No.14-872

In the
Supreme Court of the United States

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

Petitioners,

v.

JOHN T. CHISHOLM, ET AL.,

Respondents.

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

MOTION FOR LEAVE TO FILE AS *AMICI CURIAE* AND BRIEF FOR *AMICI CURIAE* CENTER FOR COMPETITIVE POLITICS AND FIVE FORMER COMMISSIONERS OF THE FEDERAL ELECTION COMMISSION IN SUPPORT OF PETITIONERS

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February 20, 2015

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

Pursuant to Rule 37.2(b) of the Rules of this Court, the Center for Competitive Politics and five former members of the Federal Election Commission move for leave to file the attached *amicus curiae* brief in support of the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in the instant case. All parties were timely noticed, pursuant to Rule 37.2(a), of *Amici*'s intention to file the attached brief. Petitioners have consented to the filing of this brief. Respondents have not.

The Petition asks whether a federal forum is available for individuals and groups subjected, in violation of the First Amendment, to an invasive and burdensome state investigation of their political activities. This question is of critical interest to *Amicus* Center for Competitive Politics, which is a nonprofit corporation dedicated to the promotion and defense of the political rights protected by the First Amendment. *Amicus* often represents clients in state and federal courts, including before this Court, on matters substantially related to those presented here.

Amici Lee Ann Elliott, David Mason, Hans von Spakovsky, Darryl Wold, and Bradley A. Smith are former members of the Federal Election Commission ("FEC"), and all served as *amici* to the Seventh Circuit below. As former FEC commissioners, they have expertise and insight into the value of First Amendment political rights, as well as the harm posed by lengthy government

investigations into the activities of political speakers.

Accordingly, *amici* respectfully requests that this Court grant its motion for leave to file.

Dated: February 20, 2015

Respectfully Submitted,

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INTEREST OF *AMICI CURIAE*[1]

Founded in 2005 by former Federal Election Commission Chairman Bradley A. Smith, the Center for Competitive Politics ("CCP") is a 501(c)(3) organization that works to defend the First Amendment rights of speech, assembly, and petition through litigation, research, and education. CCP was co-counsel in *SpeechNow.org v.* FEC, 599 F.3d 686 (D.C. Cir. 2010), and has filed *amicus curiae* briefs in many of the notable cases concerning campaign finance laws and restrictions on political speech, including *Citizens United v. FEC,* 558 U.S. 310 (2010) and *McCutcheon v. FEC,* 572 U.S. ___, 134 S. Ct. 1434 (2014).

Amici Curiae Lee Ann Elliott, David Mason, Hans von Spakovsky, Darryl Wold, and Bradley A. Smith are former members of the Federal Election Commission ("FEC") with decades of combined experience in interpreting the Federal Election Campaign Act, implementing regulations, devising enforcement policy, and investigating violations. They submit this brief to apprise the Court of the complexities and difficulties of applying campaign finance laws in a manner consistent with the First Amendment. They are aware of the dangers that such investigations and enforcement measures pose to the First Amendment rights of speech and association.

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[1] No party has contributed, monetarily or otherwise, to the preparation or filing of this brief, which was authored entirely by counsel for *amici*. Petitioners have consented to this filing.

SUMMARY OF ARGUMENT

The First Amendment protects the right to privately associate with others, and to jointly advocate concerning the issues of the day. Yet, in the state of Wisconsin, an elected district attorney was permitted to conduct a lengthy, sprawling investigation into Petitioners and their allies, including armed, late night raids on private homes, seizure of private property, and gag orders preventing the targets from speaking. All this was premised upon the notion that discussion of the most prominent legislative issue in Wisconsin, collective bargaining reform, constituted an illegal effort to support candidates for office. When Petitioners sought to halt this investigation, and to vindicate their First Amendment rights in federal court, the Seventh Circuit closed the courthouse door.

Wisconsin's John Doe investigation, and others like it, may be convened on the thinnest of pretexts. Once targeted, affected organizations must functionally end their political activities. Moreover, by their very nature, investigations concerning illegal coordination will target the most sensitive information: internal communications, membership lists, and conversations with political allies.

This Court has recognized the harm imposed when political speakers are denied effective judicial review of state actions that violate First Amendment rights. The state investigation here is such a case, and involves the type of injury for which 42 U.S.C. § 1983 demands a federal forum.

ARGUMENT

I. Wisconsin's Theory of Coordination Permits Functionally-Limitless Investigations to be Undertaken on the Thinnest Pretexts.

A. The John Doe investigation was predicated upon Petitioners' discussion of issues, not candidates.

It is undisputed that the Petitioners never engaged in express advocacy to support Governor Scott Walker or any other candidate. Rather, "the Club's issue advocacy" that gives rise to this case was "related to [collective bargaining reforms], issues in the 2011 Wisconsin Supreme Court campaign, key issues in the 2011 and 2012 Senate recall campaigns, and key issues in the 2012 general election campaign." 40a. To take one illustrative example, the Wisconsin Club for Growth, in an ad that "did not name a candidate and did not coincide with an election," explained why the Club felt that collective bargaining reform was a "fair" measure that should be adopted. 39a. The Club's communications were conducted, not to elect any candidate, but because Petitioners "believed that advocacy on the issues underlying [collective bargaining] could be effective in influencing public opinion." *Id.*

By engaging in this issue advocacy, Petitioners were joining many other individuals and groups seeking to discuss the issues of the day. Governor Walker's ultimately successful effort to reform collective bargaining rules in Wisconsin was

the most prominent political issue in that state. Monica Davey and Steven Greenhouse, *Angry Demonstrations in Wisconsin as Cuts Loom*, N.Y. TIMES, Feb. 16, 2011.[2] Protestors swarmed Madison, with "[t]housands of teachers, state workers[,] and students fill[ing] a square around the Capitol." *Id.* Schools "were closed…after many employees called in sick to help lobby." *Id.* Wisconsinites "shared stories of their families' deep history in unions, people struggling to pay their mortgages, workers considering moving away, switching careers, retiring." *Id.* The national implications of the collective bargaining law were clear as well. William B. Gould, IV, a Stanford labor law professor and former National Labor Relations Board chairman, confidently predicted that successful passage of the reform would spark "a lot of other Republican governors…[to] emulate this." *Id.*

In this context, the Petitioners sought to add their voices to the multitudes publicly discussing a pending legislative agenda. This activity—which is protected at the federal level, thanks to this Court's *per curiam* decision in *Buckley v. Valeo*, 424 U.S. 1 (1976)—was considered suspect by an elected district attorney and, ultimately, an independent special prosecutor.

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[2] *Available at*: http://www.nytimes.com/2011/02/17/us/17wisconsin.html

B. The John Doe investigation demonstrates that coordination investigations are often overbroad and extraordinarily invasive.

The theory by which the Club's aired opinions could be considered harmful—more harmful, in fact than the other voices raised in Madison in 2011 and afterward—is an expansive one. The individuals who authorized and conducted the John Doe investigation believed that any advocacy concerning public policy could only be viewed as moves in a zero-sum game between Governor Walker and his political opponents. Since the Petitioners publicly supported Governor Walker's agenda for collective bargaining reform, they reason, the Petitioners' communications should be treated as campaign advertisements designed to support Walker and allied candidates running in the recall elections. Consequently, in the minds of the John Doe prosecutors, Petitioners' issue speech constituted a conspiracy to improperly coordinate "independent" spending with Walker and others. This theory of illegal coordination is neither new nor novel. *See, e.g., United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1138 (2d Cir. 1972) (rejecting theory that "because the advertisement is derogatory to the President's stand on the Vietnam war, the President is a candidate for re-election, and the war is a campaign issue, the advertisement was an attempt to influence the presidential election").

But, as this Court has previously observed, such a wide-ranging theory infringes upon the federally protected right to freedom of association, "a basic constitutional freedom that is closely allied to freedom of speech and a right which, like free

speech, lies at the foundation of a free society." *Buckley*, 424 U.S. at 25 (internal citation and quotation omitted). Regulating issue advocacy as a functional equivalent to direct candidate advocacy is perilous, because efforts to do so inevitably wind up swallowing all public speech about public issues. This occurs for the simple reason that "[c]andidates, 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.

What happened here is instructive. Prosecutors targeted essentially every important conservative organization in Wisconsin, seizing the internal and external communications of "some 29 conservative groups, including Wisconsin and national nonprofits, political vendors[,] and party committees." *Wisconsin Political Speech Raid*, WALL STREET JOURNAL, Nov. 18, 2013. [3] Nonprofit organizations, whose donor lists are typically protected from disclosure by federal tax law, were ordered to hand those confidential lists over to state officials. 26 U.S.C. § 6104(d)(3)(A) (generally protecting anonymity of donors to nonprofit organizations).

The intrusive nature of a coordination investigation is widely understood and predictable, as is the very slight preliminary showing required to initiate such an inquiry. An illegal coordination

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[3] *Available at*: http://www.wsj.com/articles/SB10001424052702304799404579155953286552832

claim alleges that someone spoke to someone else concerning a prohibited topic. Naturally, any contact between two individuals can raise suspicions that such a conversation occurred. And, once initiated, a coordination investigation will focus on who spoke with whom. This will require an invasive investigation that, by its nature, is directed precisely at private communications. Moreover, since information may be passed through intermediaries, the investigation will often expand to encompass the target's entire professional and personal network.

For example, in 1997, a complaint by the Democratic National Committee triggered an investigation of over 60 conservative organizations, plus numerous individuals, that lasted over four years. The various respondents were ultimately exonerated. FEDERAL ELECTION COMMISSION, MUR 4624. Another investigation of the Christian Coalition led to over 80 depositions and years of legal fees before the Coalition was found not to have illegally coordinated its activities. *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999); Mark Hemingway, *IRS' Lerner Had History of Harassment, Inappropriate Religious Inquiries at FEC*, WEEKLY STANDARD, May 20, 2013. [4] These examples are not outliers, but rather paradigmatic examples of the intrusive and speech-inhibiting nature of coordination investigations based on flimsy allegations and generalized suspicion.

To make matters worse, in many states, as is the case at the federal level, investigations are

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[4] *Available at*: http://www.weeklystandard.com/blogs/irss-lerner-had-history-harassment-inappropriate-religious-inquiries-fec_725004.html?nopager=1

generally initiated by partisan complaints. *See, e.g.* Erin Cox, *Hogan Accuses Brown of Illegal Coordination*, BALTIMORE SUN (Sept. 8, 2014) (complaint filed by Republican nominee Larry Hogan "accusing his Democratic opponent of illegally coordinating with a political action committee in the race for governor");[5] John Wagner, *Md. Democratic Party Files Complaint Targeting GOP Candidate Larry Hogan*, WASHINGTON POST (July 24, 2014) (complaint "alleging that Republican gubernatorial candidate Larry Hogan had illegally used Change Maryland, a watchdog group he operated, to promote his upcoming campaign"). [6] In some states, investigatory powers are delegated to actors with little judicial or administrative supervision. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2338-39 (2014) (describing general process whereby election law violations are reviewed in Ohio).

In short, in cases where illegal coordination is alleged, the danger that the investigatory process will be used for partisan gain is particularly acute.

Nor are the state courts necessarily immune from these concerns, or positioned to exercise effective oversight. However judges are selected, they will often have at least some connection to organizations discussing issues of public policy—if not political organizations, then advocacy groups of

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[5] *Available at*: http://articles.baltimoresun.com/2014-09-08/news/bal-hogan-accuses-brown-of-illegal-coordination-20140908_1_campaign-manager-campaign-finance-reports-illegal-coordination

[6] *Available at*: http://www.washingtonpost.com/local/md-politics/md-democratic-party-files-complaint-targeting-gop-candidate-larry-hogan/2014/07/24/887f85e4-1362-11e4-8936-26932bcfd6ed_story.html

one stripe or another. Those organizations are, in turn, likely to be viewed as at least loosely allied with certain political positions and the candidates supporting those positions. A broad coordination investigation, especially one premised upon issue speech, may sweep up such relationships.

This danger is especially pronounced where judges are elected, as is the case in Wisconsin. Given that the John Doe proceeding has affected nearly every conservative group in Wisconsin, how many elected state judges will be entirely free from involvement with one or more targets? In this very investigation, prosecutors have requested the recusal of one or more justices of the state Supreme Court. Associated Press, *Prosecutor Asks for Justice Recusal in Walker Case*, WISCONSIN LAW JOURNAL (Feb. 13, 2013).[7] If prosecutors may obtain the recusal of judges friendly to targeted organizations, fundamental fairness requires that those targets obtain recusal of their ideological opponents. This situation is a recipe for judicial paralysis.

For all these reasons, the federal courts must be available, as Section 1983 demands, to supervise coordination investigations and blunt their obvious potential to chill speech and association. In Petitioners' case, simply supporting certain issues was considered sufficient grounds to initiate an aggressive probe. At that point, armed raids and blanket subpoenas were authorized. Such actions, where they implicated rights protected by the First Amendment, should be subject to federal review.

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[7] *Available at*: http://wislawjournal.com/2015/02/13/prosecutor-asks-for-justice-recusal-in-walker-case/

II. Unless Federal Review is Available, Similar Investigations Threaten to Chill Speech at the Heart of Civil Society.

A. A number of actors—advocacy groups, state legislators, and regulators—have proposed expansive understandings of regulable political advocacy.

These events in Wisconsin must be viewed in context. Increasingly, individuals and groups concerned by the current state of campaign finance regulation have called for coordination investigations that, like the one at issue here, would substantially chill speech and association.

To take one example, the Brennan Center for Justice's recent report, *After* Citizens United: *The Story in the States*, highlights instances of potentially "improper" coordination between candidates and independent groups. Among them: a number of political organizations active in Alaska politics using the same third-party vendors (p. 15),[8] a Google investor supportive of the mayor of San Francisco's tax policy forming an independent

[8] This understanding of coordination is presently playing out in Montana. According to published reports, Governor Steve Bullock was investigated beginning in 2013 because of suspicions that he "illegally coordinated activities with third-party groups that made independent expenditures supporting him through the same consulting firm." Charles S. Johnson, *Bullock Campaign Under Investigation After Political Practices Complaint*, Missoulian (July 1, 2013) (*available at:* http://missoulian.com/news/local/bullock-campaign-under-investigation-after-political-practices-complaint/article_1583e89a-e1f5-11e2-b017-0019bb2963f4.html).

expenditure group in support of the mayor (p. 7), and a number of proposed 2011 American Crossroads ads which compared and contrasted the positions of candidates running for office in 2012 (p. 12). Chisun Lee, *et al.*, AFTER *CITIZENS UNITED*: THE STORY IN THE STATES, (Brennan Center for Justice 2014) (citations omitted). The Brennan report goes on to suggest that "using images to [a candidate's] campaign's liking" demonstrates coordination. *Id.* at 13. The Center's report also suggests coordination occurs between "candidates and supportive outside groups" when "campaigns have posted online their talking points for criticizing opponents, which may appear in outside groups' ads." *Id.* at 14. The report plainly calls for aggressive investigation of independent political advocacy, investigations that would be premised on a broad conception of "coordination" even where key factual predicates—campaign speech, actual evidence of coordinated expenditures, and the like—are lacking.

Taking a cue from such logic, a number of state legislators have introduced legislation that would functionally place all public issue speech under government supervision. In 2013, the Assembly State Government Committee in New Jersey passed A. 3863, legislation that would have subjected to government reporting and regulation spending simply made to "aid" a candidate. A. 3863, 215th Leg. (N.J. 2013). The bill never received a vote before the full legislature. That same year, Utah enacted legislation that regulates speech made for "political purposes," defined as "directly or indirectly" encouraging citizens to vote for or against a candidate. UTAH CODE ANN. § 20A-11-101(36) (2014). In 2014, a Minnesota legislative committee

passed a bill that would have required regulators and speakers to make "limited reference to external events" when determining whether a particular communication qualified as express advocacy. H.F. 1944, 88th Leg. (Minn. 2014). The Minnesota bill was not given a third reading before the state legislature, but similar legislation has been proposed this session. H.F. 43, 89th Leg. (Minn. 2015).

Connecticut has enacted a particularly expansive understanding of illegal coordination. Specifically, "the law provides for a number of 'rebuttable presumptions' that certain expenditures are not independent expenditures." *Democratic Governors Ass'n v. Brandi*, 2014 U.S. Dist. LEXIS 78672 at 10 (D. Conn. 2014); *e.g.* CONN. GEN. STAT. § 9-601c(b)(7) ("Any expenditure made by a person based on information about a candidate's campaign plans, projects or needs…indirectly provided by…a consultant or other agent acting on behalf of such candidate….with [a]…tacit understanding that such person is considering making the expenditure"). Connecticut also regulates certain issue advocacy as political expenditures. CONN. GEN. STAT. § 9-601b. A recent lawsuit brought by the Democratic Governors Association ("DGA") sought to prevent this law from being interpreted to "creat[e] a presumption of illegal coordination from a candidate's mere association with a spender, [because] permitting the [state regulators] to view this association as evidence of coordination, impermissibly regulates independent expenditures and burdens DGA's First Amendment rights." *Democratic Governors Ass'n*, 2014 U.S. Dist LEXIS 78672 at 17. This effort failed.

Regulators outside of Wisconsin have also urged broad theories of "coordination" that would

potentially turn most constitutionally-protected independent speech into potentially "coordinated" speech subject to extensive investigation. Under such theories, coordination investigations could be initiated because independent speech occurred "in the weeks before [an] election," or because a discussion of issues occurred "in the context of elections." FEDERAL ELECTION COMMISSION, MUR 4624, STATEMENT OF COMMISSIONERS SCOTT E. THOMAS AND DANNY L. MCDONALD, Sept. 7, 2001.

Coupling these expansive theories of "coordination" with such broad definitions of regulable political speech raises two concerns. First, the theories of illegal coordination involved, and the vagueness with which those theories are articulated, would permit investigations to go forward on extraordinarily thin evidence. Second, once initiated, these investigations would necessarily focus upon private communications, membership and donor lists, and other information of a particularly private nature. Put simply, far from being an outlier, Wisconsin's experience may serve as a template for those who wish to substantially burden their political and ideological opponents.

B. These boundless theories of coordination create opportunities for gamesmanship.

Petitioners argued in favor of legislation they wished to see enacted. For their trouble, Mr. O'Keefe and the Wisconsin Club for Growth remain embroiled—four years after the 2011 collective bargaining bill was signed into law—in a free-wheeling government investigation that has haled nearly every major conservative organization in

Wisconsin before a secret, closed-door state proceeding initiated by an elected district attorney.

Such investigations, in Wisconsin or elsewhere, will dramatically shrink the size and scope of our civil society. Campaign vendors will be unable to work with more than one advocacy group and candidate at a time, former officials will be unable to lift their voices on public issues, and outside groups and campaigns will have to monitor their conduits of information lest they impermissibly use the same sources. Otherwise, interested groups will file complaints, stifling the future ability of groups and actors to advocate concerning questions of public policy.

This is particularly likely in those states, such as Colorado and Massachusetts, that grant third-party standing to complainants, allowing ideological opponents to directly bring charges in state court. COLO. CONST. art. XXVIII, § 9(2)(a); MASS. ANN. LAWS ch. 55, § 33(a) (LexisNexis 2014). The opportunities for gamesmanship—especially under the increasingly broad understandings of improper coordination advanced by nonprofit groups and state legislators—ought to be apparent.

Even where investigations are begun in good faith, organizations accused of complicity in an illegal coordination scheme must marshal a defense, and generally will have to shut down for the duration of the investigation. It is impossible to know just how much issue advocacy was stifled by the John Doe investigation and its attendant seizures of conservative groups' donor lists and communications, but it is certain that the people of Wisconsin were denied access to at least some quantity of speech. The Wisconsin Club for Growth,

which is likely not alone in this, has refrained from running ads similar to those it distributed in 2011 and 2012. Given that our polity depends on a well-informed citizenry to cast votes for representatives, such harms ought to be particularly troubling. *Buckley*, 424 U.S. at 14-15 ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential").

In these circumstances it is doubtless true that any number of actors will choose caution over the risk of government-run investigations, whether initiated by elected officials or political opponents. "In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion. It these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." *Thomas v. Collins*, 323 U.S. 516, 535 (1945).

This is all the more troubling given what is threatened by these investigations: the federally protected right to freedom of association. Since the passage of the Civil Rights Act of 1871, Congress has insisted that claims concerning this constitutionally-protected right must be heard by federal courts. 42 U.S.C. § 1983.

III. The Ability to Politically Organize, Independent of Government Surveillance and Investigation, is a Fundamental Freedom Guaranteed by the Constitution and the Decisions of this Court.

A. The *NAACP* line of cases establishes the fundamental right to associate in private for political purposes.

All Americans enjoy the First Amendment right "to pursue their lawful private interests privately and to associate freely with others in doing so." *NAACP v. Alabama*, 357 U.S. 449, 466 (1958). This Court has long held that "'[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP*, 357 U.S. at 460. Indeed, "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association." *Id.* at 462.

When government power is used to compel an organization to reveal its supporters, contacts, and conversations, it is not an incidental violation of these freedoms. Rather, as seventy years of unbroken precedent holds, compelled disclosure imposes "a significant encroachment upon personal liberty." *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); *Buckley*, 424 U.S. at 66 ("compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights"). There is a "vital relationship between freedom to associate and privacy in one's associations." *NAACP*, 357 U.S. at 462.

This Court's robust protection of the right to anonymous association was a hard-fought victory of the 1950's and 1960's. A number of states, principally located in the South, sought to obtain personal information concerning rank-and-file members of the NAACP and other civil rights organizations. The states proffered a number of rationales to justify mandatory disclosure: foreign corporation registration (*NAACP v. Alabama*), the collection of license taxes (*Bates v. City of Little Rock*), and preventing subversive infiltration of domestic political groups (*Gibson v. Florida Legis. Investigation Comm.*, 372 U.S. 539 (1962)).

In each of these cases, this Court determined that the Constitution required state governments to demonstrate precisely why the associational veil ought to be pierced, and to narrowly confine compelled disclosure to a necessary governmental purpose. *Bates*, 361 U.S. at 525 ("Decision in this case must finally turn, therefore, on whether the cities as instrumentalities of the State have demonstrated so cogent an interest in obtaining and making public the membership lists of these organizations as to justify the substantial abridgment of associational freedom which such disclosures will effect").

This Court's decision in *Gibson v. Florida Legislative Investigation Committee* is particularly illuminating. There, a state investigation—the third successive legislative committee of a similar type—ordered the "president of the Miami branch of the NAACP...to appear before the" committee and "to bring with him records of the association which were in his possession or custody and which pertained to the identity of members of, and contributors to, the

Miami and state NAACP organizations." *Gibson*, 372 U.S. at 542. Ostensibly, the investigatory committee was concerned that the NAACP had been infiltrated by Communists and other "subversives." The Miami branch president, Theodore R. Gibson, refused to comply with the demand as it pertained to private information concerning the NAACP's members and donors. *Id.* at 542-543.

The *Gibson* Court placed the burden on the state to "demonstrate the compelling and subordinating governmental interest essential to support direct inquiry" into membership and donation records. *Id.* at 557. But Florida, despite relying on Court decisions blessing investigations of Communist or "subversive" actors, was unable to carry this burden. Accordingly, the Court found that the "strong associational interest in maintaining the privacy of membership lists of groups engaged in the constitutionally protected free trade in ideas and beliefs may not be substantially infringed upon" given only "a slender showing" of government tailoring. *Id.* at 555-556.

The protections of cases such as *Gibson* remain intact, and have been invoked by federal courts to protect the communications and operations of later organizations. *See, e.g., Perry v. Schwarzenegger*, 591 F.3d 1126, 1133 (9th Cir. 2010) (district court and parties agreed that "names of rank-and-file members" protected by First Amendment privilege). "[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Perry*, 591 F.3d at 1139 (quoting *Buckley*, 424 U.S. at 64); *see also Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006)

("The right to speak is often exercised most effectively by combining one's voice with the voices of others").

Indeed, this Court and its subordinate tribunals have routinely vindicated the rights of Americans to privately associate together to form organizations that discuss issues of public importance. *E.g. Buckley v. Valeo*, 519 F.2d 821, 914 (D.C. Cir. 1975) (*en banc*) (Tamm., J., concurring in relevant part) ("I can hardly imagine a more sweeping abridgment of [F]irst [A]mendment associational rights…[then] creat[ing] a situation whereby a group contributes to the political dialog in this country only at the severest cost to their associational liberties. I can conceive of no governmental interest that requires such sweeping disclosure…").

These interests are at stake here. Wisconsin authorities obtained the internal communications, and the donor and membership lists, of nonprofit organizations engaged in issue advocacy. They did this not only by demanding that information, but by forcibly taking it in predawn raids. It is self-evident that such behavior implicates fundamental federal rights.

B. This Court has recognized a First Amendment harm not merely in having speech and association burdened by compelled disclosure, but also in denying speakers the timely protection of the federal judiciary.

State authorities were permitted to conduct the John Doe investigation for months without properly notifying its many targets that their

associational liberties were in jeopardy. *See NAACP v. Button*, 371 U.S. 415, 433 (1963) "[t]he threat of sanctions may deter the[] exercise" of constitutional rights "almost as potently as the actual application of sanctions"). This prevented the targets from seeking constitutional review of the State's investigation when the injury began. Upholding the Seventh Circuit's opinion would only compound this harm by delaying federal judicial oversight of Wisconsin's activities.

Just a few short Terms ago, this Court made clear that easy access to the federal courts is critical when governments threaten First Amendment political freedoms. In his controlling opinion in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, the Chief Justice objected to the discovery practices of the Federal Election Commission and stated that litigation in the First Amendment context ought to "be objective…[and] entail minimal, if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation." 551 U.S. 449, 469 (2007) (Roberts, C.J., controlling opinion). Imposing obstacles to swift judicial review can, itself, "constitute[] a severe burden on political speech." 551 U.S. at 468 n. 5.

The John Doe investigation has been ongoing for quite some time. Sending this matter back to the state courts will only increase the uncertainty suffered by Petitioners and their national allies—perhaps for several more years. Moreover, ongoing delay, and the possibility that a federal forum will not be available, will likely chill potential plaintiffs in Wisconsin and elsewhere from challenging similar coordination theories advanced by other state

officials. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003) ("Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech").

The First Amendment injury imposed by this delay is compounded, of course, by the fact that the federal judiciary tasked with jurisdiction over Wisconsin has found the state's theory of illegal coordination to be unconstitutional. *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014); *Wisconsin Right to Life v. Barland*, 2015 U.S. Dist. LEXIS 11012 (E.D. Wis. Jan. 30, 2015) (permanently enjoining the State from "administering or civilly enforcing" Wisconsin campaign finance regulations as applied to issue advocacy). The State's attorneys and the Government Accountability Board have repudiated the legal theory underlying the investigation. *See* Plaintiffs and Defendants' Proposed Judgment, ECF No. 130-2, at 2, *Wisconsin Right To Life, Inc. v. Barland*, No. 10-669 (E.D. Wis. Nov. 24, 2014). Nonetheless, the investigation continues.

C. The seizure challenged here is precisely the form of injury for which § 1983 designates a federal forum.

Congress's creation of federal jurisdiction when a "state…subjects, or causes to be subjected, any citizen of the United States within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution" is not discretionary. 42 U.S.C. § 1983.

In such circumstances, the offending party "shall be liable." *Id.*

While not all investigations are presumptively federal matters, this case rests on a theory striking at the heart of the First Amendment. *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) ("[T]he First Amendment has its fullest and most urgent application' to speech uttered during a campaign for political office") (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). The state of Wisconsin has misused its police powers to inflict a significant injury upon the right of free association. A lengthy investigation has ensued into the means by which an ever-expanding number of civil society groups, domiciled both inside and outside the state of Wisconsin, engaged in the public discussion of public issues.

This case calls for a robust application of Section 1983. The right of free association, "a basic constitutional freedom," is threatened here by state action—yet the federal courts have been closed to the petitioners. *Buckley*, 424 U.S. at 25 (citation and quotation marks omitted). Seven decades of jurisprudence amply demonstrate that a federal issue has been properly raised, and must be properly heard in federal court. 42 U.S.C. § 1983; *Buckley*, 424 U.S. at 25 ("In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny'") (quoting *NAACP v. Alabama*, 357 U.S. at 460-461).

CONCLUSION

Because of the fundamental federal rights at stake, and the high likelihood of abuse in this and similar cases, Wisconsin's sprawling John Doe investigation ought to be reviewed by the federal judiciary. Accordingly, this Court ought to grant the Petition.

Dated: February 20, 2015

Respectfully Submitted,

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