No. ____

IN THE

Supreme Court of the United States

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

Petitioners,

v.

JOHN T. CHISHOLM, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Anti-Injunction Act ("AIA") provides that federal courts "may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress…." 29 U.S.C. § 2283. *Mitchum v. Foster*, 407 U.S. 225 (1972), held that 42 U.S.C. § 1983 is such an express authorization, while recognizing that Section 1983 claims may still be subject to abstention under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). Six of the circuits have read *Mitchum* to establish a bright-line rule that the AIA itself does not itself bar Section 1983 claims that seek to enjoin state-court proceedings.

Petitioners brought suit under Section 1983 to challenge a district attorney's office's retaliatory campaign against political opponents, carried out in part through court-supervised investigatory proceedings. Notwithstanding *Mitchum*, the Seventh Circuit held that considerations of "equity, comity, and federalism" insufficient to support abstention nonetheless required dismissal of Petitioners' injunctive-relief claims pursuant to the AIA. It also refused to consider Petitioners' personal-capacity claim that they were subjected to an intrusive, harassing, and damaging criminal investigation in retaliation for their First Amendment-protected advocacy and association, holding instead that liability could lie only where officials seek to enforce state law that itself violates clearly established federal law.

The questions presented are:

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

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

PARTIES TO THE PROCEEDING

Petitioners Eric O'Keefe and the Wisconsin Club for Growth, Inc., were the appellees below. Respondents John Chisholm, Francis Schmitz, Bruce Landgraf, David Robles, and Dean Nickel, sued in their official and personal capacities, were the appellants. The Honorable Gregory Peterson, who is represented by the Wisconsin Department of Justice, was also a defendant in the district court in his official capacity only but did not move to dismiss any claims, did not contest Petitioners' entitlement to injunctive relief, and did not appeal the district court's entry of a preliminary injunction against him.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Wisconsin Club for Growth, Inc., is a non-profit corporation. It has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners are political activists who brought suit to enforce their First Amendment rights after they were targeted for abuse and intimidation by a rogue district attorney's office in its long-running investigation of Governor Scott Walker, his associates, and supporters of his policies. In retaliation for supporting Walker's controversial reforms limiting collective-bargaining rights for public-sector workers, conservative activists across the state were subjected to home raids, everything-but-the-kitchen-sink subpoenas demanding internal communications and membership information, and other intimidation—all as part of a secret investigation into conduct that a state court held isn't even regulated by Wisconsin law. The purpose of these actions was to silence Walker's supporters. It worked, to devastating effect.

The key historical facts regarding these events are not in dispute, and the district court found that Petitioners had "easily" stated a plausible claim for official retaliation. App. 29a. The court of appeals did not disagree. Yet it dismissed Petitioners' case in its entirety on grounds that do not withstand scrutiny under this Court's precedents and that conflict with the decisions of its sister circuits.

In the decision below, the Seventh Circuit contorted the holding of this Court's decision in *Mitchum v. Foster*, 407 U.S. 225 (1972), to authorize dismissal pursuant to the Anti-Injunction Act of Section 1983 claims that it thought raised issues of "equity, comi-

ty, and federalism" but do not implicate any abstention doctrine that this Court has ever recognized. App. 6a, 8a. In so doing, it departed from an unbroken line of authority in this Court and in the other circuits recognizing Section 1983 as an express statutory exception to the AIA. Certiorari is warranted to resolve those conflicts, to rebuke the lower court's transparent attempt to circumvent the limitations on *Younger* abstention that this Court recognized just last term in *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584 (2013), and to enforce the principle that federal courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given," *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821).

The court below also split with the position of five other circuits in holding that retaliatory investigation, unlike virtually all other kinds of official retaliation, can provide no basis for personal-capacity liability, even when it is calculated to, and actually does, chill the exercise of protected rights. This exception finds no support in law or logic, given the Court's recognition in prior cases that investigatory powers, just like any other kinds of official power, may be abused to stifle citizens' rights. *See, e.g.*, *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972). Certiorari is warranted to close this loophole by definitively answering in the affirmative the question of personal-capacity liability for bad-faith investigation that this Court expressly reserved in *Hartman v. Moore*, 547 U.S. 250, 256, 262 n.9 (2006).

The practical importance of these issues cannot be overstated. Reversal of the lower court decision is essential to ensure that citizens have recourse to federal court when state officials abuse investigatory powers to target them for abuse in retaliation for exercise of their federal right to speak out on controversial policy matters. The "freedom to oppose or challenge" government action without fear of official retribution is "a right by which we distinguish a free nation from a police state." *Hill v. Colorado*, 530 U.S. 703, 775 (2000) (Kennedy, J., dissenting) (alteration and quotation marks omitted). State officials should not be able to avoid federal-court scrutiny merely by cloaking retaliatory actions in the guise of investigation.

The Court should grant certiorari and reverse the decision of the court below.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 769 F.3d 936 and reproduced at App. 1a. The opinions of the United States District Court for the Eastern District of Wisconsin are available at 2014 WL 1379934 (denying motions to dismiss) and 19 F. Supp. 3d 861 (granting preliminary injunction) and reproduced at App. 17a and 37a.

JURISDICTION

The Seventh Circuit rendered its decision on September 24, 2014, App. 1a, and denied rehearing on

October 23, 2014, App. 66a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Anti-Injunction Act, 28 U.S.C. § 2283, provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Section 1983 of Title 42 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress….

STATEMENT OF THE CASE

A. Respondents' Years-Long Campaign of Retaliation

1. Petitioner Eric O'Keefe has a long history of political and policy activism, including co-founding the lead petitioner in *U.S. Term Limits, Inc. v.*

Thornton, 514 U.S. 779 (1995). A longtime resident of Wisconsin, he actively participates in that state's political debates as a director of the Wisconsin Club for Growth, a Section 501(c)(4) organization that advocates for free-market policies and fiscal responsibility at the state level. App. 38a. Petitioners have been prominent supporters of the policies of Wisconsin Governor Scott Walker, particularly Act 10, which limited collective-bargaining rights for most public employees. *Id.* Union-led opposition to its introduction and passage in 2011 threw Wisconsin into a state of turmoil, including months of street protests, boycotts of businesses, and an unprecedented series of recall elections. During this time, the Club took to the airwaves to educate the public on the benefits of Act 10's reforms. *See generally* App. 39a–40a.

2. O'Keefe and the Club were unaware, however, that they and virtually every other activist group publicly supporting Governor Walker's policies had become targets, due to their advocacy, of a long-running criminal investigation conducted by the Milwaukee County District Attorney's office. That "John Doe" investigation[1] commenced in 2010, soon after Walker, then serving as Milwaukee County Executive, became the frontrunner to be the Repub-

[1] Wisconsin's "John Doe" statute provides for criminal investigatory proceedings supervised by a judge, serving in a quasi-prosecutorial capacity, in lieu of a grand jury. Wis. Stat. § 968.26; *State ex rel. Newspapers, Inc. v. Circuit Court for Milwaukee Cnty.*, 221 N.W.2d 894, 896 (Wis. 1974).

lican candidate for governor. App. 40a–41a. Its stated purpose, at that time, was to investigate the "origin" of funds embezzled from a local charity; Walker's office, which donated the funds, had reported their apparent theft, and identified the likely thief, a year earlier.

At the beginning, those privy to the investigation raised questions about why a routine law-enforcement matter would require a secret John Doe proceeding, why that investigation would focus on the "origin" of the money, when the issue was who at the charity had taken it, and whether the investigation's stated purpose was a pretext for Walker's political opponents in the District Attorney's office to target Walker. Within days, the investigation raided Walker's County Executive office to seize documents and computers and absorbed a separate investigation (opened by the state's campaign regulator) into a straw-man contribution to Walker's gubernatorial campaign.

Over the next two years, the investigation's scope was officially expanded at least eighteen times to target Walker's staff, his campaign supporters, and finally his philosophical allies in the conservative movement. Although conducted in secret, the investigation became the leading political news story in the state, through leaks to local media that proved damaging to Walker, disclosures in other cases of Walker-related material obtained by the investigation, and raids timed to coincide with major political events like elections. Unbeknownst to O'Keefe and

the Club, investigators subpoenaed from third parties their financial and communications records (including email messages and phone logs), as well as those of the Club's allies and vendors and other conservative activists. No one suspected that the investigation had expanded to target Walker's policy supporters.

3. That changed on October 3, 2013, when armed officers raided the homes of conservative activists across Wisconsin, including the Club's associates and vendors. App. 43a–44a. Deputies, accompanied in several instances by representatives of the District Attorney's office, restrained their targets while they seized business papers, computers, phones, and other devices. Among the materials seized were many of the Club's records. App. 44a.

That same day, the Club's accountant and directors, including O'Keefe, were served with subpoenas demanding that they turn over Club records and communications from 2009 to the present. App. 44a–45a. This included donor information, correspondence regarding the Club's internal operations, and all financial materials. It wasn't just the Club: nearly all conservative advocacy groups in Wisconsin were also targets of the investigation and received identical subpoenas. App. 44a. (Subpoenas were also mailed to prominent out-of-state activists and vendors.) Each of the subpoenas warned that disclosing its contents or even the fact of its existence was grounds for contempt. *Id.*

The effect on O'Keefe and the Club's activism was immediate and devastating. App. 46a–47a. The raids and subpoenas put the Club's supporters, allies, and vendors on notice that it was a central target of a notorious John Doe investigation and intimidated them from working with it, lest they too become targets for retaliation. App. 47a. O'Keefe's allies and associates in his out-of-state activism got word of the investigation (some had received subpoenas) and canceled meetings with him and declined to take his calls. App. 46a–47a. Fundraising for activism became impossible because donors feared that associating with the Club could draw them into the investigation and O'Keefe was not at liberty, due to the secrecy order, to even attempt to explain what was happening. *Id.* O'Keefe also couldn't guarantee to donors that their identities would remain confidential—a major concern due to severe retaliation against Act 10 supporters—and that their money would go to fund advocacy, rather than legal expenses. App. 46a. Deprived of funds, cut off from its vendors and allies, and unsure even of what law it was alleged to have violated, the Club was paralyzed, as were all other major conservative advocacy groups in Wisconsin. App. 47a.

It was only after O'Keefe and other targets moved to quash the subpoena directed at them that he finally learned the basis of the investigation into the Club's activities. App. 45a. According to prosecutors, the Club's communications with Walker and his staff regarding Act 10 and other issues transformed the

Club's issue advocacy—the Club has never advertised in support of or opposition to any candidate, ever—into an in-kind contribution to Walker's campaign. The core of this illegal "coordination," they argued, was the Club's issue advocacy related to state senate races at a time when Walker was not even a candidate for office. Prosecutors also cited as illegal "coordination" the Club's donations to other social-welfare organizations and Walker's fundraising for the Club. That fundraising, they argued, actually transformed the Club into a "subcommittee" of Walker's official campaign committee, rendering all of its advocacy after that point illegal for failure to comply with campaign-finance requirements. App. 50a.

4. On January 10, 2014, the John Doe Judge, Gregory Peterson, granted the motion to quash, finding that "the subpoenas do not show probable cause that the moving parties committed any violations of the campaign finance laws." App. 69a. That was because the relevant state laws "only prohibit coordination by candidates and independent organizations for a political purpose, and political purpose…requires express advocacy," which was not in evidence. *Id*. The state itself, through its Attorney General, has also repudiated the theory of criminal liability underlying the investigation and embraced

Judge Peterson's order as stating the "correct interpretation of the Wisconsin Statutes."[2]

There being no right of appeal from an order entered in a John Doe proceeding, the prosecutors petitioned the Court of Appeals for a supervisory writ and writ of mandamus. App. 4a. Several of the investigation's targets, in turn, petitioned the Wisconsin Supreme Court to "bypass" the Court of Appeals and decide the issues itself. *Id.* The bypass petition was granted on December 16, 2014, and the case is now pending before the Wisconsin Supreme Court.

B. The District Court Denies Defendants' Motions To Dismiss and Enters an Injunction

Although quashing the subpoenas directed at the Club provided some relief, it did not end the John Doe investigation. Most worrisome to O'Keefe and the Club, it did not require the District Attorney's office to cease its years-long retaliatory targeting of the Club. After all, Defendants had carried out their retaliatory campaign through no fewer than six separate John Doe proceedings that they expanded and re-targeted at will and through conduct outside those proceedings; had employed a variety of theories of criminality to support their investigations;

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[2] Letter from Daniel P. Lennington, Assistant Deputy Attorney General, State of Wisconsin, to Kevin J. Kennedy, Director and General Counsel, Wisconsin Government Accountability Board, Oct. 3, 2014, available at *Citizens for Responsible Government Advocates, Inc. v. Barland*, 2:14-cv-01222-RTR, ECF No. 15-3 (E.D. Wis. filed Oct. 9, 2014).

and had shown an unusual tenacity in pursuing Governor Walker and his supporters for years on end. So long as O'Keefe and the Club remained in Respondents' crosshairs—under whatever pretextual legal theory—they would be blocked from actively and effectively participating in Wisconsin political debates. Seeking to resume their advocacy and to deter future retaliation, O'Keefe and the Club brought suit in federal court seeking injunctive and monetary relief.

1. Based on pre-litigation investigation and the materials disclosed in the motion-to-quash proceedings, their 62-page complaint details Respondents' years-long campaign of retaliation against Governor Walker, his associates, and ultimately his allies on matters of public policy and, in particular, Act 10. App. 18a, 29a. The uncontested facts show that Respondents: targeted nearly the entire Wisconsin conservative movement that publicly supported Act 10, including groups that had little to do with one another or with Walker; timed their activities, including raids and disclosures, for maximum political impact; ignored reports of materially identical conduct by left-leaning groups, including labor unions and other opponents of Act 10; employed unusual, heavy-handed tactics likely to chill speech and associational rights; and relied on a legal theory that has been rejected as a matter state law, reflecting its pretextual nature. Taken altogether, the complaint alleged, these facts demonstrate that Respondents'

true purpose is not to enforce Wisconsin law but to harass, intimidate, and silence supporters of Act 10.

That circumstantial evidence of retaliatory purpose was subsequently confirmed by a whistleblower who had served in the District Attorney's Office. According to Michael Lutz, who had worked under Milwaukee County District Attorney John Chisholm, the District Attorney's office was a hotbed of anti-Walker activity, and Chisholm considered it his "personal duty" to fight Walker's Act 10 reforms. Chisholm, he said, led "an anti-Walker cabal of people in his office who were just fanatical about union activities and unionizing." Prosecutors hung blue union fists—symbolizing solidarity with union opposition to Act 10—on the walls of the office and conducted the investigation as a campaign to dig up dirt on Walker, his aides, and his allies, with the aim of taking down Walker and reversing his policies.[3]

The complaint brought several claims under Section 1983 for injunctive relief and monetary damages against the prosecutors and investigators responsible for the investigation, who are Respondents here. The first, and primary, claim alleged that Respondents were retaliating against O'Keefe and the Club due to their First Amendment-protected advocacy in support of Act 10 and association with Walker and other activists. The third claim alleged bad-faith ex-

[3] Stuart Taylor, Jr., District attorney's wife drove case against Wis. Gov. Walker, insider says, Legal Newsline, September 9, 2014, http://legalnewsline.com/news/251647-district-attorneys-wife-drove-case-against-wis-gov-walker-insider-says.

ercise of prosecutorial power in violation of the First and Fourteenth Amendments, *see Dombrowski v. Pfister*, 380 U.S. 479 (1965), and the fourth alleged that Respondents violated O'Keefe and the Club's associational rights by forcing disclosure, through seizures, of the Club's members, donors, and internal deliberations and strategies. The final claim sought injunctive relief from the gag order prohibiting O'Keefe from discussing or even acknowledging the existence of the John Doe proceeding, under penalty of contempt—which it alleged violated O'Keefe's First Amendment free speech rights.[4]

2. On April 8, 2014, the district court denied Respondents' motion to dismiss on a variety of abstention- and immunity-related grounds. App. 17a.

a. As relevant here, the district court found that *Younger* abstention was unavailable under the reasoning of *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584 (2013), because a John Doe proceeding is not, as required, a criminal prosecution, civil enforcement proceeding, or order "'in furtherance of the state courts' ability to perform their judicial functions.'" App. 20a (quoting *Sprint*). Instead, the court explained, a John Doe proceeding "is an investigatory device, similar to a grand jury proceeding, but lacking the oversight of a jury." *Id.* The court also

[4] O'Keefe previously moved the John Doe judge to lift the gag order, and that request was denied in a December 17, 2013 order. Under Wisconsin law, he has no right of appeal to seek reversal of that order. *In re John Doe Proceeding*, 660 N.W.2d 260, 273 (Wis. 2003).

stated that, irrespective of *Sprint*, *Younger* abstention did not apply because O'Keefe and the Club had alleged "'specific facts' that the state proceeding was 'brought in bad faith for the purpose of retaliating for or deterring the exercise of constitutionally protected rights.'" App. 22a. *See also Dombrowski*, *supra*.

Notably, none of the Respondents raised the Anti-Injunction Act as grounds for dismissal of the complaint's official-capacity claims.

b. As to the personal-capacity claims, the district court denied qualified immunity. App. 33a–34a. The complaint, it stated, had plausibly alleged that Respondents violated their right to be free from retaliation for First Amendment-protected speech and association. And, it reasoned, Respondents "cannot seriously argue that the right to express political opinions without fear of government retaliation is not clearly established." App. 34a. (citing, *inter alia*, *Delgado v. Jones*, 282 F.3d 511, 520 (7th Cir. 2002); *Pieczynski v. Duffy*, 875 F.2d 1331, 1336 (7th Cir. 1989)).[5]

3. On May 6, 2014, the district court preliminarily enjoined Respondents from undertaking further retaliation against O'Keefe and the Club, ordering them to cease all activities related to the investiga-

[5] The district court also denied Respondents' claims to sovereign immunity and prosecutorial immunity, reasoning as to the latter that Respondents' alleged conduct was investigatory, rather than prosecutorial, in function. App. 31a–33a.

tion and relieving O'Keefe and the Club from any obligation to cooperate further with the investigation. App. 37a. Based on the voluminous factual record before it—including hundreds of pages of evidence submitted by Respondents—the court found that Respondents carried out "a long-running investigation of all things Walker-related" that they had expanded "statewide" to target conservative supporters of Walker's policies. App. 40a–41a. Their actions in carrying out that investigation, in turn, had "'devastated' O'Keefe's ability to undertake issue advocacy with the [Club]," caused the Club to lose "$2 million in fundraising that would have been committed to issue advocacy," and "dramatically impaired" O'Keefe's out-of-state advocacy. App. 46a. And it found that, "most importantly, the timing of the investigation has frustrated the ability of WCFG and other right-leaning organizations to participate in the 2014 legislative session and election cycle." App. 47a.

Analyzing the four preliminary-injunction factors, the court found that O'Keefe and the Club "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.'" App. 62a. (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 view-

points, it is still unlawful to target the plaintiffs for engaging in vigorous advocacy that is beyond the state's regulatory reach." App. 60a. Based on various constitutional precedents, the court held that Respondents targeted O'Keefe and the Club even though their advocacy was beyond Respondents' reach under law. App. 55a–62a.

The court found that the remaining preliminary-injunction factors all weighed in O'Keefe and the Club's favor because (1) loss of First Amendment rights constitutes irreparable injury, (2) damages are an inadequate remedy for First Amendment violations, and (3) injunctions protecting First Amendment freedoms are always in the public interest. App. 62a–63a (citing, *inter alia, Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

Accordingly, it entered the preliminary injunction requested by O'Keefe and the Club. App. 64a–65a.

C. The Seventh Circuit Orders Petitioners' Action Dismissed on Anti-Injunction Act and Qualified-Immunity Grounds

1. The Seventh Circuit consolidated Respondents' various appeals of the district court's orders, and determined that Respondents' appeals of denial of their motions to dismiss the official-capacity claims were frivolous and therefore incapable of supporting interlocutory jurisdiction. App. 76a–77a. Because O'Keefe and the Club had sought injunctive relief only with respect to their retaliation and "bad

faith" claims, those were the only official-capacity claims before the court of appeals.

2. In a September 24, 2014 decision, the Seventh Circuit ordered the district court to dismiss all of O'Keefe and the Club's claims—including those not even on appeal. App. 16a.

a. Raising the issue *sua sponte*, without the benefit of any briefing, the panel held that the Anti-Injunction Act ("AIA") barred O'Keefe and the Club's official-capacity claims for injunctive relief in light of the ongoing John Doe proceeding. According to the panel, this Court's decision in *Mitchum v. Foster*, 407 U.S. 225 (1972), requires lower courts to consider "principles of 'equity, comity, and federalism'" to determine whether injunctive relief in a Section 1983 suit is "appropriate" under the AIA. App. 2a. It undertook an *ad hoc* four-factor inquiry to determine that such relief was not appropriate in this case. First, there was an ongoing state proceeding. App. 6a–7a. Second, O'Keefe and the Club may have "adequate remedies at law" in that proceeding. App 7a. Third, federal relief might require "unnecessary constitutional adjudication." App. 7a. Fourth, the John Doe proceeding implicated important state interests because it was "criminal in nature." App. 8a. Although citing *Sprint*, the Court expressly declined to address *Younger* abstention. App. 6a.

b. As to the personal-capacity claims, the panel refused to consider what it called O'Keefe and the Club's "subjective[]" retaliation claim—i.e., that Respondents carried out their investigation targeting

O'Keefe and the Club for the purpose of retaliating against and chilling their exercise of First Amendment rights. App. 9a. Instead, it considered only whether O'Keefe and the Club could prevail on a claim "objectively" showing that "no reasonable person could have believed that the John Doe proceeding could lead to a valid conviction" because its underlying legal basis was invalid as a matter of federal law. *Id*. The answer, it held, was no, because it was not clearly established that the First Amendment "forbids regulation of coordination between campaign committees and issue-advocacy groups." App 13a. Accordingly, it held that Defendants were entitled to qualified immunity. *Id*.

Having disposed of just two official-capacity claims and one personal-capacity claim, the panel ordered the case "remanded with instructions to dismiss the suit, leaving all further proceedings to the courts of Wisconsin." App. 16a.

3. O'Keefe and the Club petitioned for rehearing and rehearing *en banc*, arguing that the panel decision had improperly failed to recognize their "subjective" retaliation claim, erroneously dismissed claims that were not on appeal, and conflicted with this Court's decisions in *Sprint* and *Dombrowski* regarding abstention. Rehearing was denied on October 23, 2014. App. 67a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Certiorari To Address the Applicability of the Anti-Injunction Act to Claims Not Subject to *Younger* Abstention

The Seventh Circuit's *sua sponte* invocation of the AIA as a basis to dismiss Petitioners' official-capacity Section 1983 claims was a transparent attempt to circumvent this Court's holding last term in *Sprint Communications, Inc. v. Jacobs* that federal courts are almost always "obliged to decide cases within the scope of federal jurisdiction" and that abstention in favor of state-court proceedings—that is, *Younger* abstention—is appropriate only in certain "exceptional" circumstances not present here. 134 S. Ct. 584, 588 (2013). Under the Seventh Circuit's reasoning, a federal court may effectively "abstain" under the AIA in any case that involves any manner of pending state-court proceeding, irrespective of the availability of *Younger* abstention. That approach clashes with *Sprint* and is incompatible with *Mitchum v. Foster*, 407 U.S. 225 (1972), which every other court of appeals to consider the issue has found to establish a bright-line rule that the AIA itself is no bar to Section 1983 suits. This Court's review is essential to bring consistency to the law and prevent wholesale circumvention of federal courts' "virtually unflagging" "obligation," 134 S. Ct. at 591 (quotation marks omitted), to hear and decide cases within their jurisdiction.

A. The Decision Below Misconstrued This Court's Precedent in *Mitchum v. Foster*

The Seventh Circuit's reasoning cannot be squared with *Mitchum*, which held that Section 1983 "is an Act of Congress that falls within the 'expressly authorized' exception" to the AIA's bar on injunctions to stay state-court proceedings. 407 U.S. at 243. *Mitchum* explained that the "very purpose of Section 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights," and that Congress "plainly authorized the federal courts to issue injunctions in § 1983 actions, by expressly authorizing a 'suit in equity' as one of the means of redress." *Id*. at 242. Accordingly, it reversed a lower court's determination that the AIA deprived it of power to enjoin a proceeding pending in state court. *Id*. at 243.

The Court's only qualification of its holding was that Section 1983 did not displace "the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Id*. This referred, it stated, to the principles of abstention "canvassed at length…in *Younger v. Harris*, 401 U.S. 37 (1971), and its companion cases." *Id*. So while the AIA could provide no basis to decline to decide a Section 1983 action, abstention pursuant to *Younger* remained available in appropriate cases. And that is how the Court has addressed *Mitchum's* holding in subsequent decisions. *See, e.g.*, *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 594 n.1 (1975) (explaining that *Mitchum* rejected dismissal "solely on

the basis of the anti-injunction statute," without addressing application of *Younger*); *Trainor v. Hernandez*, 431 U.S. 434, 444 n.8 (1977) (abstaining under *Younger*, while noting that the AIA "is not applicable here because this 42 U.S.C. § 1983 action is an express statutory exception to its application"); *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983) (same approach).

The decision below takes *Mitchum's* qualification to swallow its actual holding that Section 1983 is an "expressly authorized" exception to the AIA. Contrary to *Mitchum* and this Court's decisions applying it, the Seventh Circuit held that application of the AIA itself (as opposed to any abstention doctrine) to Section 1983 claims turns on consideration of "principles of 'equity, comity, and federalism.'" App. 2a. The district court's error, it stated, was that it "gave those principles no weight," and giving them weight, it concluded, required dismissal of all injunctive-relief claims pursuant to the AIA—including claims that weren't even on appeal. App. 8a. The court made clear that it was applying the AIA and not any abstention doctrine, expressly declining to "take sides" in the circuit split over *Younger's* application to investigatory proceedings or to address the application of *Sprint Communications*, which the parties had briefed at length. App. 6a.

Mitchum was the Seventh Circuit's only cited support for its approach, but *Mitchum* doesn't countenance anything like this. To the contrary, recognizing that Congress enacted Section 1983 to create "a

uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation," *Mitchum* established a bright-line rule that the AIA itself *never* bars Section 1983 claims. *See Trainor*, *supra*. In rejecting that rule, the decision below sows confusion regarding the proper application of the AIA—an issue that will now presumably have to be briefed and addressed in future cases—and undermines Congress's objectives in establishing a comprehensive and effective federal-court remedy for violation of federal rights by state actors.

B. The Decision Below Squarely Conflicts with Decisions of the Second, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits

In the wake of *Mitchum*, many of the courts of appeals were asked to recognize various federalism-based exceptions to its holding, and all of them declined. *See Citizens for a Better Environment, Inc. v. Nassau Cnty.*, 488 F.2d 1353, 1359 (2d Cir. 1973) (rejecting application of AIA and applying "the normal rules of federal abstention"); *Timmerman v. Brown*, 528 F.2d 811, 814 (4th Cir. 1975); *Jones v. Wade*, 479 F.2d 1176, 1181 & n.5 (5th Cir. 1973); *Ealy v. Littlejohn*, 569 F.2d 219, 225 (5th Cir. 1978); *Gottfried v. Med. Planning Servs., Inc.*, 142 F.3d 326, 329 (6th Cir. 1998); *Lewellen v. Raff*, 843 F.2d 1103, 1109 & n.7 (8th Cir. 1988); *Phelps v. Hamilton*, 59 F.3d 1058, 1064 & n.11 (10th Cir. 1995). One may surmise that the issue has not been addressed in the

remaining circuits due to the clarity of *Mitchum* and futility (prior to the decision below) of raising it.

These decisions regarding Section 1983 as a categorical exception to the AIA, and abstention as a separate inquiry, are in plain conflict with the Seventh Circuit's *ad hoc* consideration of "equity, comity, and federalism" to trigger application of the AIA to Section 1983 claims. Whether a plaintiff has recourse to the federal courts to enjoin violation of federal rights by state officials should not vary depending on which circuit the state is located. The Court's review is now necessary to establish uniformity among the circuits.

C. The Court's Review Is Necessary To Prevent Circumvention of Federal Courts' "Virtually Unflagging" Obligation To Enforce Federal Rights

The Seventh Circuit's open-ended consideration of "equity, comity, and federalism" to avoid adjudicating federal-law claims is a new guise for the old approach that this Court specifically and unanimously rejected last term in *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584 (2013). If allowed to stand, the decision below provides a blueprint to circumvent *Sprint's* limitations on *Younger* abstention in almost every case.

Sprint reinforced the fundamental principle that "federal courts ordinarily should entertain and resolve on the merits an action within the scope of a jurisdictional grant, and should not 'refus[e] to de-

cide a case in deference to the States.'" *Id.* at 588 (quoting *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989)). On that basis, it held that abstention in favor of parallel state proceedings is appropriate in only three "exceptional" circumstances: "state criminal prosecutions, civil enforcement proceedings, and civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id.* (quotation marks omitted).

Sprint specifically rejected the multifactor approach to *Younger* abstention associated with *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432 (1982). Several lower courts had understood *Middlesex* to authorize *Younger* abstention where (1) there is "an ongoing state judicial proceeding," (2) the proceedings "implicate important state interests," and (3) there is "an adequate opportunity" in the state proceedings "to raise federal challenges." *Sprint*, 134 S. Ct. at 593 (quoting Eleventh Circuit's "*Middlesex* test") (alterations omitted). But *Sprint* clarified that these are "*additional* factors appropriately considered by the federal court" only after it is established that a case implicates one of the three "exceptional" circumstances where abstention in deference to state proceedings is available at all. *Id.*

The decision below resuscitates *Middlesex*-style abstention in all but name. According to the Seventh Circuit, the AIA bars Section 1983 claims for injunctive relief where (1) there is an ongoing state pro-

ceeding, App. 6a–7a; (2) that proceeding implicates important state interests (e.g., it is "criminal in nature"), App. 8a; and (3) plaintiffs may have an opportunity to raise their claims in that proceeding and obtain relief, 7a.[6] This approach, of course, strips *Sprint* of any practical effect: compliance with its holding requires nothing more than replacing any invocations of "*Younger*" or "*Middlesex*" with "Anti-Injunction Act."

The same considerations that motivated *Sprint* therefore merit the Court's review here. The decision below denies a federal forum for claims that are distinctly federal in nature and do not involve the kind of "exceptional" circumstances that threaten "undue interference with state proceedings." 134 S. Ct. at 588. It fosters confusion and undermines predictability regarding the availability of a federal forum for enforcement of federal rights. And it facilitates violation of the fundamental principles that federal courts have "'no more right to decline the exercise of jurisdiction which is given, than to usurp that which

[6] Underscoring the improvisational nature of its approach, the decision below throws in an additional factor, "the rule against unnecessary constitutional adjudication." App. 7a–8a (citing *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 582 (1979)). But that rule simply requires that, "[b]efore deciding the constitutional question," a federal court "consider whether the statutory grounds might be dispositive." *Beazer*, 440 U.S. at 582. Where the proper interpretation of state law is at issue, a potentially dispositive statutory question might weigh in favor of abstention under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The Seventh Circuit did not, however, consider the application of *Pullman* abstention in this case.

is not given.'" *Id*. at 590 (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821)).

Most of all, this Court's review is necessary to enforce lower-court adherence to its decision in *Sprint*.

II. The Court Should Grant Certiorari To Confirm That Government Officials May Be Held Liable for Subjecting Citizens to Bad-Faith Investigation in Retaliation for Speaking Out

Although recognizing that "as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions…for speaking out," this Court's decision in *Hartman v. Moore* expressly reserved the question of "[w]hether the expense or other adverse consequences of a retaliatory investigation would ever justify recognizing such an investigation as a distinct constitutional violation." 547 U.S. 250, 256, 262 n.9 (2006). Five Circuits to date have answered that question in the affirmative, holding that a retaliatory investigation is actionable when its particulars would likely deter a person of ordinary firmness from exercise of First Amendment rights. The court below, however, joined one other circuit in holding that retaliatory investigation is an exception to the general availability of damages for official reprisal against protected speech and association. This case presents the perfect vehicle for the Court to answer definitively the question left open in *Hartman* and resolve this important and recurring issue.

A. The Decision Below Deepens the Existing Circuit Split on This Question

The courts of appeal are split on the question presented.

1. Five circuits have rejected the position of the court below that retaliatory investigation, unlike virtually all other kinds of official retaliation, can provide no basis for personal-capacity liability. *See Izen v. Catalina*, 382 F.3d 566, 572 (2d Cir. 2004) (reversing grant of summary judgment on claim that IRS agent "violated the First Amendment when he undertook an investigation with the substantial motivation of retaliating against [an attorney] for his advocacy on behalf of unpopular criminal tax defendants"); *Pendleton v. St. Louis Cnty.*, 178 F.3d 1007, 1010–11 (8th Cir. 1999) (affirming denial of qualified immunity for officers who allegedly "fabricated a criminal investigation" in retaliation for the plaintiffs' advocacy); *Lacey v. Maricopa Cnty.*, 649 F.3d 1118, 1132 (9th Cir. 2011) (reversing dismissal of retaliation claim against special prosecutor for conducting "an extremely intrusive investigation" allegedly in retaliation for newspapers' reporting); *White v. Lee*, 227 F.3d 1214, 1226–29, 1237–38 (9th Cir. 2000) (affirming denial of qualified immunity for HUD officials who allegedly carried out "extraordinarily intrusive and chilling" investigation in retaliation for plaintiffs' advocacy against a housing project); *Smith v. Plati*, 258 F.3d 1167, 1176 (10th Cir. 2001) (quoting *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000)) ("'Any form of official retaliation for

exercising one's freedom of speech, including…bad faith investigation[] and legal harassment, constitutes an infringement of that freedom.'"); *Bennett v. Hendrix*, 423 F.3d 1247, 1248, 1250–56 (11th Cir. 2005) (affirming denial of qualified immunity for sheriff and deputies who allegedly "carried out a campaign of police harassment and retaliation" through investigatory actions "after plaintiffs supported a county referendum opposed by the sheriff").

Notably, none of these circuits has authorized liability for the mere commencement of a criminal investigation, but only for investigations involving retaliatory conduct that would deter a person of "ordinary firmness" from the exercise of First Amendment rights" *E.g.*, *Bennett*, 423 F.3d at 1254–55 (surveying cases applying objective "ordinary firmness" standard). *Cf. Rehberg v. Paulk*, 611 F.3d 828, 850 & nn.23, 24 (11th Cir. 2010) (rejecting retaliatory investigation claim where plaintiff did not allege that investigation caused him to incur expense or other adverse consequences).[7]

With nearly a decade's experience, there is no indication that the availability of retaliatory investiga-

[7] There is no plurality position, however, on whether (as with retaliatory prosecution claims under *Hartman*) it is a plaintiff's burden to plead lack of reasonable suspicion or probable cause. *Compare Skoog v. Cnty. of Clackamas*, 469 F.3d 1221, 1235 (9th Cir. 2006) (no), and *Izen*, 382 F.3d at 571–72 (no), *with Small v. McCrystal*, 708 F.3d 997, 1009–10 (8th Cir. 2013) (yes), and *Glober v. Mabrey*, 384 Fed. App'x 763, 772 (10th Cir. 2010) (citing *McBeth v. Himes*, 598 F.3d 708 (10th Cir. 2010)) (yes).

tion claims, even in circuits that do not require the plaintiff to plead probable cause, has resulted in a flood of claims challenging ordinary police work and run-of-the-mill criminal investigation. Instead, the circuits recognizing such claims have altogether seen no more than a few per year, many of them (like this case) involving blatantly abusive conduct unambiguously directed at chilling advocacy and association.

2. The court below joins the Fourth Circuit in holding that retaliatory investigation does not support a claim for money damages. *See Blankenship v. Manchin*, 471 F.3d 523, 528 n.3 (4th Cir. 2006) (holding that an official's actions with regard to an allegedly retaliatory investigation provide "no basis for an independent § 1983 claim"). As described above, the Seventh Circuit refused to consider O'Keefe and Club's claim that Respondents' retaliatory motive led them to undertake an intrusive investigation employing tactics intended to chill, and which did chill, O'Keefe and Club's exercise of their speech and associational rights. Instead, it reasoned that a claim could lie only if "no reasonable person could have believed that the John Doe proceeding could lead to a valid conviction" in light of federal law. App. 9a, 12a–13a. Under this "objective[]" approach, App. 9a, a "retaliation" claim is essentially identical to a facial challenge to state law, because it is the underlying state law that is on trial. Retaliatory motive is irrelevant, even if it was the but-for cause of investigatory actions and, by extension, the plaintiff's injury. *See* App. 11a–12a.

B. The Decision Below Is Manifestly Wrong

1. The Seventh Circuit's creation of an exception to the rule against official retaliation for actions that can be described as "investigatory" finds no support in this Court's precedents. To the contrary, it is in plain conflict with the Court's reasoning in this area.

"Official reprisal for protected speech 'offends the Constitution because it threatens to inhibit exercise of the protected right.'" *Hartman*, 547 U.S. at 256 (alterations omitted) (quoting *Crawford–El v. Britton*, 523 U.S. 574, 588, n. 10 (1998)). Thus, the Court's cases have confirmed time and again that "retaliation is subject to recovery as the but-for cause of official action offending the Constitution." *Id.*

There is no basis to exempt from that general rule official actions taken in the context of a criminal investigation. The Court has specifically recognized that investigatory proceedings like grand juries may, just like any other government action, be abused to stifle citizens' rights. Such a proceeding may "prob[e] at will and without relation to existing need," to chill protected association. *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972) (quoting *DeGregory v. Attorney General of N.H.*, 383 U.S. 825, 829 (1966)). It may "expose[] for the sake of exposure." *Id.* (quoting *Watkins v. United States*, 354 U.S. 178, 200 (1957)). And it may blatantly "attempt to invade protected First Amendment rights by forcing wholesale disclosure of names and organizational affiliations for a purpose that was not germane to the determination of whether crime has been committed." *Id.* (citing, *inter*

alia, *NAACP v. Alabama*, 357 U.S. 449 (1958); *NAACP v. Button*, 371 U.S. 415 (1963)). No less than any other official power, the power to investigate may be abused as a tool of reprisal.

Moreover, the Court has consistently refused to close the door to liability for retaliation in contexts implicating substantial governmental interests. For example, the Court has repeatedly recognized and enforced the right of government workers to be free from retaliation for constitutionally protected expression, notwithstanding the government's interests and prerogatives as an employer. *E.g.*, *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563, 574 (1968) (holding that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment"). Likewise, the Court has sanctioned personal liability for "claim[s] that prosecution was induced by an official bent on retaliation," notwithstanding the government's overriding interest in the enforcement of laws and the potential for abuse by criminal defendants. *Hartman*, 547 U.S. at 265. The government interests at stake in conducting investigation are surely no greater than in these other contexts and, as experience in the circuits allowing liability for retaliatory investigation has shown, are not at all compromised by the recognition of such claims.

In sum, there is no justification for departure from the general rule that official retaliation may be subject to recovery.

2. The circumstances of the instant case exemplify the illogic of the Seventh Circuit's approach. A state court held that Respondents lack probable cause (or any other reasonable basis under state law) to carry out their investigation—in other words, that their investigation has zero likelihood of leading to a valid conviction, because the conduct being investigated is not regulated by state law. *See* App. 68a–73a. But because it is not clearly established that such regulation would violate federal law, *see FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 n.17 (2001), Respondents have *carte blanche* to use it as a pretextual basis to harass and intimidate whomever they like. So long as they never make an arrest or bring charges, they need not fear that even actions specifically intended as retaliation will expose them to the risk of liability.

Under this view, a rogue district attorney's office could target members of a civil-rights group advocating police reform on more or less any bogus pretext. Whether or not the pretext is actually recognized by state law (it wasn't in this case) or is supported by any evidence whatsoever, the targeted citizens would have no damages remedy for intimidating investigatory tactics that drive away members and make it impossible to conduct effective advocacy.

The result is to punch a hole in the First Amendment's protections against retaliatory abuse of law-enforcement power. Citizens have a remedy against retaliatory arrest. *See Reichle v. Howards*, 132 S. Ct. 2088, 2096 (2012). They have a remedy against re-

taliatory prosecution. *Hartman*, *supra*. But under the Seventh Circuit's approach, they have no recourse against a campaign of intimidation and harassment that continues for years on end, suppressing protected speech and association, but that never culminates in an arrest or prosecution.

C. This Case Is an Ideal Vehicle To Resolve This Important Question

First, this petition squarely presents the question that the Court expressly left unresolved in *Hartman* and that has since divided the courts of appeals. Petitioners' retaliatory investigation claim is straightforward, and its viability has been briefed, argued, and decided in both the district court and the court of appeals.

Second, that claim is substantial. The district court found that the Petitioners' allegations of retaliatory purpose were plausible, App. 29a, and nearly all of the historical facts regarding the commencement and conduct of the investigation are undisputed at this stage. A decision in the Petitioners' favor would allow their retaliation claim to proceed to trial, there being no apparent grounds for summary judgment.

Third, a state court has already held that Respondents' investigation lacked any legal basis as a matter of state law. Even if this Court were to decide that a retaliatory-investigation plaintiff must plead lack of reasonable suspicion or probable cause, *see Hartman*, 547 U.S. at 262, that would have no effect

on Petitioner's claim. This case is therefore a suitable vehicle to resolve both questions associated with retaliatory-investigation claims—whether they state a constitutional tort and whether lack of probable cause is an element of the claim. Moreover, unlike in other cases raising these issues, the Court need not address the potentially complex and unrelated question of the viability of the challenged investigation's stated legal basis.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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