Conservative groups ask U.S. Supreme Court to defend rights of John Doe targets

By M.D.Kittle

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MADISON, Wis. — The John Doe investigation into dozens of conservative groups and Gov. Scott Walker's campaign is "sinister," causing "irreparable harm," even to those right-of-center organizations not targeted in the secret probe.

That's the assessment of the Wisconsin-based John K. MacIver Institute for Public Policy in a motion filed Friday in U.S. Supreme Court.

MacIver is requesting to file an amicus, or friend of the court, brief in support of conservative targets of the politically charged probe who say they want to hold John Doe prosecutors officially and personally accountable for an abusive and overreaching investigation that violated their First Amendment rights.

Other limited government groups also filed amicus briefs Friday, including the Center for Competitive Politics, the Cato Institute, the Wisconsin Institute for Law & Liberty and the Cause of Action Institute.

"It is hard to imagine a more chilling impact than what the MacIver Institute experienced as a consequence of (the prosecutors) acts," writes Madison-area attorney Jim Troupis, whose firm is representing MacIver.

The free market think tank wasn't, to the best of its executive's knowledge, targeted by Milwaukee County District Attorney John Chisholm and his fellow prosecutors in the probe that has alleged possible illegal coordination between dozens of conservative groups and Walker's campaign during Wisconsin's partisan recall season of 2011-12.

But the fear, the omnipresent shadow of the Democrat-led investigation, curtailed MacIver's speech and conservative advocacy, the request before the Supreme Court asserts. The extensive

informational work MacIver did on Act 10, Walker's signature reforms to the state's public sector collective bargaining laws, in 2011 and 2012, disappeared in 2014 following reports of paramilitary-style raids on the homes and offices of conservative targets in October 2013.

MacIver chose "not to speak to those same issues in that way in 2014 for fear it would be subject to an investigation," the court document states. "Such investigations inevitably create fear in donors on whom the Institute relies, and any investigation would have sapped the Institute of resources by requiring it to address the governmental authorities."

That is precisely what has happened to many of the 29 conservative organizations targeted by Chisholm, a Democrat, two of his assistant DAs special prosecutor Francis Schmitz, and Dean Nickel, a contracted special investigator working for John Doe probe partner, the state Government Accountability Board. The prosecutors would not consent to the amicus briefs.

"We spent, but we didn't spend like we did in the last couple of cycles, and I believe a good part of that was related to the John Doe investigation," one source, whose organization has been targeted in the politically charged probe, told Wisconsin Reporter in November.

The source spoke on condition of anonymity, because, like many other targets, at the time she still couldn't say for sure whether she could go to jail for speaking publicly about the investigation, launched in September 2012 by Chisholm.

Schmitz, Chisholm and the other prosecutors have repeatedly declined comment or have not returned multiple requests for comment.

The probe came with a strict gag order. Targets who spoke publicly about it could face contempt charges.

The presiding John Doe judge in January 2014 quashed several subpoenas because the prosecutors had failed to show probable cause that a crime had been committed and effectively froze the investigation. A federal judge last month issued a declaratory judgment that, in part, told Chisholm and the GAB they could no longer go after the conservative targets using their exotic theory of illegal coordination that relied on unconstitutional sections of Wisconsin campaign finance law.

Still, subjects of the shadowy probe don't know where they stand, and may not until the state Supreme Court settles John Doe-related legal challenges before it.

Veteran political activist Eric O'Keefe, a director of the Wisconsin Club for Growth, is the only John Doe target who has openly defied the gag order and spoken publicly. O'Keefe and the club sued the prosecutors in federal court. A U.S. District Court judge ordered the probe shut down and said that the prosecutors' illegal coordination theory that effectively transforms issue advertisements, which don't directly endorse or oppose a candidate, into express advocacy, which does, was "simply wrong."

But the U.S. Court of Appeals for the Seventh Circuit in October overturned the lower court's ruling, removing the preliminary injunction and ordering that the federal court system must abstain from getting involved in legal controversies that are the domain of Wisconsin's courts — in the name of states' rights.

O'Keefe last month filed a petition in the U.S. Supreme Court seeking review of the 7th Circuit's decision, calling it contorted" in its erroneous interpretation of Supreme Court opinions on federal court jurisdiction over state abuses of federal constitutional rights — a decision that "sows confusion" about rightful court intervention.

In short, the appeals court abdicated its responsibility to intervene in a case marked by retaliatory prosecution.

The U.S. Supreme Court has yet to decide whether it will take O'Keefe's case.

"The practical importance of these issues cannot be overstated," the petition asserts. "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,'" the petition asserts, quoting a 2000 Supreme Court opinion. "State officials should not be able to avoid federal-court scrutiny merely by cloaking retaliatory actions in the guise of investigation."

MacIver agrees in its motion before the high court. The organization argues that the court's ruling in Sprint Communications Inc. v. Jacobs clearly lays out the limits of federal court abstention. The 7th Circuit's decision not to intervene "leaves an enormous gap in Section 1983 (federal civil rights law) and in doing, leaves this retaliatory and abusive investigation without a prospect of relief," the motion states.

MacIver argues that 7th Circuit Judge Frank Easterbrook, who wrote the panel's decision and is widely recognized as one of the foremost experts on federal practice and procedure, is "confused" in deferring to the state's court system in the case.

The think tank asserts the chilling effect that the investigation brought to center-right organizations in Wisconsin can never be fully calculated.

"The speech never given; the debate that never was and the legislative action never undertaken are necessarily unquantifiable," MacIver's motion states. "The Seventh Circuit's failure to recognize the critical role of the federal courts here — in terms of both official capacity and personal capacity remedies — should be reversed."

In its motion, the Cato Institute implores the Supreme Court to uphold the principles in landmark cases that demand federal court relief in cases of retaliation.

“The same constitutional harm suffered by victims of retaliatory prosecutions—namely suppressed First Amendment activity—befalls victims of retaliatory investigations, particularly those, like here (in the John Doe investigation), adorned with leaks and coordinated pre-dawn raids,” the brief states.