, *Texas Association of Business v. Earle*, 388 F.3d 515, 516–17 (5th Cir. 2004), predates *Sprint* and is based on factors drawn from *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432 (1982), that *Sprint* expressly disavowed as being "dispositive" of whether *Younger* abstention applies, holding instead that they were "*additional* factors appropriately considered by the federal court before invoking *Younger*." 134 S. Ct. at 593.

Defendants' other cited court of appeals decisions, *Craig v. Barne*y, 678 F.2d 1200 (4th Cir. 1982), and *Kaylor v. Fields*, 661 F.2d 1177 (8th Cir. 1981),

suffer from a similar flaw. Both decisions turn on the court of appeals' assessment of whether the plaintiff had the ability to challenge the grand-jury proceedings on constitutional grounds in state court, *see Kaylor*, 661 F.2d at 1182; *Craig*, 678 F.2d at 1201–02, but that consideration—the third *Middlesex* factor—is now an *additional factor* that a court should consider before invoking *Younger* to abstain. *Sprint*, 134 S. Ct. at 593. Given *Sprint's* clarification that the ability to raise constitutional challenges in state proceedings is not dispositive of *Younger* abstention, Defendants' reliance on these cases can be understood as nothing more than an attempt to bootstrap the determination of whether a state criminal prosecution is pending by reference to the types of procedures that might allow for *Younger* abstention if such prosecution were pending. Nor do any pending state proceedings fully resolve the claims at issue here, which concern Defendants' abusive and retaliatory conduct. *See Bickham v. Lashof*, 620 F.2d 1238, 1245 (7th Cir. 1980). *See also infra* § I.C.

Finally, as a practical matter, the comity and federalism values motivating *Younger* abstention are not present in this case. Although Defendants rely on certain statutory similarities between a John Doe proceeding and a grand jury, MTD Br. 58–59, 63–64, the John Doe aspects of the investigation are, in practice, more like a subpoena mill in service of Defendants' secret criminal investigation than a grand jury. Between August 2012 and October 2013, when Defendants convened multiple John Doe proceedings, conducted multiple home raids, procured dozens (if not hundreds) of subpoenas, and continually investigated Plaintiffs and other conservative advocacy groups,

John Doe judge Kluka performed a total of *one day's work*. R.1 ¶¶ 128–30. It would turn the *Younger* doctrine on its head if the question of its application depends on whether the prosecutor chooses to use a John Doe investigatory proceeding to conduct an investigation or chooses to conduct that same investigation outside such a proceeding. To avoid that anomalous result, the Court should simply follow *Sprint* and require abstention only where there is a pending state criminal prosecution.

2. *Younger* Abstention Is Inappropriate Because Defendants' Secret Criminal Investigation Was Brought in Bad Faith

Even if *Younger* abstention could apply to Defendants' secret criminal investigation, despite that it is not a criminal prosecution, abstention would nonetheless be inappropriate under *Younger's* "bad faith" exception.

Defendants frame their challenge to this aspect of the district court's decision as one of pleading, not as an evidentiary issue: "Plaintiffs [allegedly] do not meet the high standard for pleading prosecutorial bad faith." MTD Br. 68. Under Seventh Circuit precedent, a plaintiff must "allege specific facts" showing "that state prosecution 'was brought in bad faith for the purpose of retaliating for or deterring the exercise of constitutionally protected rights.'" *Collins v. Kendall Cnty., Ill.*, 807 F.2d 95, 98 (7th Cir. 1986) (quoting *Wilson v. Thompson*, 593 F.2d 1375, 1383 (5th Cir. 1979)). This exception to *Younger* abstention applies where defendants "have engaged in a pattern of activity designed to harass the appellant." *Sekerez v. Supreme Court of Ind.*, 685 F.2d 202, 208 (7th Cir. 1982). The district court correctly concluded that Plaintiffs'

"complaint easily satisfies this standard, precisely alleging that the defendants have used the John Doe proceeding as a pretext to target conservative groups across the state." R.83 at 6.

Defendants' claims that "Plaintiffs' allegations pertaining to Defendants which are relevant to their claims are very few" are belied by Plaintiffs' detailed, 62-page Complaint.[10] Plaintiffs' specific facts in support of their bad-faith allegations plausibly state a constitutional tort claim for First Amendment retaliation against all Defendants under the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), ECF No. 43 at 3 (arguments that Complaint is inadequate are not before the Court), and demonstrate that Defendants have taken official action to deter Plaintiffs' constitutionally protected rights of speech and association and that those actions are motivated, at least in part, by the content of Plaintiffs' advocacy.

The Investigation Is Pretextual. Plaintiffs alleged facts demonstrating that Defendants relied on pretexts to target conservatives for extraordinarily aggressive investigation and harassment. *See Esmail v. Macrane*, 53 F.3d 176, 179 (7th Cir. 1995).

Defendant Landgraf commenced the first proceeding based on the pretext of seeking the "origin" of missing charitable funds—an unnecessary line of inquiry related to a year-old matter his office had until then ignored. R.1. ¶¶ 64–74. Almost immediately, the Milwaukee Defendants broadened the investigation in an increasingly politicized direction until they had the entire

[10] In fact, Plaintiffs' Complaint is sufficiently detailed that Defendants complained to the district court about its length. *See* R.162-3 at 1–2.

Wisconsin conservative movement in their crosshairs. *Id.* ¶¶ 76–77 (adding unrelated Gardner investigation); ¶¶ 78–80 (Walker employees targeted immediately); ¶¶ 81–83 (real-estate-contract bid-rigging regarding events postdating the petition); ¶ 80 (sexual misconduct); ¶¶ 84–85 (all organizations that supported the Budget Repair Bill); ¶ 83 (other avenues were explored).

Defendants' actions within and beyond the structures of the various John Doe proceedings establish a fixation with targeting Wisconsin conservatives—from the Governor to those who supported his policies. *Id.* ¶¶ 72, 86 (political potential apparent from the beginning); ¶¶ 73–74 (aides targeted without delay); ¶¶ 84–85 (Robles public-records request); ¶¶ 87–94 (investigation goes statewide). Their targets now include Plaintiffs—along with 28 other conservative 501(c)(4) social-welfare organizations, committees, and other entities in Wisconsin that are responsible for practically all conservative advocacy within the state. *E.g.*, *id.* ¶¶ 1–3, 55.

Harassment and Intimidation. Defendants ordered, authorized, and otherwise participated in determined intimidation tactics, including home raids, unlawful arrests, and kitchen-sink subpoenas. R.1 ¶¶ 114–39. A state-court judge acknowledged that Defendant Landgraf "was behaving badly, probably for political reasons." *Id.* ¶ 116. Defendants launched home raids across the state in a manner intended to harass Plaintiffs' associates and without cause. *Id.* ¶¶ 122–25. The subpoenas seek donor identities and other information that has no conceivable relevance even to Defendants' mistaken legal theories of campaign-finance coordination. *Id.* ¶¶ 131–38; R.7 Ex. B ¶ 45

(estimating 100+ subpoenas issued). Defendants informed Plaintiffs that they do not intend to respect Plaintiffs' and others' First Amendment privilege in making use of the documents they seized. R.1 ¶ 135. Defendants leaked information to the press by various means to embarrass the targets of their investigation. *Id.* ¶¶ 157–172.

Defendants' Actions Were Motivated by Plaintiffs' First Amendment-Protected Advocacy. Defendants' secret criminal investigation occurred during Wisconsin's "political storm," *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 144 (7th Cir. 2011) (*Barland I*), against the backdrop of heated and continually escalating political unrest in the state, due to changes in policy (especially Act 10) advocated by Plaintiffs and others. R.1 ¶¶ 15–61. The Milwaukee Defendants timed raids to coincide with political events (including raiding Walker's office the day before the 2010 gubernatorial election, R.7 Ex. A. Ex. 21 at 5) and leaked details of the probe to the *Milwaukee Journal Sentinel*, R.1 ¶¶ 157–172; *see* R.7 Ex. A Ex. 23. In the middle of the recall-petition drive against Walker, the Milwaukee Defendants released criminal complaints against five targets of the investigation that were designed to tie those targets to the Governor. R.7 Ex. A Exs. 13, 14, 19, 21, 22; R.7 Ex. C ¶¶ 16–20.

Only Conservatives Were Targeted. Plaintiffs alleged that Defendants failed to investigate claims that progressive social-welfare organizations were coordinating with the official campaign committee to recall Governor Walker, R.1 ¶ 149; R.7 Ex. A Ex. 41; ignored public reports that Democratic-

party recall candidates were coordinating with ideologically sympathetic social-welfare organizations, R.1 ¶¶ 143, 147–48, 150; and ignored a request to investigate a prominent Milwaukee union that was sending express-advocacy mailings without fulfilling reporting requirements, *id.* ¶ 151.

Defendants' Legal Justification for Their Investigation Is a Pretext. As discussed at length below, *see infra* § II.B.1, Defendants contrived a series of pretextual legal theories—including a non-existent prohibition on "coordinated fundraising" and restrictions on coordinated issue advocacy unrelated to the candidate with whom it was allegedly coordinated—to support their targeting and investigation of conservative activists. R.1 ¶¶ 95–107.[11]

Defendants' Purpose Is To Chill Protected Speech. Plaintiffs' allegations cumulatively show an irreparable deprivation of Plaintiffs' rights from which the court could reasonably infer that Defendants' purpose—at minimum—has been to silence conservative voices, and they have succeeded to date, resulting in the ongoing and unmitigated chilling of Plaintiffs' speech. R.1 ¶¶ 180–195. Any meaningful participation in ongoing matters of public

[11] In addition, Defendants' chief legal theory, regarding alleged coordination of issue advocacy, is one that GAB itself disclaimed in a 2010 stipulation with the Club. *See* Stipulation, *Wis. Club for Growth v. Myse*, No. 10–cv–427–wmc, ECF No. 22–1 (W.D. Wis. filed August 6, 2010) (stipulation resolves first claim of complaint in plaintiffs' favor); *id.* ECF No. 1 (complaint's first claim alleges that "[n]o state law has been enacted expanding the scope of political speech subject to regulation to include issue advocacy communications"). *Mulholland* held that a county election board's attempt to enforce a regulation it agreed was unconstitutional in a consent decree with another party "shaves very close to harassment or bad faith prosecution." 746 F.3d at 818. Unlike the *Mulholland* defendants, Defendant Schmitz (a GAB agent who is required by Wisconsin law to regularly report to the full Board, Wis. Stat. § 5.05(c)(4)–(5)) does not even have the excuse that the settlement agreement was with a third party.

interest is ruled out as long as the investigation continues, which could be years. *Id.* ¶¶ 192–95. The cumulative effect of Defendants' actions—and, indeed, the purpose of their actions—is the deprivation of Plaintiffs' and others' First and Fourteenth Amendment rights. *Id.* ¶¶ 195–225.

3. *Younger* Does Not Allow for Dismissal of Plaintiffs' Damages Claims

Defendants' assertion of *Younger* is necessarily related only to Plaintiffs' claims for injunctive relief. *See Younger*, 401 U.S. at 54. Even if this Court finds *Younger* abstention is required, that would require dismissal of Plaintiffs' equitable claims, but only a stay of their damages claims. *See Deakins*, 484 U.S. at 201–04; *Simpson v. Rowan*, 73 F.3d 134, 139 (7th Cir. 1995).

C. The District Court Did Not Abuse Its Discretion in Declining *Pullman* Abstention

The district court did not abuse its decision in declining *Pullman* abstention here in light of the differences between Plaintiffs' retaliation claims and the claims pending in state court, as well as the critical First Amendment issues raised by this action. Moreover, given the district court's authority to issue a preliminary injunction and to stay under *Pullman* abstention, this Court lacks interlocutory appellate jurisdiction over this issue.

As an initial matter, the Court should decline to consider *Pullman* abstention.[12] Defendants argue that "the Court has jurisdiction to address abstention" because it bears upon and is central to the grant of the Plaintiffs'

[12] Plaintiffs suggested in the district court that the Seventh Circuit likely would have jurisdiction over the *Pullman* abstention issue. R.206 at 1. Upon further consideration, Plaintiffs' preliminary view was incorrect.

preliminary injunction and immunity decisions, based on pendent appellate jurisdiction, and based on the Court's *sua sponte* authority. *See* MTD Br. 1–2. While Plaintiffs do not contest jurisdiction over the *Younger* and *Burford* abstention issues, which if meritorious could require dismissal of their equitable claims, *Pullman* abstention is a different issue entirely.

Pullman abstention is neither jurisdictional, nor does it require dismissal. *See United States v. Mich. Nat'l Corp.*, 419 U.S. 1, 4 (1974). Rather, *Pullman* abstention is a creature of equity. *See R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500–01 (1941). A decision to stay under *Pullman* does not displace the Court's other inherent equitable powers, including the authority to enter a preliminary injunction in order to prevent irreparable harm during the abstention period while state courts consider narrower interpretations of state law. *See City Investing Co. v. Simcox*, 633 F.2d 56, 64 & n.18 (7th Cir. 1980) (observing that it was not an abuse of discretion for a district court that abstained on *Pullman* grounds to decline to provide equitable relief); *Rivera-Feliciano v. Acevedo-Vila*, 438 F.3d 50, 63–64 (1st Cir. 2006) (upholding preliminary injunction during the pendency of *Pullman* abstention); *Reproductive Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1143–44 (8th Cir. 2005) (same); *N.J.-Phila. Presbytery of the Bible Presbyterian Church v. N.J. State Bd. of Higher Educ.*, 654 F.2d 868, 885–86 (3d Cir. 1981) (same).

Because a court can abstain under *Pullman* while still issuing a preliminary injunction to protect a litigant's interests during the stay, it follows that the *Pullman* question is not central to the grant of the preliminary injunction,

inextricably intertwined with Defendants' challenge to the injunction, or an appropriate exercise of the Court's *sua sponte* authority to consider.[13] Nor is the characterization of the state proceedings for immunity purposes central to determining the applicability of *Pullman* abstention or balancing the equities in a decision whether to abstain.

If the Court determines that it has jurisdiction over this issue, it should decline Defendants' invitation to apply an incorrect standard of review. While Defendants cite *Barland I*, 664 F.3d at 150, for the proposition that "review of the *Pullman* doctrine is subject to *de novo* review," but *Barland I* actually holds that the question of whether *Pullman* "abstention applies…is a legal issue subject to *de novo* review." In contrast, the decision whether or not to abstain if the prerequisites for *Pullman* abstention are met is discretionary. *See, e.g.*, *City Investing*, 633 F.2d at 63; *Int'l College of Surgeons*, 153 F.3d at 360; *Trust & Inv. Advisers*, 43 F.3d at 294 (citing *Harman v. Forssenius*, 380 U.S. 528, 534 (1965)). Thus, to prevail on appeal, the Defendants must not only prove that the district court erred as a matter of law in determining that *Pullman* abstention was unavailable, but that it abused its discretion in declining to abstain.

Defendants cannot hope to meet this burden. *Pullman* abstention "is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy." *Wolfson v. Brammer*, 616 F.3d 1045, 1066 (9th Cir. 2010)

[13] Courts of appeals have, on occasion, considered whether a district court erred in declining to abstain under *Pullman* during a preliminary-injunction appeal. *See Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011). But Plaintiffs are unaware of any authority expressly considering whether such jurisdiction is appropriate, particularly when a preliminary injunction is available even if a district court abstains.

(quotation marks and alterations omitted). It is available "only when (1) there is a substantial uncertainty as to the meaning of the state law and (2) there exists a reasonable probability that the state court's clarification of state law might obviate the need for a federal constitutional ruling." *Barland I*, 664 F.3d at 150 (quotation marks omitted). As the district court correctly found, the second criterion is not met here because a decision by Wisconsin state courts on the meaning of state law would not avoid the need for a decision on Plaintiffs' First Amendment retaliation claims. R.83 at 8.

To be sure, the futility and unconstitutionality of Defendants' theory of criminal liability—along with many other facts—evidences their bad faith. But whether or not Defendants' theory of criminal liability was also unsupported by Wisconsin law is relevant to this issue *only* inasmuch as it further evidences Defendants' bad faith. *Compare Barland I*, 664 F.3d at 151 (holding that district court erred in abstaining under *Pullman* where the outcome of the state proceeding would not resolve the federal question raised in the federal case).

Even if the Court disagrees on this point, the district court did not abuse its discretion in its alternate holding that it would not exercise its discretion to abstain. "A party appealing under this standard bears a heavy burden, for a decision constitutes an abuse of discretion when it is not just clearly incorrect, but down-right unreasonable." *Zhou v. Guardian Life Ins. Co. of Am.*, 295 F.3d 677, 679 (7th Cir. 2002) (citation and quotation marks omitted). A party meets its burden under this standard "only when it is clear that no rea-

sonable person would agree [with] the trial court's assessment." *Marrocco v. Gen. Motors Corp.*, 966 F.2d 220, 223 (7th Cir.1992).

The district court's decision not to abstain in a case implicating important First Amendment issues, R.83 at 8, is well within the norm of federal-court decisions, *see Wolfson*, 616 F.3d at 1066 ("[C]onstitutional challenges based on the First Amendment right of free expression are the kind of cases that the federal courts are particularly well-suited to hear. That is why abstention is generally inappropriate when First Amendment rights are at stake.") (alterations and quotation marks omitted). And as the district court correctly ruled, not only is vindication of the First Amendment a core federal interest, but this case involves a particularly important aspect of that interest: "speech uttered during a campaign for political office." R.83 at 9 (quoting *Citizens United v. FEC*, 558 U.S. 310, 339 (2010)).

D. The District Court Did Not Abuse Its Discretion in Declining *Burford* Abstention

The district court did not abuse its discretion in declining *Burford* abstention, *see Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), an exotic doctrine that "only rarely favors abstention," *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996). Not only is *Burford* abstention inappropriate, Defendants' argument would, if accepted, eviscerate federal-court authority to provide remedies for unconstitutional campaign-finance statutes.

A federal court has discretion to abstain under *Burford* if (1) "it is faced with difficult questions of state law that implicate significant state policies" or (2) "concurrent federal jurisdiction would be disruptive of state efforts to es-

tablish a coherent policy with respect to a matter of substantial public concern." *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 503 (7th Cir. 2011) (quotation marks and citations omitted). Although the Milwaukee Defendants argued below that both prongs of this test were satisfied, *see* R.60 at 23, they have abandoned their first-prong argument by failing to brief it on appeal.

Defendants' suggestion that concurrent federal jurisdiction would disrupt Wisconsin's efforts to establish a coherent policy regarding a matter of substantial public concern is baseless. Defendants cite *Adkins* for the general test concerning *Burford* abstention, MTD Br. 77, but *Adkins* also holds that, "for [the] second basis of *Burford* abstention to apply…., judicial review by state courts *with specialized expertise* is a prerequisite," *Adkins*, 644 F.3d at 504. *See also Int'l College of Surgeons*, 153 F.3d at 364 (*Burford* abstention was not appropriate because any court of general jurisdiction could review final administrative decisions). A John Doe investigatory proceeding, presided over by a retired judge, is not a court of specialized expertise. Nor does Wisconsin maintain specialized courts to oversee John Doe investigations.

Moreover, Defendants' argument has staggering implications. All or nearly all states administer campaign-finance regulations through agencies. If the district court lacked discretion to do anything but abstain under *Burford*, abstention would effectively be mandated in virtually all suits challenging campaign-finance laws in this Circuit. That outcome may please Defendants and other state officials, given the prevalence of litigation by parties aggrieved by Wisconsin's unconstitutional efforts to enforce its archaic campaign-

finance statute. *Cf. Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 841 (7th Cir. 2014) (*Barland II*). It would, however, do violence to the First Amendment—a matter of paramount federal concern.

Unsurprisingly, it is an open question whether *Burford* abstention is "ever…appropriate where substantial first amendment issues are raised." *See Felmeister v. Office of Attorney Ethics*, 856 F.2d 529, 534 (3d Cir. 1988). Defendants have not identified any decision where a federal court actually abstained under *Burford* in a case raising non-frivolous First Amendment issues.[14] At the very least, in light of the compelling federal interest at stake, the district court did not abuse its discretion in deciding not to abstain.

Finally, as with *Younger*, *Burford* abstention does not call for dismissal of Plaintiffs' damages claims. *See Quackenbush*, 517 U.S. at 530.

E. Defendants Are Not Entitled to Qualified Immunity from Plaintiffs' Personal-Capacity Claims

1. All Defendants Schmitz's and Nickel's Arguments Are Forfeited, as Are All But One of the Milwaukee Defendants'

On appeal, Defendants make three qualified-immunity arguments: (1) the right to coordinate issue advocacy is not sufficiently well established as to defeat qualified immunity, (2) Plaintiffs' claimed right to be free from retal-

[14] Defendants' reference to *Guillemard-Ginorio*, 585 F.3d 508, *Siegel v. LePore*, 234 F.3d 1163 (11th Cir. 2000), *Fisher v. King*, 232 F.3d 391 (4th Cir. 2000), and *Planned Parenthood of Dutchess-Ulster, Inc. v. Steinhaus*, 60 F.3d 122 (2d Cir. 1995), for the proposition that "[f]ederal courts may apply the *Burford* doctrine to First Amendment civil rights claims" is misleading. MTD Br. 77. None of these cases held that *Burford* abstention applied in such a case. Instead, each affirmed a district court's decision not to abstain without holding that *Burford* abstention was unavailable as a matter of law.

iation for the protected speech is insufficiently specific to defeat qualified immunity, and (3) the district court improperly considered Defendants' subjective motivation in its qualified-immunity decision. MTD Br. 27–43. To preserve an issue for appeal, a party must specifically and adequately present it below, and it is not enough that "the 'general issue' was before the district court." *Pole v. Randolph*, 570 F.3d 922, 937 (7th Cir. 2009) (citing *Domka v. Portage Cnty., Wis.*, 523 F.3d 776, 783 (7th Cir. 2008) and *Kunz v. DeFelice*, 538 F.3d 667, 681 (7th Cir. 2008)). Defendants Nickel and Schmitz raised *none* of these arguments below and have forfeited them all.[15] The Milwaukee Defendants preserved only the argument that the right to coordinate issue advocacy is not well established.

The Milwaukee Defendants. In the district court, the Milwaukee Defendants argued that Plaintiffs' Complaint actually alleges that the Defendants violated Plaintiffs' right to coordinate with candidates by opening an investigation into them, and that the right to coordination is not well established, R.60 34–37. These arguments are preserved but meritless. The Milwaukee Defendants did not argue that Plaintiffs' right to be free from retaliation is not sufficiently particularized or that subjective motive is not a relevant inquiry. R.60 at 34–37. Those arguments are forfeited.

Defendant Schmitz. Defendant Schmitz's qualified-immunity defense is entirely forfeited. R.44 at 9–10. His motion-to-dismiss brief cursorily con-

[15] Notably, Defendants Nickel and Schmitz took the opposite position regarding subjective motive before the district court, arguing that the Complaint failed to allege "retaliatory animus," which, they argued, "is an essential element of a retaliatory prosecution claim." R.44 at 13; R.54 at 3, 21, 22.

tended (1) that the Complaint's allegations were insufficient to "demonstrate that Mr. Schmitz violated Plaintiffs' constitutional right," without specifying what right was at issue; and (2) that the John Doe proceeding does not violate clearly established law, because "[t]he validity and constitutionality of [the] subpoena [served on O'Keefe] was briefed at length by the State prior to Judge Peterson's order granting Plaintiffs' motion to quash." R.44 at 9–10. He does not make these arguments on appeal, and those he makes now are forfeited.

Defendant Nickel. Defendant Nickel forfeited all arguments on appeal. Nickel's motion-to-dismiss brief made two arguments: (1) that "a special investigator involved in a criminal proceeding is entitled to qualified immunity when conducting his normal investigatory duties," particularly when he is just following orders, R.54 at 25–26; and (2) "as an investigator and non-attorney," Nickel may not have known that he was "violating the constitutional rights of Plaintiffs by simply participating in the John Doe investigation." R.54 at 27. Nickel forfeited all the issues now raised.

2. Plaintiffs' Right To Be Free from Retaliatory Abuse of Law-Enforcement Proceedings Is Clearly Established

A qualified-immunity analysis involves two elements: (1) whether Defendants violated Plaintiffs' constitutional rights, and (2) whether the right was clearly established at the time of violation. *Rooni v. Biser*, 742 F.3d 737, 742 (7th Cir. 2014). Defendants contest only the second element in their motion-to-dismiss brief. *See* MTD Br. 28.

"For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Estate of Escobedo v. Bender*, 600 F.3d 770, 779 (7th Cir. 2010) (quotation marks omitted). A plaintiff can meet that standard by showing either that (1) "a closely analogous case establishes that the conduct is unconstitutional," or (2) "the violation is so obvious that a reasonable officer would know that what he is doing violates the Constitution." *Id.* at 780. The rights at issue here are clearly established under both tests.

First, there are numerous precedents prohibiting the abuse of law-enforcement proceedings, such as investigations, to retaliate against persons for the exercise of their free speech. *E.g.*, *Dombrowski v. Pfister*, 380 U.S. 479, 482 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68–69 (1963); *Collins*, 807 F.2d at 97–98; *Fitzgerald v. Peek*, 636 F.2d 943, 945 (5th Cir. 1981); *Cullen v. Fliegner*, 18 F.3d 96, 103–04 (2d Cir. 1994); *Lewellen v. Raff*, 843 F.2d 1103, 1112 (8th Cir. 1988); *Krahm v. Graham*, 461 F.2d 703, 707 (9th Cir. 1972); *Torres v. Frias*, 68 F. Supp. 2d 935, 939 (N.D. Ill. 1999). It is also established that this can be a violation of equal-protection rights. *See, e.g.*, *Esmail*, 53 F.3d at 179; *Ciechon v. City of Chi.*, 686 F.2d 511, 523 & n.16 (7th Cir.1982).[16]

One analogous case, cited by the district court, concerned a retaliatory investigation launched by a local sheriff and his deputies to intimidate businesses that supported a referendum they allegedly opposed. *Bennett v. Hendrix*,

[16] In assessing whether there is a closely analogous case, courts look to controlling authority in the Supreme Court and the governing Circuit, but a "clear trend in the case law" from other courts will establish a right as well. *Estate of Escobedo*, 600 F.3d at 781 (quotation marks omitted).

423 F.3d 1247 (11th Cir. 2005). They targeted local business owners for invasive surveillance, attempted to obtain arrest warrants based on "trumped-up environmental charges," and "issued false traffic citations." 423 F.3d at 1249. The Eleventh Circuit denied qualified immunity and found the clearly-established-right issue not even close. *Id.* at 1255–56. *See also Blankenship v. Manchin*, 471 F.3d 523, 533 (4th Cir. 2006) (denying qualified immunity to state official who targeted company for increased scrutiny in retaliation for its political speech).

Defendants attempt to distinguish *Bennett* on the grounds that *those defendants'* actions "were objectively unreasonable and violated the plaintiffs' rights."[17] MTD Br. 33. But Defendants ignore that the same allegations are present here: Defendants subpoenaed, surveyed, harassed, and invaded the homes of Wisconsin conservatives on a host of pretextual theories—including, most recently, trumped-up campaign-finance charges—for the purpose of retaliating against and chilling their political involvement. R.1 ¶¶ 56–139. Defendants were on notice that law-enforcement officers cannot lawfully do that.

Second, Defendants' alleged conduct is obviously unconstitutional. *Estate of Escobedo*, 600 F.3d at 779. At base, Defendants argue that a reasonable prosecutor or investigator may be unaware that he can't target citizens for pretextual investigation—raiding their homes, seizing their documents and per-

[17] Defendants discuss *Bennett* in their section concerning the role of subjective motivation, MTD Br. 32–33, but ignore its conclusions regarding clearly established law.

sonal effects, blanketing them in subpoenas, etc.—in retaliation for those citizens' political views, speech, and associations. The Court may take notice of the fact that this is not Soviet Russia. Fed. R. Evid. 201(b). "[C]areer prosecutors and investigators," PI Br. 42, should know better—or they shouldn't be career prosecutors and investigators. *See Whitlock v. Brueggemann*, 682 F.3d 567, 586 (7th Cir. 2012) ("A right can be clearly established on the basis of common sense.") (quotation marks and alteration omitted).

3. The District Court Properly Framed the Right at Issue

The district court correctly recognized that the right at issue is Plaintiffs' "right to express political opinions without fear of government retaliation" because that is "the constitutional right allegedly violated." *Purvis v. Oest*, 614 F.3d 713, 717 (7th Cir. 2010). *See also Miller v. Harbaugh*, 698 F.3d 956, 962 (7th Cir. 2012) (discussing *Pearson v. Callahan*, 555 U.S. 223 (2009)). Indeed, Plaintiffs alleged that the Milwaukee Defendants violated their rights to be free from retaliation for their political views (R.1 ¶¶ 196–201, 207–12), to be free from disparate treatment (¶¶ 202–06), to be free from compelled disclosure that undermines their associational rights (¶¶ 213–20), and to speak freely about the abuses of the John Doe investigation (¶¶ 221–25). Defendants claim that Plaintiffs are seeking damages for alleged violations of the "right to coordinate issue advocacy with a political candidate." MTD Br. 33. And they fault the district court for relying on too-recent decisions in *McCutcheon v.*

FEC, 134 S. Ct. 1434 (2014), and *Barland II*, 751 F.3d 804—decisions that are actually not cited in the motion-to-dismiss order.[18] *See* MTD Br. 39–41.

Defendants argue that positing a "right of coordination" is the only way to comply with the Supreme Court's instruction that a "'broad general proposition'" is not sufficient to establish that a right is clearly established. MTD Br. 30 (quoting *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012)). But that instruction simply means that the "inquiry must be undertaken in light of the specific context of the case," *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (quotation marks omitted), or, in other words, that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *id.* at 199 (quotation marks omitted). And, again, that can be established by reference to analogous precedent or common sense. *See Estate of Escobedo*, 600 F.3d at 779. Meeting both tests, Plaintiffs' right is established at a sufficiently specific level.[19]

The precise criminal offense that a public official identifies as the pretext for an investigation targeting ideological opponents for retaliatory harassment is irrelevant because it is *the retaliation itself* that violates federal law.

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[18] In fact, *Barland II* was handed down more than a month after the district court's motion-to-dismiss order.

[19] For this reason, the Milwaukee Defendants' reliance on *Reichle* is misplaced. *Reichle* held that the "right to be free from a retaliatory arrest that is otherwise supported by probable cause" was not clearly established because the Supreme Court or applicable Court of Appeals "has never held that there is such a right."132 S. Ct. at 2094 (emphasis added). But the right involved in this case—to be free of abuse of criminal process in retaliation for First Amendment advocacy and association—has been recognized by the Supreme Court, this Court, and many others.

See, e.g., *Greene v. Doruff*, 660 F.3d 975, 977 (7th Cir. 2011). *Bennett* illustrates the folly of Defendants' view. As described above, that case involved a retaliatory investigation with the specific pretexts that its targets violated environmental and traffic laws. 423 F.3d at 1249. The Eleventh Circuit appropriately did not consider whether there was a clearly established right to pollute or to drive recklessly. Instead, it considered whether "the law was clearly established at the time of the defendants' alleged actions that retaliation against private citizens for exercising their First Amendment rights was actionable." *Id.* at 1255. Similarly, the question whether there was a clearly established right to coordinate issue advocacy with a candidate is irrelevant to the question of whether the Milwaukee Defendants have qualified immunity from Plaintiffs' damages claims for First Amendment retaliation.[20]

4. Defendants' Argument Does Not Support Appellate Jurisdiction

For the same reason, resolution of Defendants' proposed "right to coordination" is not properly before the Court because it would not "conclusively determine[] [Defendants'] claim of right not to *stand trial* on the plaintiff's allegations." *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985). A decision holding that the right to coordinate issue advocacy was not clearly established during the investigation would not resolve: (1) whether the Milwaukee Defendants acted in retaliation for Plaintiffs' exercise of their First Amendment rights; (2) whether the Milwaukee Defendants had any reason to believe Plaintiffs

[20] Even if the Court accepts Defendants' framing of the rights at issue, the result is the same. *See infra* § II.B.1.

may have engaged in conduct violating Wisconsin law; (3) whether Wisconsin law may be interpreted, consistent with the First Amendment, to reach coordinated issue advocacy; or (4) whether Plaintiffs' advocacy actually violates Wisconsin law. Those and other questions would have to be considered on remand, reflecting that the narrow defense posed by the Milwaukee Defendants is not conclusive of liability as to any claim and therefore is not an immunity from suit susceptible to collateral-order appeal. After all, "when the defendant's contention does not invoke a 'right not to be tried,' the foundation for an interlocutory appeal is missing." *Mercado v. Dart*, 604 F.3d 360, 363 (7th Cir. 2010).

5. The District Court Properly Considered Defendants' Subjective Motive in Assessing Their Qualified-Immunity Defense

Defendants' argument that the district court "erred by focusing on the Defendants' subjective or ulterior motives" simply misunderstands the law of qualified immunity. MTD Br. 31. In *Auriemma v. Rice*, 910 F.2d 1449 (7th Cir. 1990), the Seventh Circuit clarified the role of subjective motives in qualified-immunity cases where, as here, subjective intent is an element of the underlying claim. The district court should "conduct a two-part analysis when state of mind is at issue: (1) Does the alleged conduct set out a constitutional violation? and (2) Were the constitutional standards clearly established at the time in question? Intent is relevant to (1) but not to (2)." *Id.* at 1453 (quotation marks and alteration omitted). *See also Crawford-El v. Britton*, 523 U.S. 574, 589 & n.11 (1998) ("[A]lthough evidence of improper motive is irrelevant on the

issue of qualified immunity, it may be an essential component of the plaintiff's affirmative case.").

The district court followed this textbook approach. R.83 at 17. First, it considered whether Defendants violated Plaintiffs' rights, and, as to that issue only, it referred back to its discussion of Plaintiffs' retaliation claim, which found that Plaintiffs had properly alleged that their protected exercise was "at least a 'motivating factor' in the state action." *Id.* at 12 (quoting *Massey v. Johnson*, 457 F.3d 711, 716 (7th Cir. 2006), and citing *Esmail*, 53 F.3d at 179). That was a proper consideration of subjective motive under this Circuit's precedent. Were it not, all retaliation and equal-protection claims would be eviscerated. *See Auriemma*, 910 F.2d at 1453.

The district court then proceeded to find that the right was clearly established. As to that element, the district court said nothing remotely suggesting that it was taking Defendants' subjective intent into account. R.83 at 17. Defendants' only evidence that the district court was considering their subjective intent as to that inquiry was its statement that Defendants are being sued for "pursuing the investigation in the first instance," MTD Br. 31, a statement the court made *in its prosecutorial immunity analysis*. R.83 at 16. Defendants' contention that the district court improperly considered motive is meritless.

F. Defendants Are Not Entitled to Prosecutorial Immunity for Their Investigatory Conduct

Whether or not a John Doe proceeding is analogous to a grand-jury proceeding for immunity purposes, Plaintiffs plausibly alleged Defendants'[21] participation in conduct outside the prosecutorial function, including the conception, supervision, and carrying out of a secret investigation that has not resulted in any probable-cause determination. Prosecutorial immunity does not shield the Milwaukee Defendants or Schmitz from liability for the *pre-prosecution* investigatory conduct at issue here. For that reason, even if certain aspects of Defendants' conduct (like court appearances) may be subject to immunity, Defendants are still not entitled to dismissal of Plaintiffs' claims.

"A prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). "Judicial proceedings" are those that immediately precede prosecution: "the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury *after a decision to seek an indictment has been made*." *Id*. (emphasis added). Thus, investigation prior to the decision to indict based on probable cause is not subject to absolute immunity:

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to rec-

[21] The Milwaukee Defendants and Schmitz raise this argument. Nickel is not a prosecutor.

> ommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other. Thus, if a prosecutor plans and executes a raid on a suspected weapons cache, he has no greater claim to complete immunity than activities of police officers allegedly acting under his direction.

Id. at 273–74 (citations and quotation marks omitted).

Applying this "functional approach," *Buckley* held that defendant prosecutors had failed to demonstrate that they were entitled to immunity because, at the time they carried out the investigation at issue, they lacked "probable cause to arrest petitioner or to initiate judicial proceedings" and so were not carrying out the "the prosecutor's function as an advocate." *Id*. at 269, 273–74 (quotation marks omitted). Instead, "[t]heir mission at that time was entirely investigative in character," and "[a] prosecutor neither is, nor should consider himself to be, an advocate *before he has probable cause to have anyone arrested*." *Id*. at 274 (emphasis added). *See also Hartman v. Moore*, 547 U.S. 250, 262 n.8 (2006) (although immunity attaches to the decision to prosecute, "[a]n action could still be brought against a prosecutor for conduct taken in an investigatory capacity, to which absolute immunity does not extend."); *Fields v. Wharrie*, 740 F.3d 1107 (7th Cir. 2014) (holding same); *Whitlock*, 682 F.3d at 578–79 (denying prosecutorial immunity at summary-judgment stage where factual dispute precluded finding that prosecutor possessed probable cause to indict at time of challenged investigatory conduct); *Hill v. Coppleson*, 627 F.3d 601, 605–06 (7th Cir. 2010) (same).

Buckley also holds that prosecutors do not avoid liability by choosing to conduct their pre-probable-cause investigation through a judicial proceeding like an investigative grand jury. Although an investigative grand jury had been empaneled, the Court explained, "its immediate purpose was to conduct a more thorough investigation of the crime—not to return an indictment against a suspect whom there was already probable cause to arrest." 509 U.S. at 275. Thus, the prosecutors' alleged fabrication of evidence during that investigation "occurred well before they could properly claim to be acting as advocates." *Id*. Accordingly, their conduct was "protected only by qualified immunity." *Id*.[22]

Defendants' many concessions that all of this challenged conduct occurred prior to the point (still not reached) when they have "probable cause to have anyone arrested," *Buckley*, 509 U.S. at 274, are dispositive of the issue of prosecutorial immunity. As Defendants explained in their briefing before the Wisconsin Court of Appeals, a John Doe proceeding is an "investigative proceeding" and "is not a procedure for the determination of probable cause so

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[22] *Accord KRL v. Moore*, 384 F.3d 1105, 1113–14 (9th Cir. 2004) (denying prosecutorial immunity for prosecutors' conduct in seeking warrants, based on grand-jury testimony, after the same suspect had already been indicted for other crimes); *al-Kidd v. Ashcroft*, 580 F.3d 949, 960–62 (9th Cir. 2009) (denying prosecutorial immunity where material witness was detained for investigatory purposes), *rev'd on other grounds*, *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011) (holding defendant was entitled to qualified immunity). *See also Hill v. City of New York*, 45 F.3d 653, 662–63 (2d Cir. 1995) (denying immunity at pleading stage for prosecutor's participation in videotaped interviews he claimed were for grand-jury proceeding where it was unclear whether prosecutor had probable cause to indict); *id*. (If "the results of that interview contributed to his finding probable cause, the interview would then be held to be an investigatory function.").

much as it is *an inquest for the discovery of crime*." R.53 Ex. V at 4 (emphasis added). Defendants went on to state that "[t]hese investigations involve an inquiry into possible violations of campaign finance law," and that "[o]bviously, no charges have been brought." *Id.* In fact, Defendants have conceded that the John Doe proceedings' purpose is only to "seek information necessary to determine whether probable cause exists that Wisconsin's campaign finance laws have been violated." R.60 at 13. As with *Buckley's* grand-jury proceeding, the immediate purpose of the John Doe proceeding here was to investigate and "not to return an indictment against a suspect whom there was already probable cause to arrest." 509 U.S. at 275.

Moreover, *Buckley* and its progeny preclude prosecutorial immunity here because Plaintiffs challenge Defendants' conduct in carrying out an investigation, not the prosecutor's function as an advocate. The Complaint describes in detail how Defendants conceived of and carried out an investigation targeting Plaintiffs for their advocacy. In particular, the Complaint alleges that Defendants launched an investigation to retaliate against conservative activists, R.1 ¶¶ 54–87; concocted a pretextual legal theory to support their investigation, ¶¶ 95–107; shopped the investigation around to the Attorney General before persuading a group of district attorneys to launch a coordinated series of John Doe proceedings, ¶¶ 85–94; structured those proceedings so that they could participate in and exercise control over the investigation, ¶¶ 91–92; crafted broad and invasive requests for search warrants and subpoenas to carry out their targeting of conservative activists, ¶¶ 131–36; ensured

that legal process was carried out so as to intimidate their targets, ¶¶ 120–26; seized activists' computers, business papers, private communications, and confidential records, ¶ 123; interviewed numerous witnesses and reviewed hundreds of thousands of documents, ¶¶ 75; timed investigatory conduct to injure their political opponents, ¶¶ 159, 162, 166, 168–72; and selectively leaked materials to injure their targets, ¶¶ 157, 158, 169.

Plaintiffs' allegations relating to investigatory conduct occurring before any decision to bring an indictment distinguish this case (and *Buckley*, *KRL*, and *Hill v. City of New York*) from Defendants' cases involving or discussing grand-jury indictments. *See* MTD Br. 48–49 (citing, *inter alia*, *Redwood v. Dobson*, 476 F.3d 462 (7th Cir. 2007)). Defendants' error is that the dividing line between the investigatory and prosecutorial roles when (as here) a prosecutor participates in an investigation is not the convening of a judicial proceeding like a grand jury, *see* MTD Br. 48–49, but the prosecutor's probable cause to seek an indictment, such that his investigation (from that point on) occurs in direct preparation for his role as an advocate before the court. *Buckley*, 509 U.S. at 273; *Hill v. Coppleson*, 627 F.3d at 605 ("The question of whether Rogers was acting in the role of an advocate or an investigator depends in part on whether probable cause for Hill's arrest existed before Rogers's arrival at the police station.").

Defendants' leading authority, *Harris v. Harvey*, 605 F.2d 330 (7th Cir. 1979), is consistent with this approach. *See* MTD Br. 43. The defendant, a judge, was chiefly shielded by judicial immunity. As to prosecutorial immuni-

ty, the court explained that his "only prosecutorial function was in connection with his conduct of the John Doe proceedings" in which he had signed multiple probable-cause criminal complaints and issued an arrest warrant. 605 F.2d at 334, 336. While those actions may be subject to immunity, they are not present in this case, where Defendants are engaged in what they describe as an investigatory proceeding, have yet to establish probable cause for an indictment or arrest, and (due to the unusual operation of the John Doe procedure) bear no responsibility for finding probable cause and initiating charges, tasks that are the responsibility of the presiding judge. *See* MTD Br. 46; *id*. at 49 (judge, not prosecutor, is responsible for "investigation of alleged violations of the law and, upon a finding of probable cause, initiation of prosecution") (quoting *State v. Unnamed Defendant*, 441 N.W.2d 696, 698 (Wis. 1989)).

Additionally, Defendants misstate *Harris* by omitting a crucial fact from their discussion: because the judge's prosecutorial immunity was limited to his conduct "initiating a prosecution and presenting the State's case," he was not immunized for the remainder of his conduct. 605 F.2d at 336 (alteration and quotation marks omitted). Thus, even assuming (1) that a prosecutor participating in a John Doe proceeding is entitled to the same scope of immunity as the judge who is actually playing the prosecutorial role and (2) that such a prosecutor could claim immunity for conduct undertaken when he lacks probable cause to indict, that immunity would still be limited, as in *Harris*, to direct participation in the proceeding, like advocacy before the John

Doe judge and related conduct. *Cf. Burns v. Reed*, 500 U.S. 478, 487, 492 (1991) (holding that immunity extended to a prosecutor's actual "appearance as a lawyer for the State in the probable-cause hearing" for a search warrant);[23] *Redwood*, 476 F.3d at 466 (immunity reaches "the choice of witnesses to present" at a probable-cause hearing).

The key point is that immunity still would not reach "a prosecutor's personal conduct of an interrogation, or a pre-litigation search or seizure," or other investigative conduct, *id*.—in other words, the very things that Defendants here are alleged to have done—because those things are not part of the prosecutorial function. Leaking materials to the media, as Defendants are alleged to have done, is also not a prosecutorial function. *Rose v. Bartle*, 871 F.2d 331, 346 (3d Cir. 1989); *Powers v. Coe*, 728 F.2d 97, 103 (2d Cir. 1984); *Helstoski v. Goldstein*, 552 F.2d 564, 566 (3d Cir. 1977). And instigating or perpetuating a criminal proceeding is not subject to immunity. *Cervantes v. Jones*, 188 F.3d 805, 810 (7th Cir. 1999). Accordingly, even if certain limited aspects of Defendants' conduct may be subject to prosecutorial immunity—despite Defendants' concessions that they never had probable cause to indict and aren't even responsible for initiating prosecutions under the John Doe statute—they are still not entitled to dismissal.[24]

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[23] Notably, *Burns* declined to address immunity with respect to a challenge to a prosecutor's "motivation in seeking the search warrant or his conduct outside of the courtroom relating to the warrant." 500 U.S. at 487.

[24] Defendants' argument that a prosecutor's "subjective motives" in bringing "a prosecution" are irrelevant to the prosecutorial-immunity inquiry, MTD Br. 53–54, is undermined by the fact that Defendants have never brought a prosecution.

II. The District Court's Entry of a Preliminary Injunction Was Not an Abuse of Its Discretion

A. Standard of Review

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 795 (7th Cir. 2013) (quoting *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). When reviewing a district court's grant or denial of a preliminary injunction, this Court reviews the district court's "legal conclusions de novo, its findings of fact for clear error, and its balancing of the injunction factors for an abuse of discretion," according "great deference to the district court's weighing of the relevant factors." *Stuller, Inc. v. Steak N Shake Enters., Inc.*, 695 F.3d 676, 678 (7th Cir. 2012) (quotation marks omitted).

B. Plaintiffs Are Likely To Prevail on Their First Amendment Retaliation Claim

"[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006). A retaliation claim lies where "(1) [plaintiffs] engaged in activity protected by the First Amendment; (2) they suffered a deprivation that would likely deter First Amendment activity; and (3) the First Amendment activity was at least a motivating factor in the [state] officer's de-

cision." *Thayer v. Chiczewski*, 705 F.3d 237, 251 (7th Cir. 2012). In this case, Plaintiffs' issue advocacy and political associations are "core" First Amendment activities. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 477–79 (*WRTL*); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958); *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). And there can be no doubt that Defendants' subpoenas, raids, and threats of criminal liability "would likely deter" Plaintiffs' First Amendment activity. *Power v. Summers*, 226 F.3d 815, 820–21 (7th Cir. 2000) (recognizing that threats of even minor deprivations, far less than law-enforcement actions or the threat of criminal punishment, are "likely to deter the exercise of free speech"). Indeed, as the district court found, Plaintiffs' First Amendment activities were in fact deterred by Defendants' conduct.

Finally, Defendants' improper motivation—i.e., to retaliate against and deter Plaintiffs' First Amendment-protected advocacy and association—is plain on the facts. Defendants targeted Wisconsin conservatives for harassment, threats, and abuse based on a pretextual legal theory under which Defendants never had any hope of obtaining a valid conviction. *See, e.g.*, *Hawkins v. Mitchell*, 756 F.3d 983, 996 & nn.9–10 (7th Cir. 2014); *Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1975); *Collins v. Kendal Cnty., Ill.*, 807 F.2d 95, 101 (7th Cir. 1986). Defendants' retaliatory motive is confirmed by the course of their investigation over four years, their decision to target nearly all conservative activists in the state, the severity of their tactics, the timing of their actions, and more. Plaintiffs having demonstrated that Defendants are subjecting them to retaliatory action merely for speaking out, the district court did not abuse its

discretion in finding that Plaintiffs have a substantial likelihood of success on the merits.

1. Defendants Had No Likelihood of Obtaining a Valid Conviction Under Their Incorrect Legal Theory

Plaintiffs' speech on the issues prevails over Defendants' attempt to criminalize and suppress it, for three independent reasons. First, issue advocacy is absolutely protected by the First Amendment and cannot be constitutionally restricted. Second, even if the First Amendment does (in the abstract) allow restrictions on issue advocacy, such restrictions could not be constitutionally imposed under Wisconsin's campaign-finance system because they would also ban vast swaths of indisputably protected speech and association, rendering the law unconstitutionally overbroad and vague. And third, even if Wisconsin law could be constitutionally applied to regulate issue-advocacy expenditures coordinated with a candidate for office, Defendants cannot identify any expenditure by Plaintiffs relevant to Walker's recall election, much less one that was coordinated with him or his campaign. At every level, Defendants' legal theory is revealed for what it is: a pretext adopted for the purpose of chilling speech.

a. Speech on the Issues Is Absolutely Protected by the First Amendment Except for When Coordination Renders It the Functional Equivalent of a Campaign Expenditure

The First Amendment prohibits any law "abridging the freedom of speech." U.S. Const. Amend I. While the First Amendment allows limited restrictions on campaign-related speech where necessary to guard against *quid-pro-quo* corruption, the Supreme Court held that speech on the issues, as

opposed to speech advocating the election or defeat of a candidate, is categorically excluded from such regulation because such issue advocacy is *not campaign-related speech*. Accordingly, government has no compelling interest in restricting it.

"Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election." *WRTL*, 551 U.S. at 474 (2007) (Roberts, C.J.).[25] Defendants' insistence that a state generally may restrict speech on the issues because it may have been coordinated with a candidate for office is inconsistent with that principle and therefore, as the district court correctly held, "simply wrong." R.181 at 13. The Supreme Court's decisions in *Buckley v. Valeo* and *WRTL* demonstrate that Defendants' illegal-coordination theory is unconstitutionally overbroad and cannot possibly be sustained under the First Amendment. Put simply: "Issue ads…are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them." *WRTL*, 551 U.S. at 478–79.

Legal Background. *Buckley* is the origin of two distinctions that are central to regulation of campaign finance consistent with the First Amendment. The first is the distinction between limitations on political contributions and those on political expenditures. Because "[a] contribution serves as a general expression of support for the candidate and his views, but does not com-

[25] Chief Justice Roberts's opinion in *WRTL*, being the "position taken by those Members who concurred in the judgments on the narrowest grounds," is controlling. *Marks v. United States*, 430 U.S. 188, 193–94 (1977). *See also Citizens United*, 558 U.S. 310, 340 (2010) (adopting the Chief Justice's approach in *WRTL* as a "framework for protecting the relevant First Amendment interests"). Subsequent citations of *WRTL* refer to the Chief Justice's opinion.

municate the underlying basis for the support[,].…[a] limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication." 424 U.S. at 21. By contrast, "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id*. at 19.

Accordingly, campaign contributions may be restricted to further the legitimate governmental interest in avoiding *quid-pro-quo* corruption, but only where the restriction is "closely drawn to avoid unnecessary abridgment" of First Amendment rights. *Id*. at 25. Expenditures for political communications, however, may rarely if ever be limited. Restrictions are subject to strict scrutiny and will be upheld only when the government can prove that they further its compelling interest in preventing *quid-pro-quo* corruption and are narrowly tailored to achieve that interest. *Id*. at 25–26. *See also Citizens United v. FEC*, 558 U.S. 310, 340, 345 (2010). Consistent with the contribution–expenditure distinction, the Court recognized that certain expenditures coordinated with a candidate may also be restricted, to prevent circumvention of contribution limits. *Buckley*, 424 U.S. at 46–47.

But constitutional considerations compelled the Court to draw an additional distinction—between "express" and "issue" advocacy—to limit the Federal Election Campaign Act's (FECA) reach to unambiguously election-related communications. FECA Section 608(e)(1) purported to limit "any ex-

penditure…relative to a clearly identified candidate." *See id*. at 41–42. Because "[t]he use of so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech," the law would be impermissibly vague absent a limiting construction. *Id*. at 41. That "constitutional deficienc[y]," the Court held, "can be avoided only by reading [section] 608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate," *id*. at 43—in other words, "express advocacy." All other communications, or "issue advocacy," fell outside the reach of the Act. *Id.*[26] *Accord FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 249–50 (1986). *Buckley* also imposed an identical limiting construction on a provision requiring disclosure of expenditures made "for the purpose of…influencing" elections to ensure that its reach "is not impermissibly broad" in violation of the First Amendment and impermissibly vague in violation of the Fifth Amendment's Due Process Clause. 424 U.S. at 77–80.

[26] Notably, the very same definition of "expenditure" applied to FECA's general coordination provision. *See id.* at 192 (quoting FECA § 608(c)(2)(B) (1976)). And subsequently, the same limiting construction was applied to other FECA provisions, including those addressing coordinated expenditures. *FEC v. Colo. Republican Fed. Campaign Comm.*, 839 F. Supp. 1448, 1454 (D. Colo. 1993) (citing cases and declining to "expand[] *Buckley's* carefully circumscribed exception to its prohibition against regulation of freedom of speech"), *rev'd*, 59 F.3d 1015 (10th Cir. 1995), *vacated*, 518 U.S. 604 (1996). *See also Buckley*, 424 U.S. at 46 n.53 (relying on example, from legislative history, of coordinated express advocacy to define scope of coordination provision); *McConnell v. FEC*, 540 U.S. 93, 202 (2003) (stating that purpose of new statutory provision regarding coordinated "electioneering communications" was to "pre-empt[] a possible claim" that, in light of *Buckley*, such communications were not subject to regulation as contributions).

WRTL confirmed the constitutional necessity of *Buckley's* distinction between express advocacy and speech on the issues. At issue was an amendment to FECA enacted in the Bipartisan Campaign Finance Reform Act (BCRA) that expanded the scope of the prohibition on corporations' election-related speech to include "electioneering communications," defined as "any broadcast, cable, or satellite communication that refers to a candidate for federal office and that is aired within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction in which that candidate is running for office." 551 U.S. at 457–58. Although the provision had been upheld against facial challenge in *McConnell v. FEC*, 540 U.S. 93, 204–06 (2003), *WRTL* considered its application to "speech about public issues more generally, or 'issue advocacy,' that mentions a candidate for federal office." 551 U.S. at 456.

"[T]he interests held to justify restricting corporate campaign speech or its functional equivalent do not justify restricting issue advocacy," the Court held. *Id*. at 457. As the Court explained, it "has never recognized a compelling interest in regulating ads…that are neither express advocacy nor its functional equivalent." *Id*. at 476. And such regulation was not justified by the governmental interest in preventing corruption that it previously held to support restrictions on express advocacy: "Issue ads like WRTL's are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them. To equate WRTL's ads with contributions is to ignore their value as political speech." *Id*. at 478–79.

Restrictions on Issue Advocacy Fail Strict Scrutiny. "Laws that burden political speech are subject to strict scrutiny." *Citizens United*, 558 U.S. at 340 (quotation marks omitted). That includes limitations on expenditures for political communications, like those at issue here. *Buckley*, 424 U.S. at 19. Therefore, *Buckley's* and *WRTL's* constitutional line controls: "Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election." 551 U.S. at 474. It's that simple.

The factual circumstance of coordination with a candidate for office does not alter that conclusion. (Nor, as a legal matter, could it, given *WRTL's* emphatic and unqualified holding regarding speech on the issues.) Conditioning the right to speak out on the issues on maintaining one's distance from candidates and elected officials "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." *Clifton v. FEC*, 114 F.3d 1309, 1314 (1st Cir. 1997). "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP*, 357 U.S. at 461. *See also* U.S. Const. Amend I (recognizing right "to assemble, and to petition the Government for a redress of grievances"). Government therefore may not condition exercise of that right on sacrifice of the core First Amendment right to participate in "the discussion of political policy." *Buckley*, 424 U.S. at 48. *See Speiser v. Randall*, 357 U.S. 513, 526 (1958) (applying unconstitutional-

condition doctrine); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (same). Or vice-versa.

Were there any doubt that strict scrutiny applies to the kind of speech restriction Defendants would impose here, despite *WRTL's* and *Citizens United's* unqualified and categorical rule, *Buckley's* logic compels it.[27] Limits on communications expenditures, *Buckley* explained, are subject to strict scrutiny because they "heavily burden[] core First Amendment expression. For the…right to speak one's mind on all public institutions includes the right to engage in vigorous advocacy no less than abstract discussion." 424 U.S. at 48 (alteration and quotation marks omitted). By contrast, limits on contributions are subject to lesser scrutiny because contributions convey little more than the message of support:

> A contribution serves as a general expression of support for the candidate and his views, but *does not communicate the underlying basis for the support*. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.… A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution *but does not in any way infringe the contributor's freedom to discuss candidates and issues*. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves *speech by someone other than the contributor*.

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[27] *FEC v. Colorado Republican Federal Campaign Committee* (*Colorado II*) expressly reserved the question of what degree of scrutiny applies to regulation of issue advocacy *by political parties*. 533 U.S. 431, 456 n.17 (2001). Accordingly, *Colorado II* does not mark a departure from *Buckley's* approach, subsequently reaffirmed in *WRTL*, of subjecting limitations on issue advocacy to strict scrutiny.

Id. at 21 (emphases added).

Speech on the issues is an "expenditure" in every respect that *Buckley* regarded as relevant. In fact, *Buckley* held up "the discussion of political policy generally or advocacy of the passage or defeat of legislation" as the gold standard of core speech entitled to the First Amendment's strongest protections. *Id*. at 48. That is issue advocacy. Speech on the issues, unlike a contribution, does not merely convey support for a candidate—it may not even mention a candidate—and limitations on such speech directly infringe the "freedom to discuss…issues."

Buckley and its progeny also elucidate the dividing line for when speech on the issues can be regarded as a contribution and regulated as such: when it "involves speech by someone other than the contributor." *Id*. at 21. In other words, only when issue advocacy "amount[s] to no more than payment of the candidate's bills" may it be restricted as a contribution. *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 n.17 (2001) (*Colorado II*).[28] *WRTL*, confronting a similar distinction regarding regulation of speech in the face of serious concerns about vagueness, overbreadth, and chilling effects, suggests the constitutionally required standard: issue advocacy may be limited only when it ceases to be the nominal speaker's own speech and instead is the objective "functional equivalent" of a campaign expenditure. 551 U.S. at 469–70. *See also Colorado II*, 533 U.S. at 447 (holding that government may regulate

[28] In fact, the federal government adopted that position in *Colorado II*, conceding that the coordination provision at issue there "is simply to prevent someone 'from making contributions in the form of paying the candidate's bills.'" *Id*. at 468 n.2 (Thomas, J., dissenting) (quoting argument transcript).

parties' coordinated campaign-related expenditures because they are "the functional equivalent of contributions").

Thus, long before Defendants commenced their investigation, they should have known from *Buckley* (1976) and *WRTL* (2007) that genuine issue advocacy (as opposed to paying a candidate's bills) cannot be regulated as a campaign contribution. *WRTL* expressly said as much, in clear language that any prosecutor should be expected to understand. 551 U.S. at 464, 478–79. Defendants' cases (at PI Br. 39) are not to the contrary, with all but one concerning express advocacy or acknowledging that they do not address issue advocacy. *See Colorado II*, 533 U.S. at 456 n.17 (expressly acknowledging that its holding does not reach issue advocacy); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 494–96 (7th Cir. 2012) (coordination provision limited to expenditures that are made "on behalf of or in opposition to a candidate");[29] *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 144 (7th Cir. 2011) (*Barland I*) (addressing "spending for speech advocating the election of candidates for Wisconsin state and local public office"); *Republican Party of N.M. v. King*, 741 F.3d 1089, 1091 (10th Cir. 2013) (controversy involved "two entities organized to engage in express advocacy").

Wisconsin Coalition for Voter Participation, Inc. v. State Elections Board, 605 N.W.2d 654, 680, 684 n.9 (Wis. Ct. App. 1999) (*WCVP*), is the only excep-

[29] *Madigan* rebuffed a challenge based on *WRTL's* distinction between issue and express advocacy on the basis that the statute at issue "is limited by language nearly identical to that used in *Wisconsin Right to Life* to define the functional equivalent of express advocacy." 697 F.3d at 485. By contrast, Defendants here seek to extend Wisconsin law's prohibitions to reach issue advocacy.

tion. That case interprets Wisconsin's "political purposes" limitation to turn not on the distinction between issue and express advocacy but on the kind of intent- and circumstances-based inquiry that *WRTL* held to violate the First Amendment. *See* 551 U.S. at 468–69.[30] That may explain why *WCVP* hasn't been cited in a reported decision in over a decade.

Restrictions on Issue Advocacy Fail Closely Drawn Scrutiny. The result is the same under *Buckley's* "closely drawn" scrutiny due to the vast overbreadth and chilling effects attendant to restricting speech on the issues coordinated with a candidate or elected official.

Contribution limits (if that is how restrictions on coordinated issue advocacy are to be viewed) may be upheld where the government demonstrates that they are "closely drawn" to match the government's interest in preventing *quid-pro-quo* corruption and its appearance and "to avoid unnecessary abridgment of associational freedoms." *Buckley*, 424 U.S. at 25. *See also Randall v. Sorrell*, 548 U.S. 230, 253–62 (2006) (Breyer, J.) (striking down contribution limit that "disproportionately burdens numerous First Amendment interests" and so was "not narrowly tailored"). Anything less fails to satisfy this "rigorous standard of review." 424 U.S. at 29.

[30] Not to mention that *Buckley* (1976) adopted a limiting construction of basically the very same language to avoid vagueness and overbreadth concerns. *Compare* 424 U.S. at 77–80 (interpreting provision concerning expenditures made "for the purpose of…influencing" the nomination or election of candidates for federal office) *with* Wis. Stat. § 11.01(16) (defining "political purposes" as actions "done for the purpose of influencing the election or nomination for election of any individual to state or local office.…").

Treating issue advocacy as a campaign contribution and subjecting it to contribution limits is not closely drawn because it sweeps up too much core speech and association, thereby disproportionately burdening First Amendment rights. "Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest." *Buckley*, 424 U.S. at 42. And candidates, especially incumbents, are situated at the center of public-policy debates, taking actions through the political process that literally become public policy. Their participation in the policy debates, coalition-building, and public persuasion necessary to advance their views is all subject to the First Amendment's strongest protections. *Id.* at 48. Likewise, so is the public's right to advance public-policy objectives through the political process, including through collaboration with candidates, especially incumbents, in undertaking those same activities. *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975); *Bond v. Floyd*, 385 U.S. 116, 135–36 (1966). These things are the life-blood of representative democracy.

Consider the example of a state senator who introduces a bill to appropriate additional cancer-research funding for the state university. In the face of objections by fiscal conservatives, he works with cancer-patient advocacy organizations to promote the legislation and put pressure on its critics, coordinating the timing, content, and targets of advertisements to ensure their effectiveness. One ad concludes: "Why does Representative Smith oppose re-

search to find a cure? Call him today and tell him that research matters to Wisconsin families." *Compare WRTL*, 551 U.S. at 458–59 (reciting scripts for typical issue advertisements). Equating this issue advocacy with contributions "is to ignore [its] value as political speech." *Id.* at 479. And that's so even if "Representative Smith" is mounting a challenge for the senator's seat. *Id.* at 468 (rejecting "the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another").

The abridgment of associational freedoms is even greater than this example alone suggests, due to the inevitable chilling effects of regulation and enforcement. Campaign-finance limitations are enforced by regulatory agencies and prosecutors wielding civil and criminal penalties. Particularly with so uncertain a concept as "coordination"—the metes and bounds of which are far from clear—the risk of enforcement actions, penalties, and criminal sanction will inevitably chill protected speech and association. Identical concerns led the Supreme Court to invalidate a state ban on "unreasonable" fundraising fees charged to charities:

> [T]he fundraiser must bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder….This scheme must necessarily chill speech in direct contravention of the First Amendment's dictates….This chill and uncertainty might well drive professional fundraisers out of North Carolina, or at least encourage them to cease engaging in certain types of fundraising (such as solicitations combined with the advocacy and dissemination of information) or representing certain charities (primarily small or unpopular ones), all of which will ultimately "reduc[e] the quantity of expression." *Buckley v. Valeo*, 424 U.S. at 19. Whether one views this as a restriction of the charities' ability to speak, or a restriction of the professional fundraisers'

> ability to speak, the restriction is undoubtedly one on speech, and cannot be countenanced here.

Riley v. Nat'l Fed. of the Blind of N.C., Inc., 487 U.S. 781, 794 (1988) (citations omitted). In the same fashion, restricting issue advocacy merely because it is coordinated with a candidate for office also "must necessarily chill speech" and reduce the quantity of expression, and therefore fails narrow tailoring.[31] *See also Clifton*, 114 F.3d at 1314 & n.3; *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 88–89 (D.D.C. 1999).

This substantial abridgment of associational freedoms is not justified by the governmental interest in preventing *quid-pro-quo* corruption. Speech on the issues is not as valuable to a candidate as contributions of cash, which he can put to any use. Issue advocacy, by contrast, may not singularly reflect the candidate's priorities or preferred messaging, because issue-based organizations have their own priorities and beliefs that are reflected in their speech. For example, while a candidate's priority may be to criticize his opponent for cutting spending on women's health services, an anti-tax group would not carry that message in its advertisements. Unlike a hidden contribution or simply paying the candidate's bills, issue advocacy is carried out in the light of day—the very point is to educate and persuade through public communications. And government has at its disposal narrower, more targeted means to address the risk of *quid-pro-quo* corruption, including regulation of coordinated

[31] Plaintiffs are aware of no narrower approach to restriction of issue advocacy that would comport with the rejection of intent- and effect-based tests. *See Riley*, 487 U.S. at 794; *WRTL*, 551 U.S. at 467–69 (explaining that such standards "unquestionably chill a substantial amount of political speech").

express advocacy or its functional equivalent, disclosure requirements,[32] and regulation of "earmarking" for political purposes.[33]

Finally, the regulation of issue advocacy coordinated with a candidate is precisely the kind of "prophylaxis-upon-prophylaxis approach" rejected in *WRTL* and which requires particular diligence in scrutinizing fit. 551 U.S. at 479. After all, contribution limits themselves are prophylactic, "because few if any contributions to candidates will involve *quid pro quo* arrangements." *Citizens United*, 558 U.S. at 357. Restriction of coordinated expenditures is another prophylaxis, to prevent circumvention of contribution limits. *Buckley*, 424 U.S. at 46–47. Extending that restriction to reach issue advocacy adds yet another prophylactic layer, on the view that what appears to be speech on the issues may be an attempt to circumvent regulation of unequivocally campaign-related speech. *WRTL*, 551 U.S. at 478–79. The object of all this regulation is not money laundering or the like, but core First Amendment speech and association. "Enough is enough." *Id.* at 478.

b. Defendants' Coordination Theory Is Incompatible with Wisconsin Law

Even if issue advocacy could be restricted consistent with the First Amendment, Wisconsin's campaign-finance law cannot be read to do so without rendering it facially unconstitutional.

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[32] For example, like those that may apply to lobbying contacts with legislators. *United States v. Harriss*, 347 U.S. 612 (1954).

[33] *See, e.g., Colorado II*, 533 U.S. at 462–63.

In certain respects, Wisconsin's system of campaign-finance regulation is identical to FECA. Wisconsin law limits campaign contributions and requires disclosure of contributions. Wis. Stat. §§ 11.26, 11.06(1). To prevent circumvention of contribution limits through coordination, it regards "disbursement[s]" that are "made or incurred with the authorization, direction or control of or otherwise by prearrangement with the candidate or the candidate's agent" as contributions. Wis. Stat. § 11.06(4)(d). And like FECA, it limits regulation to disbursements "made for political purposes," § 11.01(7)(a)(1), which it defines as actions "done for the purpose of influencing the election or nomination for election of any individual to state or local office…." § 11.01(16). This definitional provision is incorporated throughout Wisconsin's campaign-finance code.

According to Defendants, whether an expenditure is "for political purposes" turns on whether the speaker intended to influence an election or its speech had that effect. *See, e.g.*, R.53 Ex. V at 14 ("There is ample additional evidence providing a reasonable belief that the conduct of coordination…was done for the purpose of influencing the recall from or retention in office of the Governor and State Senators, or the elections, during the 2011 and 2012 recall elections. This is a political purpose."); R.1 Ex. C at 4 (citing *WCVP*, 605 N.W.2d at 679–80); MTD Br. 38–39 (arguing that *WCVP's* intent-based approach "remains controlling law in Wisconsin"); MTD Br. 72–73.

But *Buckley* construed language in FECA identical to Wisconsin's "political purposes" provision as referring only to express advocacy, so as to limit

the statute's reach to "spending that is unambiguously related to the campaign of a particular federal candidate." 424 U.S. at 80. This limiting construction was necessary, the Court held, to avoid constitutional vagueness and overbreadth concerns. *Id*. at 76–80.

Subsequently, *WRTL* rejected precisely the same intent- and effects-based standard Defendants urge here, finding it to be incompatible with the First Amendment. The Court explained, "*Buckley* had already rejected an intent-and-effect test for distinguishing between discussions of issues and candidates," on the basis that "analyzing the question in terms 'of intent and of effect' would afford 'no security for free discussion.'" 551 U.S. at 467 (quoting *Buckley*, 424 U.S. at 43). Specifically, "an intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of [the statute], on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue." *Id*. at 468. The Court also rejected an "electoral effects" test, reasoning that it would "typically lead to a burdensome, expert-driven inquiry" and "unquestionably chill a substantial amount of political speech." *Id*. at 469. Instead, the Court held, "the proper standard…*must be objective*, focusing on the substance of the communication rather than amorphous considerations of intent and effect." *Id*. at 469 (emphasis added). The First Amendment, it concluded, permits regulation only of express advo-

cacy and its "functional equivalent," as determined by its content and nothing else.[34] *Id.* at 469–70.

Accordingly, Defendants' "intents-and-effects" interpretation of Wisconsin's "political purpose" limitation as reaching speech that is neither express advocacy nor its functional equivalent is incompatible with *WRTL*. If Defendants chose to rely on pre-*WRTL* case law to support their investigation, they did so at their peril and to the extreme detriment of their victims.

That this case concerns alleged "coordination" of issue advocacy is irrelevant, for four reasons.

First, the same "political purposes" definition applies to "disbursements" (i.e., expenditures) that are not coordinated in any respect with a candidate or campaign committee. *See* Wis. Stat. § 11.01(7) (defining "disbursement"); §§ 11.05, 11.06 (imposing onerous registration and reporting requirements on any individual or group making disbursements); § 11.61(1)(a) (imposing criminal penalties for violation of those registration and reporting requirements). These disbursements cannot be restricted under *Buckley*, *WRTL*, and *Citizens United*, so even if there were some constitutional distinction between coordinated and uncoordinated issue advocacy, it would still be necessary to read "political purposes" as limited to express advocacy and its functional equivalent.

[34] "[A]n ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U.S. at 469–70.

Second, "political purposes" triggers the application of Wisconsin's unusual campaign "subcommittee" status. Wisconsin law limits each candidate for office to a single campaign committee and further provides that any other "committee"—that is, a group that accepts contributions or makes expenditures for "political purposes"—that coordinates its actions with the candidate or his committee becomes a "subcommittee" of that campaign committee. Wis. Stat. § 11.10(4). The consequences of such a designation are severe, as a subcommittee is barred from:

- Making independent expenditures without the permission of the campaign committee's treasurer, Wis. Stat. § 11.16(1)(a);
- Using preexisting funds for any purpose, § 11.05(6);
- Accepting corporate contributions for independent expenditures, § 11.38;
- Accepting individual contributions for independent expenditures above the base limits applicable to the candidate's committee, § 11.26(1); and
- Contributing to other candidates' committees to which the candidate's committee has already contributed the base amount, § 11.26(2).

In Defendants' repeatedly expressed view, all of these consequences follow any coordination of fundraising or expenditures, including issue advocacy, with a candidate or his committee. *E.g.*, R.53 Ex. V at 12 ("By operation of law, any person coordinating with or acting at the request or suggestion of

the Governor Scott Walker or his committee, FOSW, is deemed to be a subcommittee of FOSW."). Thus, if a cancer charity or the Boy Scouts coordinates a charitable fundraiser with a candidate for office, that organization becomes a campaign subcommittee, becomes subject to the requirements and limitations of Wisconsin campaign-finance law, faces civil and criminal penalties if it has accepted corporate donations or exceeded contribution limits, and is subject to state regulation of its speech and associational activities going forward *ad infinitum*.[35]

For an issue-advocacy group, designation as a subcommittee is the free-speech death penalty. And that is obviously unconstitutional; the government has no compelling interest, for example, in limiting independent expenditures or barring corporate speech expenditures. *E.g., Buckley*, 424 U.S. at 16–18; *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

Third, even if one ignores other provisions of Wisconsin law and focuses solely on coordinated issue advocacy, Defendants' intent- and effects-based test is still subject to all the vagueness objections identified in *Buckley* and *WRTL*. A state that wishes to regulate coordinated issue advocacy—assuming that it could possibly do so—would still need to draw a clearer line than that which Defendants propose, lest protected speech and association be chilled by uncertainty and litigation risk. 551 U.S. at 468–69.

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[35] In addition, under Defendants' view of the law, the organization's expenditures for that event would presumably be considered in-kind contributions to the candidate, immediately subjecting the organization and its officers to potential criminal penalties for exceeding contribution limits, taking corporate contributions, and failing to file disclosures. *See* R.110 Ex. A; R.1 Ex. C at 6.

Fourth, Defendants' argument that Plaintiffs could "coordinate" with a candidate regarding issue advocacy fails as a matter of Wisconsin law because it is circular. Wisconsin law does not define "coordination." Instead, under Wisconsin law, "coordination" with a candidate is based on an interpretation of the term "contribution" as something "of value…made for political purposes," using the same "political purposes" gateway as most other Wisconsin law provisions. Wis. Stat. § 11.01(6)(a). And "political purposes" is defined in Section 11.01(16) as something done "for the purpose of influencing the election…of any individual." Thus, under Wisconsin's statutory approach, whether conduct counts as unlawful "coordination" turns on whether the conduct was done for "political purposes," which (in Defendant's view) depends on whether the conduct was coordinated. *See* MTD Br. 38–39. This is yet another way that Defendants' theory is simply incompatible with Wisconsin law.

In sum, whether or not a state could regulate coordinated issue advocacy under some other statutory scheme, *this statutory scheme* must be subject to the same limiting construction applied in *Buckley* and *WRTL*, excluding issue advocacy from its reach.[36]

[36] In fact, the Court held as much in *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 832 & n.20 (*Barland II*) (noting structural role of "political purposes" trigger); *id.* at 834 (narrowing construction applies "when Chapter 11 is applied beyond candidates, their committees, and political parties"). Plaintiffs believe that *Barland II* governs here, but do not principally rely upon it because the law on these points was clearly established no later than 2007, when the Supreme Court decided *WRTL*. Notably, GAB conceded that point in *Barland II*. *Id*. at 833.

c. Defendants Identify No Expenditure by Plaintiffs Relating to Walker's Recall Election, Much Less One Coordinated with Walker

Because "actual or apparent quid pro quo corruption is the *only* interest the Supreme Court has recognized as sufficient to justify campaign-finance restrictions," *Barland I*, 664 F.3d at 153, a coordinated expenditure may be treated as an in-kind contribution to a candidate only if, at the absolute least, it is undertaken for the purpose of influencing votes in *that candidate's* race. *See Buckley*, 424 U.S. at 46 (noting that coordination may be regulated to prevent "the simple expedient of paying directly for media advertisements or for other portions of *the candidate's* campaign activities") (emphasis added); *McConnell*, 540 U.S. at 144 (upholding soft-money ban on the basis that "contributions to a federal candidate's party *in aid of that candidate's campaign* threaten to create—no less than would a direct contribution to the candidate—a sense of obligation") (emphasis added). On that basis, this Court in *Madigan* adopted a limiting construction of Illinois' coordinated-expenditure statute that limited its reach to coordination "*with the candidate or entity on whose behalf* the electioneering communication is supposedly made." 697 F.3d at 496–97 (emphasis added). Even Defendants' leading authority on coordination, *WCVP*, involved alleged coordination with a candidate to send out postcards regarding *that candidate's election*. 605 N.W.2d at 675.

This point is sufficiently obvious that Plaintiffs are unaware of any reported decision involving alleged coordination between a candidate and a

third party on expenditures not undertaken to influence voting in *that candidate's* race.

Yet in over 100 pages of briefing and with most of Plaintiffs' advocacy available to the public on YouTube, Defendants do not identify any broadcast advertisements by the Club that could have had anything to do—however tenuous—with Walker's recall election. The reason is simple: there are none. *See* R.120-6 Ex. H (table prepared by Plaintiffs addressing Defendants' affidavits); R.7 Ex. B ¶ 33 (testifying that the Club did not engage in any 2012 advertising referencing Governor Walker). Indeed, to the extent they were related to elections at all, the Club's communications expenditures focused on issues in the senate recall elections, not Walker's. *Id.* ¶ 33.

Faced with this fact, Defendants suggest that issue advocacy by Wisconsin Manufacturers & Commerce ("WMC") in 2012 could constitute illegal coordination between the Club for Growth and Friends of Scott Walker. PI Br. 50. Defendants' alleged evidence of coordination, however, is limited to transfers by the Club (which occurred in April and May 2012) and ad purchases by WMC; they fail to suggest that either the Club or WMC coordinated with Walker—or even with each other. *See* PI Br. 50. Defendants' affidavits do no better, citing a December 2011 (i.e., before commencement of the Walker special-election campaign) phone conference involving 31 participants, including a single WMC representative and *no representative of the Club*, and a single follow-up email, also involving no Club representative. R.110 Ex.

F ¶ 41 & Ex. 19. And the Club was far from WMC's only donor. *See id.* ¶¶ 42–43 (WMC spent roughly $1 million more than the Club donated).

Lacking any evidence of improperly coordinated expenditures, Defendants stuffed the record with evidence of alleged communications between the Club and Governor Walker and simply assert that each contact demonstrates "coordination." But the Supreme Court has held that communications on things like "campaign strategy" and policy positions are not "coordination" for constitutional purposes, even when they are a prelude to election-related expenditures. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 614 (1996) (Breyer, J.) (*Colorado I*). In effect, Defendants' labeling of these communications as "coordination" is simply their effort to redefine the term "coordination" to regulate core associational rights of candidates and citizens. But "[a]n agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." *Id.* at 621–22. Were the law otherwise, potentially any communication made in concert with a candidate for office—from a candidate's speech at a Boy Scout dinner to a television ad supporting a bill for cancer-research funding—could be regulated as an in-kind contribution and be subject to criminal penalties.

In short, after years of investigation, Defendants have been unable to identify a single advertisement by the Club so much as referencing Governor Walker when he was a candidate. Under well-established law, Defendants could have had no reason at all to suspect that the Club was engaged in any impropriety.

d. Defendants' Attempt To Regulate Solicitations To Support a Social-Welfare Group Is Unconstitutional and Not Even Arguably Supported by Wisconsin Law

Defendants argued below, and suggest before this Court, that their investigation was necessary to determine the "nature and extent" of alleged solicitations by Governor Walker and his campaign committee for "contributions to organizations regulated by [26 U.S.C. § 501(c)(4)]." R.114 at 3 (quotation marks omitted). According to Defendants, "a candidate is prevented by Wisconsin law from raising funds for an 'independent' organization…." R.109 at 3. *See also id.* at 9 ("[T]he GAB and prosecutors could reasonable [sic] surmise that Governor Walker was being asked to raise large sums and directing the donations to a supposedly 'independent' group."). Like Defendants' "subcommittee" theory, this pretextual theory cannot be reconciled with the First Amendment.

First, while Defendants suggest (and argued vigorously in state court and below, R.114 at 3; R.109 at 3, 7, 9; R.53 Ex. F at 4; R.110 Ex. E at 12–14; R.110 Ex. C ¶ 22) that coordinated fundraising for the Club violates Wisconsin law, PI Br. 11–13, they fail to identify a single provision of Wisconsin law that would actually be violated. A solicitation ban is a serious matter that cannot be casually inferred. "[A] limit on the solicitation of otherwise permissible [campaign] contributions prohibits exactly the kind of expressive activity that lies at the First Amendment's 'core.'" *Green Party of Conn. v. Garfield*, 616 F.3d 189, 207 (2d Cir. 2010). *See also Riley*, 487 U.S. at 788–89 (solicitation of money for charitable organization is core First Amendment-protected activi-

ty). It is subject to strict scrutiny. *Id*.; *Green Party*, 616 F.3d at 208. The absence of such a ban in Wisconsin law is not an inadvertent omission, but reflects a deliberate policy choice guided by constitutional imperative.[37]

Second, whatever legitimate interest the government may have in regulating coordinated *expenditures*, it has no interest at all in regulating *contributions* other than to candidates and parties, because such contributions present no direct risk of *quid-pro-quo* corruption. That was the point of *Barland I*, 664 F.3d 139, where this Court struck down Wisconsin's statute limiting aggregate annual contributions to political committees. "Because *Citizens United* held 'as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption,' it followed inexorably that 'contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption.'" *Id*. at 154 (quoting *SpeechNow.org v. FEC*, 599 F.3d 686, 694 (D.C. Cir. 2010)). As regards contributions to such third parties, "there is no corrupting 'quid' for which a candidate might in exchange offer a corrupt 'quo'" and so there is *no* valid government interest in regulation. 664 F.3d at 154 (quoting *SpeechNow*, 599 F.3d at 694–95). "As such, after *Citizens United* there is no valid governmental interest suf-

[37] Wisconsin law does regulate candidate solicitations in other contexts. For example, Wis. Stat. § 11.36(4) bars solicitations for campaign contributions in state-owned facilities. Wis. Stat. § 11.16(5) regulates how candidates and their campaigns may engage in joint solicitations for campaign contributions and distribute the funds so raised. And Wisconsin law restricts fundraising on behalf of independent groups like the Club by a single class of candidates: those seeking judicial office. Wis. Sup. Ct. R. 60.05(3)(c)(2)(a). No analogous restriction applies to any other candidates for elected office in Wisconsin, including those running to be members of the Wisconsin Assembly, state senators, or governor.

ficient to justify imposing limits on fundraising by independent-expenditure organizations." *Id.* at 154.

In sum, Defendants' theory of "coordinated fundraising" violates the First Amendment and finds no support in Wisconsin law. It was a pretext adopted solely for the purpose of targeting Wisconsin conservatives.

2. Defendants' Investigation Was Retaliation Motivated by Plaintiffs' Exercise of Their First Amendment Rights

The facts show that Defendants' actions are motivated by Plaintiffs' issue advocacy, their associational activities, and their choice to conduct their advocacy outside Defendants' favored system of campaign-finance regulation.

First, Defendants' choice to target and harass nearly the entire Wisconsin conservative movement that publicly supported Act 10 evidences their retaliatory purpose. The undisputed evidence shows, R.117 Ex. E; R.7 Ex. B ¶ 43, and the district court found, that Defendants have targeted "all or nearly all right-of-center groups and individuals in Wisconsin who engaged in issue advocacy from 2010 to the present." R.181 at 7–8. In the same way that sheer quantity of prosecutions may demonstrate bad faith, *e.g.*, *Krahm v. Graham*, 461 F.2d 703, 707 (9th Cir. 1972), so does the sheer number of conservative organizations and activists that Defendants have chosen to target.

Second, the timing and course of the John Doe investigation demonstrate that conservatives' First Amendment-protected activities were "a motivating factor" in Defendants' decision to target Plaintiffs and other conservative activists. *See Thayer*, 705 F.3d at 251. The initial John Doe proceeding

revived a year-old claim that touched on Walker's County Executive office in 2010, as he campaigned for governor. That investigation ostensibly began with a focus on missing charitable funds, despite that the funds' disposition was already known to prosecutors, without any need for a John Doe investigation. R.7 Ex. C ¶ 7. It turned within days to focus on Walker, his associates, and his campaign donors, in an effort the district court found to be "a long-running investigation of all things Walker-related." R.181 at 4. Defendants timed raids to coincide with political events (including raiding Walker's office the day before the 2010 gubernatorial election), R.7 Ex. A. Ex. 21 at 6; R.7 Ex. C ¶¶ 11–12, 15–20, and leaked details of the probe to the *Milwaukee Journal Sentinel*, R.1 ¶¶ 157–72; *see* R.7 Ex. A Ex. 23. Their charging documents disclosed irrelevant information solely intended to tie Walker and his top aides to the charges. R.7 Ex. C ¶¶ 16–19. This demonstrates that Defendants' primary motive, from the very beginning, has been political. R.7 Ex. B ¶¶ 59–60.

The current John Doe proceeding was launched right after Governor Walker's recall victory, with the intention of expanding on the scope of the previous proceeding, R.117 Ex. C Ex. 1; R.117 Ex. B at 10, to reach supporters of Walker's agenda outside of Milwaukee County. *E.g.*, R.117 Exs. C, E. As the district court found, the investigation has targeted all or nearly all conservative advocacy groups, raided homes of "targets across the state," seized documents and records, and threatened targets with contempt for speaking out. R.181 at 7–8. At each step—from raiding Walker's office the day before a

gubernatorial election to taking aim at conservative activists in the aftermath of Walker's successful recall election, which cemented in place Act 10's reforms—the timing of Defendants' actions has also reflected a retaliatory motive. *Compare Lewellen v. Raff*, 843 F.2d 1103, 1111–12 (8th Cir. 1988) (scheduling of political candidate's trial immediately prior to election demonstrated "prosecution was motivated by the prosecutors' desire to retaliate for and discourage [his] exercise of his first amendment rights"); *Peele v. Burch*, 722 F.3d 956, 960 (7th Cir. 2013) (scheduling of prisoner's transfer so soon after his protected conduct suggested retaliatory motive).

Third, Defendants' actions are plainly "aimed at putting the plaintiffs out of business for exercising their first amendment rights." *Collins*, 807 F.2d at 101. *See also Krahm*, 461 F.2d at 707. As the district court found, the investigation "devastated" and "dramatically impaired" Plaintiffs' abilities to operate, threatened allies nationwide with similar treatment for associating with them, and "frustrated the ability of [the Club] and other right-leaning organizations to participate in the 2014 legislative session and election cycle." R.181 at 9–10. These are not unexpected side-effects of Defendants' conduct; they are, by all indications, the very point. *See 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….").

Fourth, as shown above, the John Doe proceeding has zero likelihood of resulting in a valid criminal conviction on Defendants' incorrect legal theo-

ry. This fact, particularly when combined with Defendants' pointed targeting of conservatives, confirms that their actual purpose is to retaliate against and deter conservative political activism. *See Collins*, 807 F.2d at 101; *Wilson v. Thompson*, 593 F.2d 1375, 1387 n.22 (5th Cir. 1979). On this basis, the district court found that "the defendants seek to criminalize the plaintiffs' speech," R.181 at 1, that Defendants are impermissibly "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," R.181 at 12, and that Defendants "target[ed] the plaintiffs for engaging in various advocacy that is beyond the state's regulatory reach," R.181 at 21. *See also Bantam Books*, 372 U.S. at 69–70.

Fifth, Defendants' retaliatory purpose is confirmed by their decision to ignore reports of materially identical alleged "coordination" by left-leaning groups, including labor unions, that opposed the Bill. R.7 Ex. A Exs. 39 (discussing the outside groups "coordinating" the Walker recall effort), 41 (advertising an event "in coordination" with outside groups and official recall committee), 42 (union official admitting on the record to coordinating activities with Milwaukee Mayor), 44 (advertisement by "independent" group featuring candidate who clearly coordinated the effort), 45 (letter to Defendant Chisholm alerting him to illegal advertising by Milwaukee union), 47 (reporting that Defendants' investigation is "looking only at conservative groups and not labor unions or other who backed Democrats in the recall elections"). *See,*

e.g., *Lewellen*, 843 F.2d at 1111 (disparate treatment demonstrates retaliation). Defendants have also declined to probe millions of dollars of political expenditures by left-leaning organizations and labor unions that, regardless of any "coordination," would be regulated by Wisconsin law under Defendants' interpretation of Wis. Stat. § 11.01(16) as turning on the speakers' intent.

Defendants argued below that some of these events occurred outside Milwaukee and therefore were not their responsibility, ignoring that they had little regard for their jurisdictional limitations in targeting Plaintiffs and other conservative activists across the state. *See, e.g.*, R.110 Ex. C; R.117 Ex. E. Defendants also argued that their impartiality is demonstrated by a handful of instances where they did investigate or prosecute Democratic Party or left-leaning individuals, but these instances are not remotely comparable to a state-wide campaign to shut down one side of the political spectrum. And the difference in tactics selected for the various investigations shows just how different these efforts were. *Compare* R.105 Exs. at 19–23 (conducting an "investigation" into a Democratic candidate by calling her and asking for information, relying on her representation that all information had been disclosed, and leaving it at that), *with* R.110 Exs. C, D; R.117 Exs. C, D, E, F (warrants, subpoenas, home raids, etc.); *see also* R.7 Ex. C ¶¶ 6–7.

The facts of this case are in many respects similar to those that the Supreme Court found to demonstrate bad faith in *Dombrowski v. Pfister*, 380 U.S. 479 (1965). The Court acted to enjoin state officials from prosecuting or threatening to prosecute a civil rights group and its leaders as part of "a plan

to employ arrests, seizures, and threats of prosecution under color of the statutes to harass appellants and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana." *Id.* at 482. These actions, the Court held, were undertaken specifically to impose a "chilling effect on free expression." *Id.* at 487. In particular, the state officials' actions were calculated to "frighten[] off potential members and contributors"; their "[s]eizures of documents and records have paralyzed operations and threatened exposure of the identity of adherents to a locally unpopular cause"; and "the continuing threat of prosecution portends further arrests and seizures, some of which may be upheld and all of which will cause the organization inconvenience or worse." *Id.* at 488–89.

Defendants here have embraced the same *modus operandi* for the same reason as did the state officials in *Dombrowski*: to chill political activism of which they disapprove. The result should therefore be the same.

3. Defendants' Retaliation Deprived Plaintiffs of Their First Amendment Rights

Defendants rightly do not contest that their conduct deprived Plaintiffs of their First Amendment rights. "Any deprivation under color of law that is likely to deter the exercise of free speech is actionable" if it is "an effective deterrent to the exercise of a fragile liberty," including "even something as trivial as making fun of an employee for bringing a birthday cake to the office," as well as "a campaign of petty harassment and even minor forms of retaliation, diminished responsibility, or false accusations." *Power*, 226 F.3d at 820. *See*

also Blankenship v. Manchin, 471 F.3d 523, 525 (4th Cir. 2006) (mere threat of increased government scrutiny satisfied this element). Defendants' targeting Plaintiffs for secret criminal investigation; seizing their documents through pre-dawn home raids; and demanding "more or less all" their records through kitchen-sink subpoenas unquestionably constitute a deprivation of First Amendment rights under this standard. R.181 at 7–9.

C. The Injunction Can Be Upheld as a Direct Challenge to Wisconsin Law

Even if this Court were to find that the district court erred in its determination that the Plaintiffs are likely to prevail on the merits of their First Amendment retaliation claim, it should nonetheless affirm the injunction on the ground that Defendants' interpretation of Wisconsin campaign-finance law is unconstitutional. That issue has a strong relationship to the injunction and has effectively been tried by the consent of the parties in the course of briefing this matter. Deciding that issue now would conserve judicial resources by avoiding remand in an area where the district court's views are readily ascertainable from its preliminary-injunction decision and would serve the public's interest in a timely adjudication of these issues.

First, the question of the constitutionality of Defendants' interpretation of Wisconsin law has been litigated below and in this appeal by implied consent, with both parties extensively briefing the substance of Wisconsin and First Amendment law. *See Torry v. Northrop Grumman Corp.*, 399 F.3d 876, 878–79 (7th Cir. 2005) (characterizing argument that judge could not rule on issue litigated by implied consent at summary-judgment stage as "frivolous");

Ryan v. Ill. Dep't of Children & Family Servs., 185 F.3d 751, 763 (7th Cir. 1999) (finding that, even before pretrial order officially added cause of action to litigate issue, the parties were "proceeding on that claim by implied consent"). Plaintiffs pleaded First Amendment retaliation and alleged that Defendants' theory of Wisconsin law was unconstitutional and incorrect, ¶¶ 95–107, Defendants countered with a full-throated defense of their interpretation, R.60 at 3–4, 19–21, 34–37; R.48 at 18–23; R.54 at 7–8; R.109 at 5–15; R.114 at 16–22, and the parties regularly updated the district court on the impact of new developments in the area, including the Supreme Court's decision in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), R.89; R90.

Second, there is a "relationship between" these questions and the causes of action in the Complaint. *See, e.g.*, *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994). It suffices that the "party moving for a preliminary injunction…establish a relationship between the injury claimed in the party's motion and the conduct asserted in the complaint." *Id.* Plaintiffs alleged that Defendants' legal theory is unconstitutional and incorrect, explained this issue in detail in their Complaint, and requested broad relief to enjoin the investigation on this basis. If the court determines that this aspect of Plaintiffs' retaliation claim is sufficient to enjoin the investigation (presumably because an investigation based on an invalid theory should stop), it should affirm the injunction.[38]

[38] On June 6, Plaintiffs moved the district court to add an official-capacity claim along these lines and to join several additional official-capacity defend-

D. The Equitable Factors Unanimously Support an Injunction To Protect Plaintiffs' Exercise of Their First Amendment Rights

Plaintiffs' Irreparable Harm. Circuit precedent holds that any ongoing deprivation of First Amendment rights constitutes *per se* irreparable harm. *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013); *Nat'l People's Action v. Village of Wilmette*, 914 F.2d 1008, 1013 (7th Cir. 1990). *See also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). This is especially true for victims of bad-faith abuse of law-enforcement proceedings. *Collins*, 807 F.2d at 98 n.5.

The Balance of the Equities. The balance of equities manifestly favors Plaintiffs, who have been deprived of their First and Fourteenth Amendment rights. Defendants "'do[] not have any legitimate interest in pursuing a bad faith prosecution brought to retaliate for or to deter the exercise of constitutionally protected rights.'" *Id.* (quoting *Wilson*, 593 F.2d at 1382–83).

In the unlikely event that Defendants prevail in this litigation, they could resume their investigation, subpoena witness testimony, and even pursue criminal charges. *See ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589–90 (7th Cir. 2012) (In First Amendment cases, "if the moving party establishes a likelihood of success on the merits, the balance of harms normally favors granting preliminary injunctive relief because the public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitu-

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ants. R.238. On July 28, the district court denied that motion, without prejudice, in light of this pending appeal. R.259.

tional."). By contrast, without an injunction, Plaintiffs' opportunity to exercise their First Amendment rights during this election season will be gone forever. The balance of equities therefore favors an immediate injunction. *Korte*, 735 F.3d at 666 (equities almost always tip in favor of victim suffering injury to First Amendment rights).

The Public Interest. Under Circuit law, "injunctions protecting First Amendment freedoms are always in the public interest." *Alvarez*, 679 F.3d at 590 (quoting *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006)). For political speech, in particular, the public interest is clear: "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United*, 558 U.S. at 339. Injunctive relief was required so that Plaintiffs could resume their participation in public debate to educate and hopefully persuade the citizens of Wisconsin of the rightness of their political views. The public interest demands that their right to do so be unimpeded.

E. The Preliminary Injunction Was Procedurally Proper

1. The District Court Was Not Required To Conduct an Evidentiary Hearing

Defendants complain that the district court abused its discretion by not conducting an evidentiary hearing, PI Br. 29–33, but a hearing is not required merely because a party requests one. *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir. 1997); *In re Aimster Copyright Litig.*, 334 F.3d 643, 654 (7th Cir. 2003). A hearing is required only if "genuine issues of material fact are created by the response to a motion for a preliminary injunction," and,

"as in any case in which a party seeks an evidentiary hearing, he must be able to persuade the court that…a hearing would be productive." *Ty, Inc.*, 132 F.3d at 1171. A district court's determination whether to hold a hearing is reviewed for abuse of discretion, *see AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 577 (7th Cir. 1999), and Defendants must show that "no reasonable person would agree [with] the trial court's" decision, *Marrocco v. Gen. Motors Corp.*, 966 F.2d 220, 223 (7th Cir.1992).

Because Defendants never attempted to show what issues of material fact required a hearing, the district court did not abuse its discretion in denying their request. Defendants' arguments to the contrary, being raised for the first time on appeal, are waived. *Pole v. Randolph*, 570 F.3d 922, 937 (7th Cir. 2009). They are also unconvincing in two respects.

First, Defendants still do not explain how a hearing might augment the already voluminous factual record before the district court. Defendants submitted roughly 1,300 pages of documents in opposition to Plaintiffs' preliminary-injunction motion, including affidavits from each defendant. In the parties' joint motion to the district court, Defendants stated only that they intended to "put Plaintiffs to their proof" and "call witnesses to rebut Plaintiffs' allegations." R.136 at 2; *see also* R.121 (letter from Defendants' counsel to the Court discusses preliminary injunction hearing but says nothing of intended testimony). They did not say who these witnesses were, what they would testify to, or which of Plaintiffs' own evidence they intended to rebut. Defendants' appellate papers do not answer these questions, either, instead accusing

the district court of wrongfully ignoring evidence that was already before it. PI Br. 30–31. That is not, however, grounds for a hearing. *See Ty, Inc.*, 132 F.3d at 1171 (no evidentiary hearing required where party's proposed live testimony would "presumably have duplicated her affidavit, which was already in evidence; at least [the party seeking to call her] has not indicated what her testimony would add to her affidavit"); *AlliedSignal, Inc.*, 183 F.3d at 577 (live testimony not required where party failed "to indicate what, if anything, a live witness would have added in light of the voluminous exhibits, affidavits, and depositions.…").

Second, Defendants fail to demonstrate why any new evidence would "so weaken [Plaintiffs'] case as to affect the judge's decision on whether to issue an injunction." *Ty, Inc.*, 132 F.3d at 1171; *see also Promatek Indus., Ltd. v. Equitrac Corp.*, 300 F.3d 808, 814 (7th Cir. 2002) (evidentiary hearing not required where further evidence from defendant could make no difference to the dispositive legal issue that resolved the motion).

The necessity of a hearing to resolve disputed factual issues is certainly not apparent from the record. PI Br. 30. Rather than identifying any fact that is in dispute and what they might have shown (i.e., their conflicting fact or facts) at a hearing, Defendants instead chose to list various "factual characterizations" with which they apparently disagree. In effect, while Defendants may have contested what legal conclusions could be drawn from the evidence cited in Plaintiffs' motion, they contested the admissibility, veracity, or credibility of virtually none of it. And unlike the cases cited by Defendants, PI Br.

29–33, this is not a case of warring testimony. *See Medeco Sec. Locks, Inc. v. Swiderek*, 680 F.2d 37, 37–38 (7th Cir. 1981); *Gen. Elec. Co. v. Am. Wholesale Co.*, 235 F.2d 606, 608 (7th Cir. 1956).

Defendants' references to conclusory declarations submitted by Defendants and other interested parties avowing their own good faith fall short of the mark. PI Br. 45–47. For any of these assertions to even approach raising a genuine issue of fact, the declarants would have needed to describe what they saw, heard, read, and did that formed the basis for this conclusion. *Compare First Commodity Traders, Inc. v. Heinhold Commodities, Inc.*, 766 F.2d 1007, 1011 (7th Cir. 1985) (affidavits conclusory where they simply stated party's allegations that fraud occurred without supporting them with specific facts); *Int'l Union of Operating Eng'rs v. Associated Gen. Contractors of Ill.*, 845 F.2d 704, 708 (7th Cir. 1988).

Rather than providing factual support for their defenses, the Milwaukee Defendants' declarations make self-serving statements to the effect that "[t]he John Doe proceeding…was brought in good faith and for the purpose of enforcing criminal laws" but provide no factual support for that conclusion. R.115 (two-page Chisholm declaration); *see also* R.116 (one-page Robles declaration); R.111 (three-page Landgraf declaration).

Defendant Landgraf's and the GAB public-information officer's affidavits did include some bare-bones information regarding investigations related to left-leaning individuals, arguing that these defendants took efforts at various times to investigate or prosecute them (such as individuals who falsified

information on recall petitions) and that examples of illegal activity cited by Plaintiffs were not Defendants' responsibility to investigate or were otherwise dealt with in an appropriate manner. *E.g.*, R.109 at 18–23. Defendants' claims that they could not investigate or prosecute those allegations were unsubstantiated, given uncontroverted evidence that they investigated and prosecuted individuals outside Milwaukee County, R.110 Exs. C, D; R.7 Ex. A Ex. 16, and their claim that the issues were dealt with appropriately begs the question whether the conservative community did not receive similar appropriate treatment based on Defendants' political animus.

Similarly, Nickel's and Schmitz's declarations provide a few factual details as to how they became involved in the investigation, but provide no factual basis for their conclusions that Nickel and Schmitz "have not been aware at any time of any retaliatory motive that underlies the commencement and continuation of any John Doe proceedings" and have not "observed, heard or read" anything that "would allow me to conclude that this investigation was motivated or based upon anything but reliable information…." R.117 ¶¶ 17–18 (Schmitz); R.103 ¶¶ 13–14 (Nickel). The same is true of the affidavits of the Iowa and Dane County District Attorneys, R.112 (1-page conclusory statement with no facts); R.113 (same), and that of GAB Executive Director Kevin Kennedy, R.104 ¶ 16.

Thus, these affidavits do not create issues of material fact. *Abuelyaman v. Ill. State Univ.*, 667 F.3d 800, 812 (7th Cir. 2011) (affidavit "largely bereft of specific allegations of discrimination" failed to create an issue of material

fact); *Hedberg v. Ind. Bell Tel. Co., Inc.*, 47 F.3d 928, 931 (7th Cir. 1995); *Int'l Union of Operating Eng'rs*, 845 F.2d at 708 (same); *First Commodity Traders*, 766 F.2d at 1011 (same).[39]

With no demonstration by Defendants that a genuine disputed issue required a hearing or why the hearing would be helpful, Defendants have forfeited the argument, and the district court did not err in deciding the injunction on the papers.

2. The District Court Made Sufficient Findings of Fact

The district court made appropriate "findings and conclusions that support its action." Fed. R. Civ. P. 52(a)(2). Findings are adequate "if they are sufficiently comprehensive to disclose the steps by which the trial court reached its ultimate conclusion on factual issues." *Bartsh v. Nw. Airlines, Inc.*, 831 F.2d 1297, 1304 (7th Cir. 1987). The two purposes of the rule are: "(1) to provide appellate courts with a clear understanding of the basis of the trial court's decision, and (2) to aid the trial court in considering and adjudicating the facts." *Id.*

Accordingly, the trial court "need not indulge in exegetics, or parse or declaim every fact and nuance and hypothesis," *id.* (quotation marks omitted), and "findings on every issue presented in a case are unnecessary if the trial court has found such essential facts as lay a basis for the decision," *In re Lemmons & Co., Inc.*, 742 F.2d 1064, 1070 (7th Cir. 1984). Although findings

[39] Precedent on this issue concerns conclusory affidavits submitted in opposition to summary-judgment motions, but because Defendants' entitlement to a hearing is predicated in part on demonstrating a "genuine and material" issue of fact, *Ty, Inc.*, 132 F.3d at 1171, these decisions apply here.

of fact for bench trials and interlocutory injunctions are judged under a similar standard, the burdens are quite different: "[g]iven [the] limited purpose, and given the haste that is often necessary…a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

The district court devoted nine pages to the facts of the case, stating its findings on all relevant factual issues. R.181 at 2–10. It addressed the nature of the Club and its issue advocacy; the circumstances leading up to the recall elections; the Defendants' investigation, from its earliest stages through its targeting of Plaintiffs; the individual Defendants' roles in the investigation, as well as GAB's involvement; the raids, subpoenas, and other conduct targeting Plaintiffs; Defendants' purported legal and factual theories; and the "devastat[ing]" impact of Defendants' conduct on Plaintiffs' participation in policy debates. These findings were grounded in the parties' evidentiary submissions, which the opinion cites throughout.

Based on these subsidiary findings, the Court concluded that "the defendants seek to criminalize the plaintiffs' speech under Wisconsin campaign finance laws," R.181 at 1, and that the investigation "has frustrated the ability of [the Club] and other right-leaning organizations to participate in the 2014 legislative session and election cycle," R.181 at 10. Applying the law, it concluded 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," R.181 at 12, and that they "target[ed] the plaintiffs for engaging in various advocacy that is beyond the state's regulatory reach." R.181 at 21. All this is more than enough to satisfy Rule 52(a). *Compare Bartsh*, 831 F.2d at 1304–05 (oral opinion consisting of eight transcribed pages that reached the important factual issues was sufficient despite that it "could have been more complete"); *compare Louis Vuitton, S.A. v. K-Econo Merch.*, 813 F.2d 133, 134 (7th Cir. 1987) (finding order inadequate where it stated, in its entirety, "Trial ends—Bench. Court enters judgment in favor of defendant and against plaintiff").

Defendants' complaints about the Court's findings fall flat. First, they contend in a footnote that the district court may not have complied with Rules 65 and 52(a) because "[i]t is unclear whether the district court's 'Background' discussion is intended to be the findings of fact." PI Br. 30 n.5. This argument is waived. *See Harmon v. Gordon*, 712 F.3d 1044, 1053 (7th Cir. 2013) ("a party can waive an argument by presenting it only in an undeveloped footnote"). It is also meritless. "An appellate court will regard a finding or conclusion for what it is, regardless of the label the trial court may have put on it." 9C Wright, et al., Federal Practice and Procedure § 2579 at 324 (3d ed. 2008). *See also Lemmons*, 742 F.2d at 1070 ("The labels of fact and law assigned by the trial court are not controlling."); *Lambert v. Buss*, 498 F.3d 446, 448 (7th Cir. 2007) (affirming and adopting district court's preliminary-injunction ruling including findings-of-fact section labeled "Background").

Second, Defendants cryptically argue that the court "summarily rejected" or "refused to consider" various arguments or evidence they presented. PI Br. 30–31. These arguments cite no authority, are poorly developed, are unclear as to their intended point, and are therefore waived. *United States v. Lanzotti*, 205 F.3d 951, 957 (7th Cir. 2000). They are also meritless. "[T]he district court was not required to make findings on every detail, was not required to discuss all of the evidence that supports each of the findings made, and was not required to respond individually to each evidentiary or factual contention made by the losing side." *Addamax Corp. v. Open Software Found., Inc.*, 152 F.3d 48, 55 (1st Cir. 1998). *See also Lemmons*, 742 F.2d at 1070 (district court not required to address "every issue presented in a case").

Third, Defendants complain that a few of the Court's factual descriptions "mirror[], sometimes *verbatim*, allegations in Plaintiffs' Complaint and Injunction Brief." PI Br. 30. "But a party cannot be penalized for the persuasive nature of his submissions." *Garcia v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 660 F.2d 1217, 1220 (7th Cir. 1981). In fact, it falls within a district court's discretion to incorporate "on a wholesale basis" entire sections of a party's papers, so long as the court "read the findings," "carefully considered them," and did not "blindly adopt[]" them. *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 759 (7th Cir. 2010); *Garcia*, 660 F.2d at 1220. The court here did not adopt Plaintiffs' papers on a wholesale basis; it cited and accepted evidence provided by Defendants, *see, e.g.*, R.181 at 6; and it unquestionably applied its independent, considered judgment.

Fourth, Defendants argue that the Court did not make findings as to their motive. PI Br. 35–53. Not so. The district court, based on its subsidiary findings of fact, concluded that "the defendants seek to criminalize the plaintiffs' speech under Wisconsin campaign finance laws," 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," that they "target[ed] the plaintiffs for engaging in various advocacy that is beyond the state's regulatory reach," and that they conducted an investigation "without a reasonable expectation of obtaining a valid conviction." R.181 at 1, 12, 21, 23 (quotation marks omitted). It is readily apparent from these findings that the court concluded that Defendants' investigation is inconsistent with any legitimate law-enforcement purpose, with the result of "frustrat[ing] the ability of [the Club] and other right-leaning organizations to participate in the 2014 legislative session and election cycle." R.181 at 10.

Those are unquestionably findings of bad faith, but even if the Court disagrees, a finding of bad faith may be inferred here, because good faith is the precise opposite of conducting an investigation with no legitimate law-enforcement purpose. *Beelman Truck Co. v. Chauffeurs, Teamsters, Warehousemen & Helpers, Local Union No. 525*, 33 F.3d 886, 892 & n.3 (7th Cir. 1994) ("no explicit finding was required" where "it may reasonably be inferred" that district court so found); *Switzer Bros., Inc. v. Locklin*, 297 F.2d 39, 45 (7th Cir. 1961) (district court's "failure to enter findings with respect [to issue raised by

appellants] is tantamount to findings adverse to appellants upon the evidence").

Defendants' claim that the district court failed to make findings related to bad faith relies on two statements from subsequent orders. PI Br. 43. One statement appears in the Court's ruling on Plaintiffs' motion to certify appeals as frivolous and concerns Defendant Schmitz's sovereign-immunity argument. R.200 at 3. In response to Defendant Schmitz's argument that Plaintiffs' Complaint "does not allege *any* facts describing why Mr. Schmitz has *any* reason to retaliate against the Plaintiffs," R.199 at 1, the Court explained that this was "not necessary for injunctive relief," R.200 at 3. In context, the statement clearly means that a "reason" to retaliate (such as political disagreement with Plaintiffs' views) is not necessary where it is self-evident that Schmitz "target[ed] the plaintiffs for engaging in vigorous advocacy that is beyond the state's regulatory reach." R.181 at 21 (cited at R.200 at 3). The second statement appeared in the court's order addressing motions to seal and maintain sealing, and the court commented that it did not rely on Defendants' affidavit evidence because the court's "legal analysis" made them "completely irrelevant"—that is, once it was established that coordinated issue advocacy is not illegal in Wisconsin, evidence of such advocacy provided no support for Defendants' arguments.

Finally, even if the Court were to find the district court's findings inadequate, the error would be harmless because "there is a sufficient record from which [the Court] can render a decision." *Bank of Am., N.A. v. Veluchamy*, 643

F.3d 185, 189 (7th Cir. 2011) (quotation marks omitted). As discussed above, *see supra* § II.B, the record shows that Plaintiffs are entitled to a preliminary injunction, making reversal on this basis inappropriate. *Auto. Fin. Corp. v. Smart Auto Ctr., Inc.*, 334 F.3d 685, 690 (7th Cir. 2003) (finding nonreversible error where district court did not explicitly make a finding that was indisputable from the record).

3. The Preliminary Injunction Complies with Rule 65(d)

Defendants contend that the injunction is not sufficiently specific and violates the Rule 65(d) prohibition against referring to other materials. Neither argument is meritorious.

The Injunction Is Sufficiently Specific. Rule 65 requires that an injunction "state its terms specifically" and "describe in reasonable detail…the act or acts restrained or required." "[A]ll that is required" to meet this standard "'is for the language of the injunction to be as specific as possible under the totality of the circumstances, such that a reasonable person could understand what conduct is proscribed.'" *United States v. Kaun*, 827 F.2d 1144, 1153 (7th Cir. 1987) (quoting *Medtronic, Inc. v. Benda*, 689 F.2d 645, 649 (7th Cir.1982)). "The appropriate scope of the injunction is best left to the district court's sound discretion, because the district court is in the best position to weigh these interests." *H-D Mich., LLC v. Hellenic Duty Free Shops S.A.*, 694 F.3d 827, 843 (7th Cir. 2012).

The district court's injunction requires Defendants to "cease all activities related to the investigation." R.181 at 25–26. Only Defendant Schmitz

moved to clarify the order, and his motion only raised two supposed ambiguities: (1) that "all activities" is vague insofar as it was not clear whether participation in state-court proceedings is enjoined, and (2) that "all activities" is vague as to whether unspecified contact with targets and their counsel is enjoined. R.227. The district court responded that: (1) participation in court proceedings is not prohibited unless the proceedings seek "to enforce compliance" with John Doe process; and (2) the injunction "does not prevent all discussions with subjects of the John Doe investigation," but "[i]n the absence of any further information regarding the content and import of 'discussions'…it is impossible for the Court to offer further clarification at this time." R.229 at 2–3. Defendants do not explain why the Court's clarification did not resolve the first issue and have "only [themselves] to blame" for providing insufficient information to the district court to provide guidance as to the second. *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1432 (7th Cir. 1985).

The arguments are also unpersuasive. Defendants contend that the phrase "the investigation" is ambiguous, but any reasonable person in their position would know that "investigation" refers to the effort begun in May 2010 first targeting Walker, his aides, and later conservatives across Wisconsin, such as Plaintiffs. *Compare* R.181 at 4–8 (preliminary-injunction order describing Defendants' activities over the past four years) *with H-D Michigan*, 694 F.3d at 843 (upholding injunction that failed to define a key term because the meaning was "sufficiently plain from the document").

The injunction could not be more specific because *only the Defendants know the full extent of activities involved in that campaign*, and the district court could not draft an order guessing about the details of these efforts without inviting abuse. *3M v. Pribyl*, 259 F.3d 587, 598 (7th Cir. 2001) (rejecting the argument that greater specificity was required for an injunction that needed to be broad to foreclose "loopholes"); *Scandia Down*, 772 F.2d at 1431–32 (Rule 65(d) "does not require the impossible" or mandate "a torrent of words when more words would not produce more enlightenment about what is forbidden" or where further detail would allow "more opportunities for evasion ('loopholes')."").

For example, if the court enjoined a specific John Doe proceeding, Defendants could evade the order by commencing new proceedings, as they have done in the past, or by continuing their efforts without a John Doe proceeding. *Compare Scandia Down*, 772 F.2d at 1431 (upholding broad injunction where "[a]ny effort to identify and prohibit" one avenue for targeting Plaintiffs "would have left another million or more subject to dispute."); *Russian Media Grp., LLC v. Cable Am., Inc.*, 598 F.3d 302, 307 (7th Cir. 2010); *cf. H-D Mich.*, 694 F.3d at 843 (upholding injunction that potentially enjoined legal conduct because defendant had demonstrated proclivity for unlawful conduct, warranting a broadly worded order).

Defendants also argue that the district court's order concerning destruction and return of property is ambiguous. The Court stayed that portion of the injunction, ECF No. 20, and the proper course of action is for the

Court to remand to allow the district court to enter a revised injunction addressing Defendants' duties as to seized property during the pendency of the litigation.

Defendants' Contention That the Injunction Violates Rule 65(d)(1)(C) Is Futile. Rule 65(d)(1)(C) provides that an injunction must "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." On that basis, Defendants question the district court's reissuance and incorporation by reference of the May 6 order into its May 8 order finding several of Defendants' appeals to be frivolous. PI Br. 60. But this Court's June 9 order suggests that this reissuance was unnecessary because "[t]he district court…*had* authority, notwithstanding the appeals, to an issue an injunction." ECF No. 43 at 2 (emphasis added). The May 6 order is therefore the operative order, and there is no basis for a Rule 65(d)(1)(C) objection because that order is self-contained.[40] *Dupuy v. Samuels*, 465 F.3d 757, 759 (7th Cir. 2006).

Regardless, any error by the district court would provide no basis for relief. In fact, Defendants' contention is "somewhat unusual" because it amounts to a request that the Court dismiss their preliminary-injunction appeals for want of jurisdiction. *Advent Elecs., Inc. v. Buckman*, 112 F.3d 267, 272

[40] Plaintiffs previously argued that Defendants had not appealed the correct preliminary-injunction order. ECF No. 39 at 16 n.5. Plaintiffs construe the Court's June 9 order confirming the district court's jurisdiction to issue the May 6 injunction as rejecting that argument and the Court's suggestion that Defendants' notices of appeal may be premature, ECF No. 43 ("to the extent [Defendants' notices] anticipated the injunction, they are effective under Fed. R. App. 4(a)(2)"), as a conditional statement that is not to the contrary.

(7th Cir. 1997). *See also Chi. & N. W. Transp. Co. v. Ry. Labor Execs' Ass'n*, 908 F.2d 144, 149 (7th Cir. 1990). If the Court agrees with Defendants on this point, then it should dismiss their preliminary-injunction appeal, *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 320 (7th Cir. 1995), as well as their *Younger* and *Burford* abstention appeals, the Court's jurisdiction over which is derivative of the preliminary-injunction appeal.

But that is unnecessary because, even if there were a Rule 65 violation, it would be "a technical, but not substantial, violation of the rule," which does not affect the validity of the injunction or the Court's jurisdiction. *Id. See also Dupuy*, 465 F.3d at 759.

As discussed above, the district court's injunction is clear, and the court's failure to copy and paste the May 6 order into the May 8 order did not make it any less clear. This case is controlled by *Chicago & North West Transportation*, 908 F.2d at 149–50, which found that a permanent injunction was effective, despite ostensibly omitting the requisite terms, because the parties understood that it made permanent a preliminary injunction entered earlier in the case and incorporated its terms. *Id.* "Since there was no possible uncertainty about the terms of the permanent injunction, the spirit of Rule 65(d) was honored" and the injunction could serve as the basis for a contempt motion. *Id.* at 150. *See also Advent Elecs.*, 112 F.3d at 273 (injunction effective despite technical Rule 65 violation where district court adopted magistrate's recommendation and order by reference).

Any doubt that Defendants knew they were bound by a valid injunction was put to rest by Defendant Schmitz's motion to clarify, *Original Great Am. Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 276 (7th Cir. 1992) (post-order motion indicated that party knew it was bound by injunction), and by Defendants' contentions on appeal that the terms are not sufficiently clear, *Advent Electronics*, 112 F.3d at 273 (contentions on appeal that order was not sufficiently clear showed that party knew it was bound by effective order). The district court's preliminary injunction therefore is effective and this Court has jurisdiction even if the May 8 order is the operative order.

Conclusion

The Court should affirm the district court's order denying Defendants' motions to dismiss and its order granting Plaintiffs' preliminary-injunction motion.

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Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed R. App. P. 32(a)(7)(B) because it contains 31,890 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) and Circuit Rule 32(b) because it has been prepared in a 12-point proportionally spaced font.

Dated: September 2, 2014

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served on September 2, 2014, upon the following counsel of record in this appeal by the U.S. Appeals Court's ECF system:

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