IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

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

Plaintiffs,

vs. Case No. 14-CV-139-RTR

FRANCIS SCHMITZ, in his official and
personal capacities, et al.,

Defendants.

DEFENDANTS CHISHOLM, LANDGRAF AND ROBLES' SUPPLEMENTAL RESPONSE BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

Alleging a conspiracy so sweeping in scope that it pits the entire "[redacted] the plaintiffs ask this Court to preemptively terminate [redacted] that implicates vital state interests and [redacted] Plaintiffs argue that the exercise of their First Amendment rights requires that the state forego enforcement of [redacted] those laws may pertain to them or anyone affiliated with them. The injunction they seek, if granted, would amount to a unilateral and indefinite [redacted]

[redacted].

Plaintiffs are very simply and quite improperly attempting to use this Court to derail a [redacted] that was initiated not at the whim of a partisan prosecutor, but on the formal, [redacted] The suggestion that a partisan purpose underlies t[redacted] is a baseless and malicious attack on not only the defendants, but also the judges and other professionals [redacted] The purpose of this supplemental response is to demonstrate: (1) there is a valid legal and factual basis [redacted] (2) the assertion that other "similarly situated" persons have not been prosecuted is demonstrably false; (3) that plaintiffs' requested relief is impermissibly non-specific, vague and overbroad; and (4) plaintiffs are barred the relief requested by their unclean hands.

ARGUMENT

A preliminary injunction is an "extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008). In order to obtain an injunction, a plaintiff carries the burden of persuasion to establish each of the following: (1) a substantial likelihood of success on the merits; (2) irreparable harm without the injunction; (3) that the harm to the party seeking the injunction would be greater than the harm that the preliminary injunction would inflict on the defendants; and (4) that the injunction is in the public interest. *Judge v. Quinn*, 612 F.3d 537, 546 (7th Cir. 2010). It is "an extraordinary remedy that may only be awarded upon a

clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22 (2008) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)) (emphasis added).

Each of the elements as applied to the plaintiffs' request here was addressed in defendants' initial response brief, (ECF No. 48), which will not be repeated here.[1] It suffices to say that [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

I. [redacted].

[redacted]

[redacted]

A. [redacted].

[redacted]

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[redacted]

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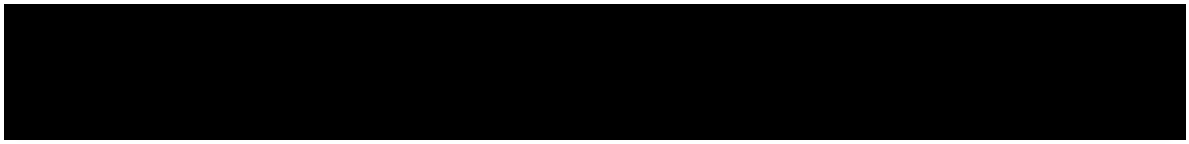

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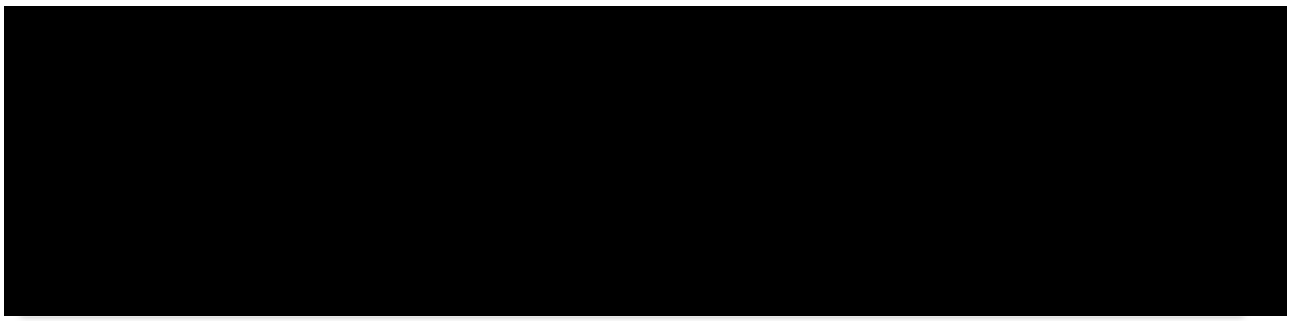

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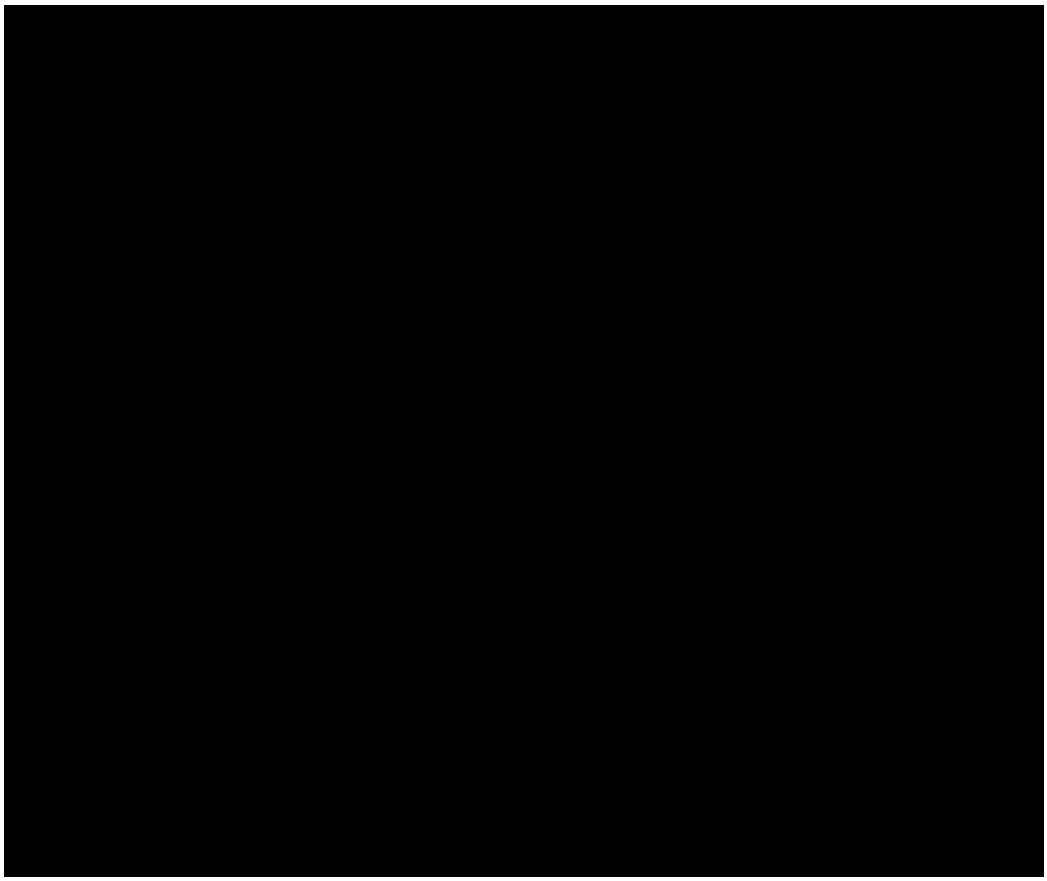

[redacted]

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[redacted]

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B. The facts, including the public record, contradict plaintiffs' accusation that they were selectively "targeted" by any defendant for their political beliefs.

Plaintiffs' other arguments addressing the "likelihood of success on the merits" prong for their preliminary injunction pertain to the defendants' alleged "selective use of prosecutorial power" in contravention of the Equal Protection Clause of the Fourteenth Amendment and the alleged "retaliation" of defendants for the plaintiffs' exercise of their "First Amendment rights." These allegations arise from the plaintiffs' belief that the defendants singled out the plaintiffs because of their conservative beliefs. In other words, [redacted]

2. Contrary to plaintiffs' arguments, the public record and the law demonstrate the defendants did not "target" conservatives whereas Democrats were neither investigated nor prosecuted for "similar" [redacted].

Turning to the plaintiffs' alleged constitutional violation arising from their assumed lack of investigation and prosecution of non-conservatives, that again is not true. A claim in this context has two elements: first, a claimant must provide evidence that persons "similarly situated" as the claimant have not been prosecuted; second, a claimant must show that the decisions to prosecute were made on the basis of an "unjustifiable standard." *United States v. Armstrong*, 116 S.Ct. 1480, 1487 (1996); *United States v. Kerley*, 787 F.2d 1147, 1148 (7th Cir. 1986). [redacted]

That said, "so long as the prosecutor had probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Wayte v. United States*, 470 U.S. 598 (1985) (*quoting Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). "The Constitution does not require the state to choose between prosecuting every individual implicated in unlawful activity or prosecuting none of them." *Busche v. Burkee*, 649 F.2d 509, 517 (7th Cir. 1981).

As [redacted]

[redacted]

Even so, plaintiffs' brief can suggest only seven instances over the past few years in which they believe Democrats were not investigated for "similar" conduct. Pl. Br., at 17-18, 24-25. To note, the plaintiffs do not rely on any actual court records, testimony, or statistical analysis typically associated with disparate treatment cases. Rather plaintiffs rely on a few internet blogs and news articles for their entire support in this regard. *See* Pl. Br., at 17-18, 24-25 (citing to exhibit 24 (blog), exhibit 25 (blog), exhibit 27 (internet article), exhibit 39 (blog), exhibit 42 (internet article), exhibit 43 (internet article), exhibit 44 (internet article), exhibit 47 (internet article)). No court has also ever granted the extraordinary remedy of a preliminary injunction on such undeveloped and unreliable "evidence."

Plaintiffs are either misinformed or willfully misleading in suggesting that the Milwaukee District Attorney's office selectively prosecutes conservatives. The truth is that the office prosecutes criminal activity that is brought to its attention and appropriate for prosecution regardless of the defendants' political affiliation. Landgraf Decl., ¶4; Chisholm Decl., ¶¶4-5; Robles Decl., ¶3. While cherry picking a few cases that conservative bloggers speculate could have been prosecuted, they fail to inform the Court of numerous prosecutions of Democrats or others that might be perceived as hostile to [redacted] and his associates. Indeed, the Milwaukee defendants recently investigated, charged, and obtained convictions of several individuals who falsified information within petitions for the r[redacted] Id., ¶5 (*State v. Wanasek*, Milw. Co. Case No. 13CM001321; *State v. Haycock*, Milw. Co. Case No.

13CM001320; *State v. Mehling*, Milw. Co. Case No. 13SC009081[5]). Similarly overlooked, purposely or by neglect, is the office's prosecution of Democrat Lena Talyor for illegal electioneering during her senatorial campaign, id., ¶6 , Ex. A (*State v. Taylor*, Milw. Co. Case No. 09SC023610), as well as Democrat Michael Mayo for misappropriation of campaign funds, id., ¶7, *State v. Mayo*, Milw. Co. Case No. 09SC023610. The Mayo case resulted in the largest forfeiture to date in Milwaukee County election law cases. Id. The Milwaukee defendants also petitioned for John Doe proceedings against organizations associated with typically left-leaning unions, such as the publicly-known John Doe proceeding commenced against WI Jobs Now!, an organization known to be associated with the Service Employees International Union (SEIU), for potential election bribery during the recent senate recall elections. Id., ¶8.

Those examples are just some of the cases in the *public record* that plaintiffs have utterly failed to acknowledge by instead selectively citing to the internet articles in support of their claim. To be sure, there are more instances of prosecutions of non-conservatives within the public court records as well as those that the Milwaukee defendants cannot disclose due to existing secrecy and seal orders. Id., ¶9. Nonetheless, contrary to plaintiffs' beliefs and reliance on internet sources, the record as noted above demonstrates that the Milwaukee defendants do not selectively investigate and prosecute conservatives for violations of the state's campaign and election laws.

Finally, while the above is enough to dispose of plaintiffs' request for injunctive relief, plaintiffs "evidence" of seven non-prosecutions by the Milwaukee defendants must be addressed for its lack of any merit. In order to be considered "similarly situated" under plaintiffs claim here, the comparators must be "prima facie identical in all relevant respects." *McDonald v.*

[5] The public records on those cases can be accessed through the Wisconsin Court System, Circuit Court Access (available at http://wcca.wicourts.gov/index.xsl).

Village of Winnetka, 371 F.3d 992, 1002 (7th Cir. 2004). In the context of selective prosecution, complainants are similarly situated only when "their circumstances present *no* distinguishable legitimate prosecutorial factors that *might* justify making different prosecutorial decisions with respect to them." *United States v. Olvis*, 97 F.3d 739, 744 (4th Cir. 1996).

Yet, here, three of the instances plaintiffs rely on to cast fault on the Milwaukee defendants involve persons or entities that are not even within the jurisdiction of the Milwaukee defendants. *See* Pl. Br, at 18, 24-25. Those include plaintiffs' accusations regarding Shelly Moore, a former Democrat candidate for Wisconsin Senate District 10 (i.e., the *western* Wisconsin counties of Pierce, Dunn, St. Croix, Pierce and Dunn County), *see* Leib Decl. ¶16, Ex. N, as well as *Madison-based* people and entities such as one-time Democratic governor candidate Kathleen Falk, various committees supporting her election, and various *Madison-based* organizations including We Are Wisconsin, United Wisconsin, and the Democratic Party of Wisconsin, that organized a recall rally *in Madison*, *see* id., ¶¶17-22, Ex. O-T. Milwaukee District Attorney's Office is legally prohibited by statute from prosecuting persons outside Milwaukee County. Its prosecutors cannot be faulted for the non-investigation and non-prosecution of those that the Milwaukee defendants have no authority to prosecute and based on acts that have no relation to Milwaukee County. *See* Wis. Stat. § 11.61(2).

One remaining instance concerns a complaint filed with the GAB related to the AFL-CIO, in which District Attorney Chisholm was also copied onto the letter addressing that filing. *See* Pl. Br., at 25. The plaintiffs' grieve that the "prosecutors had no response that complaint." Id. Yet, again contrary to plaintiffs' unsupported belief, the Milwaukee prosecutors evaluated the claim, responded to the complainant's attorney with a memorandum, and stated explicitly that the Milwaukee district attorneys will evaluate it further should the GAB in its review refer the

complaint to the Milwaukee district attorneys for criminal prosecution. Landgraf Decl. ¶10, Ex. A. The complainant's attorney likewise responded that he "understood" and thanked the Milwaukee district attorney for the response. Id. To date, however, the GAB has not referred the complaint to the Milwaukee district attorney office for criminal prosecution Id. Again, the Milwaukee defendants cannot be faulted for that.

Having disposed of those, plaintiffs are left with *only two* remaining allegations. First, heavily misquoting an internet article, the plaintiffs lament that the one-time Democrat spokesperson Jeff Fleming became a public relations independent contractor with the Milwaukee County for Mayor Tom Barrett. Pl. Br., at 18. However, that is not illegal, and it is not clear how that instance is "identical in all relevant respects" to [redacted]. *Village of Winnetka*, 371 F.3d at 1002 (7th Cir. 2004).

Finally, plaintiffs lament that Christopher Leibenthal was reportedly known to engage in "excessive" political blogging while at his Milwaukee County job. In a legal sense, plaintiffs' attempt to use that as a "similarly situated" instance is unconvincing for the simple reason that such acts are in no way comparable to [redacted] Certainly, "it is not improper for the Government to concentrate on those violations which appear most flagrant." *United States v. Heilman*, 614 F.2d 1133, 1138-39 (7th Cir. 1980). Yet, what plaintiffs do not acknowledge is that Leibenthal *was investigated* by the Milwaukee District Attorney's office, which included seizure of his computers. Landgraf Decl. ¶ 11. Accordingly, plaintiffs are again left without any basis that the Milwaukee prosecutors improperly targeted only conservatives for investigation.

In the end, as demonstrated above, plaintiffs' request for injunctive relief relies on misrepresentations of the events leading up to t[redacted] as well as the accusations that the defendants investigate and prosecute only conservatives. This Court cannot grant an injunction based on such misrepresentations.

II. The Plaintiffs' Injunctive Request is Non-Specific, is Vague as to Whom it Applies to, and is Overbroad as to What it Seeks.

Having addressed the lack of merit underlying plaintiffs' injunctive request, it is also necessary to consider the exact nature of their request. As the Seventh Circuit recently phrased the threshold question in affirming the denial of a plaintiff's request for preliminary injunction: What does the plaintiff want *us* to do? *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 2014 U.S. App. LEXIS 3326, *13-14 (7th Cir. 2014). Addressing that question in this matter demonstrates that plaintiffs' request is improper and untenable.

[redacted]

Overly broad injunctions are improper, particularly at the preliminary injunction stage. *Mantek Division v. Share Corp*., 780 F.2d 702, 711 (7th Cir. 1986). [redacted]

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III. The Plaintiffs are Not Entitled to Injunctive Relief Because, as Demonstrated Above, the Plaintiffs have "Unclean Hands."

Injunctive relief is an equitable remedy. In considering whether such a remedy should be granted, the court must consider whether the plaintiff has acted in "bad faith," or has "unclean hands," or has "failed to do equity." A party with "unclean hands" is not entitled to equitable remedies, such as injunctive relief. "The unclean hands doctrine closes the door of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." *Pampered Chef v. Alexanian*, 804 F.Supp.2d 765, 801 (7th Cir. 2011) (citing *ABF Freight System, Inc. v. N.L.R.B.*, 510 U.S.317, 329-30 (1994)). Under this doctrine, a party who comes into a court of equity to

obtain relief cannot do so if the party has acted inequitably, unfairly, or dishonestly as to the controversy in issue. *See Burns v. Nielsen*, 732 N.W.2d 640, 649 (2007).

[redacted]

a [redacted]

[redacted]

> [redacted]

> [redacted]

[redacted]

[redacted]

[redacted]

c[redacted]

CONCLUSION

Based on the arguments set forth here as well as in the defendants' previously-filed joint response brief, defendants respectfully request that the Court deny plaintiffs' motion for a preliminary injunction.

Dated this 15th day of April, 2014.

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