

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

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

Plaintiffs,

v.

Case No. 14cv139-rtr

FRANCIS SCHMITZ, in his official  
and personal capacities,  
JOHN CHISHOLM, in this official  
and personal capacities,  
BRUCE LANDGRAF, in his official  
and personal capacities,  
DAVID ROBLES, in his official  
and personal capacities,  
DEAN NICKEL, in his official  
and personal capacities,  
GREGORY PETERSON, in his  
official capacity,

Defendants.

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**DEFENDANT DEAN NICKEL'S SUPPLEMENTAL RESPONSE  
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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**BACKGROUND**

Since the Court's scheduling conference on March 13, 2014, certain restrictions have been lightened against Dean Nickel and his disclosure of information relating to the John Doe proceeding. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

As set forth below, the GAB, the non-partisan state agency comprised of a group of former Wisconsin judges, [REDACTED]

[REDACTED]

[REDACTED] Also attached are public records obtained from the GAB detailing prior investigations into members of both political parties, including the GAB's dismissal of charges against the Democratic candidates that Defendants allegedly ignored because of their similar political beliefs. (*See* declaration of Reid Magney ("Magney Dec.") and documents attached thereto). These documents establish that Defendants did not ignore similar conduct by Democratic candidates while simultaneously pursuing the Plaintiffs for the same conduct. Finally, the declarations of Dean Nickel and Kevin Kennedy, GAB's Director and General Counsel, clarify that Nickel has never been motivated by a retaliatory animus in pursuing his investigation in the John Doe proceeding. (*See* declarations of Dean Nickel ("Nickel Dec.") and Kevin Kennedy ("Kennedy Dec.")).

Nickel also incorporates and adopts the facts set forth in the "Supplemental Factual Background" section of the Supplemental Response filed by Defendant Francis Schmitz.

## ARGUMENT

### **I. Plaintiffs Are Not Likely To Succeed On The Merits Because They Were Not Targeted Because Of Their Political Beliefs And Substantial Evidence Exists Showing Potential Violations Of Wisconsin Campaign Finance Law.**

A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion. *Boucher v. School Bd. of School Dist. of Greenfield*, 143 F.3d 821, 823 (7<sup>th</sup> Cir. 1998). Granting a preliminary injunction involves the “exercise of a very far-reaching power” and is “never to be indulged except in a case clearly demanding it.” *S & S Sales Corp. v. Marvin Lumber & Cedar Co.*, 435 F.Supp.2d 879, 882 (E.D.Wis. 2006) (citing *Roland Mach. Co. v. Dresser Indus. Inc.*, 749 F.2d 380, 389 (7<sup>th</sup> Cir. 1984) (reversing district court’s grant of a preliminary injunction where the defendant set forth credible legal defenses to claims)). Here, Plaintiffs are unable to establish a likelihood of success on the merits because they are unable to show that their exercise of First Amendment rights was the cause or motivating factor for the initiation or continuance of the John Doe investigation. As explained below, there is substantial evidence showing the good faith and non-partisan basis for the investigation.

#### **A. Dean Nickel Was Not Motivated By A Retaliatory Animus.**

Dean Nickel was an investigator and supervisor for the Wisconsin Department of Justice (“DOJ”), Division of Criminal Investigation 1980 to 2006. (Nickel Dec., ¶ 3). [REDACTED]

[REDACTED] The GAB is a non-partisan state agency statutorily charged with responsibility for the administration of Wis. Stats. chs. 5 to 12, other laws relating to elections and election campaigns, as well as lobbying and ethics laws. *See* Wis. Stat. §5.05(1). (Kennedy Dec., ¶¶ 6-7). The board, employees and

contractors of the GAB must be non-partisan and remain non-partisan at all times when associated with the GAB. (Kennedy Dec., ¶ 7).

[REDACTED]

Dean Nickel is not, and has never been a member of the Democratic Party, or any other political party. (Nickel Dec., ¶ 9). He did not sign any recall petitions for Scott Walker in 2012 and did not sign any petitions asking for the repeal of the Budget Repair Bill. (Nickel Dec., ¶ 10). Nickel does not have a bias against the Budget Repair Bill because he was retired when it was enacted and it did not affect his retirement benefits. (Nickel Dec., ¶ 8). Nickel does not hold any personal animus towards conservative groups or causes, including O’Keefe or WCFG. (Nickel Dec., ¶ 11). Indeed, prior to the John Doe investigation initiated in 2013, Nickel had no knowledge of O’Keefe or WCFG. (Nickel Dec., ¶ 11). Throughout his career, Nickel has investigated individuals associated with both the Democratic and Republican parties and the

political affiliation of an individual has never played a role in his signing of probable cause affidavits or other investigatory documents. (Nickel Dec., ¶ 12). [REDACTED]

[REDACTED]

The above evidence shows that Plaintiffs' political beliefs and exercise of their First Amendment rights played no role in Nickel's investigation of their potential violation of Wisconsin's campaign finance laws. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Plaintiffs' use of and citation to newspaper articles in an attempt to establish retaliatory animus on behalf of Dean Nickel is unavailing. Leaving aside the question of the reliability of these documents, none of these articles even mention Dean Nickel or show that Nickel was motivated by any type of animus or dislike of conservative groups or causes. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Accordingly, Plaintiffs are unlikely to prevail on their First Amendment claims.

**B. The GAB Resolution And The Affidavit Of Kevin Kennedy Show That The Investigation Was Not Conducted In Bad Faith.**



[REDACTED]

[REDACTED]

**C. GAB's Public Records Shows That the Defendants Did Not Ignore Similar Conduct by Democratic Candidates or Groups.**

In their motion for a preliminary injunction, Plaintiffs argue that the Defendants' bad faith is exhibited by their failure to investigate Democrats that engaged in similar violations of Wisconsin campaign finance law. In particular, Plaintiffs point to Shelly Moore, Sandy Pasch and Senator Dave Hansen as Democrats that engaged in improper conduct but who Defendants refused to investigate because of their political beliefs. (Compl., ¶¶ 146-48). As shown in GAB records attached to Reid Magney's declaration, the GAB investigated each of these complaints and the board unanimously dismissed them because there was no evidence of campaign finance violations. (Magney Dec., pp. 19-20, 37-41). As an example, the GAB prepared a detailed memorandum summarizing its investigation into illegal coordination by Sandy Pasch's campaign for Senate arising from, among other things, a feature in a Milwaukee weekly called Shepherd Express. (Magney Dec., pp. 38-39). After investigating the matter, the GAB found that Ms. Pasch's campaign did not purchase the feature in the Shepherd Express and that the feature was an editorial endorsement. Likewise, the GAB voted unanimously to dismiss the charges against Moore and Hansen. (Magney Dec., pp. 20, 40). Given the GAB's unanimous dismissal of charges made against Pasch, Moore and Hansen, there was absolutely no reason for the Defendants to open a John Doe investigation into their conduct. The GAB records again show that the Plaintiffs were not singled out in the John Doe proceeding because of their political beliefs and there was no similar conduct by Democratic candidates.

**D. The Affidavits Of The Investigators Establish That the Doe Proceeding Was Not Initiated Because Of Plaintiffs' Political Beliefs.**

The Court has now been furnished with all of the affidavits and supporting materials underlying the Doe investigation<sup>1</sup>. [REDACTED]

[REDACTED] Clearly, such evidence supports a reasonable belief that potential violations of Wisconsin's campaign finance laws were being committed. This substantial evidence coupled with the GAB's unanimous approval of the investigation directly refutes Plaintiffs' witch-hunt theory.

If the legal theory behind the Doe investigation is found to be invalid, that does not equate to a bad faith investigation or prosecution. *Wilson v. Thompson*, 593 F.2d 1375, 1382 (5th Cir. 1979); ("being prosecuted under an arguably (or actually) invalid law is not itself a [constitutional] violation.") Certainly a claim for bad faith or selective prosecution does not arise any time a prosecutor's legal theory is later found to be invalid as it would greatly impinge on a prosecutor's duties and abilities. Rather, Plaintiffs must point to specific evidence that they were prosecuted because of their political beliefs and First Amendment activities. [REDACTED]

[REDACTED] Simply put, an individual does not have a First Amendment right to engage in unlawful conduct and the State may limit such expression. Thus, Plaintiffs do not have a likelihood of success and the motion for preliminary injunction must be denied.

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<sup>1</sup> [REDACTED]



## **II. An Injunction Would Harm The Public Interest.**

Granting an injunction and enjoining the Doe investigation would result in significant harm to the public because it would allow candidates to solicit large amounts of money through the guise of a 501(c)(4) organization and then direct those expenditures to benefit the candidates' campaign. Such a ruling could open the flood gates to impropriety and undermine Wisconsin's system of campaign finance regulation as noted by Kevin Kennedy of the GAB:



(See declaration of Kevin Kennedy from Court of Appeals action attached as Exhibit B to Leib Dec., ¶ 13) (emphasis added). Because enjoining the Doe Investigation would harm the public interest in transparent and fair elections, the motion for preliminary injunction must be denied.

### **CONCLUSION**

For the foregoing reasons, Defendant Dean Nickel requests that this Court deny Plaintiffs' Motion for Preliminary Injunction.

Dated: April 15, 2014.

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