IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

THE JOHN K. MACIVER INSTITUTE FOR PUBLIC POLICY, INC.,	)	
Plaintiff,	)	
v.	)	
FRANCIS SCHMITZ, in his official and personal capacities,	)	
JOHN CHISHOLM, in his official and personal capacities,	)	
	)	**Civil Case No. 16-cv-539**
BRUCE LANDGRAF, in his official and personal capacities,	)	
	)	**JURY TRIAL DEMANDED**
DAVID ROBLES, in his official and personal capacities,	)	
KEVIN KENNEDY, in his official and personal capacities, and	)	
SHANE FALK, in his official and personal capacities,	)	
JONATHAN BECKER, in his official and personal capacities,	)	
Defendants.	)	

CLASS ACTION COMPLAINT

Plaintiff The John K. MacIver Institute for Public Policy, Inc. ("MacIver Institute"), for its Class Action Complaint against Defendants Francis Schmitz, John Chisholm, Bruce Landgraf, David Robles, Kevin Kennedy, Shane Falk, and Jonathan Becker (collectively, "Defendants"), alleges and states as follows:

Nature of the Action

1. From August 2012 to January 2014, Defendants conducted a sweeping investigation into scores of conservative individuals and groups throughout the country. Defendants probed deeply into their personal and political affairs since 2009, directing more than 150 search warrants and subpoenas in rapid-fire succession to every corner of the country—from New Jersey to Florida to Texas and California—all in the name of Wisconsin campaign finance regulation.

2. Defendants had a running start. When they began their investigation in August 2012 (later, called "John Doe II"), they already had a massive trove of materials they had seized from some of the same individuals in an earlier investigation, called "John Doe I," which had itself spanned a period of years. Having developed their John Doe II theory during John Doe I, it did not take long for Defendants to amass a staggering database of political intelligence. Successive waves of search warrants and subpoenas flooded Defendants with millions of records, straining the resources of two state agencies to merely store the information, let alone begin to analyze it. Nonetheless, especially throughout the latter half of 2013, Defendants continued to seize sensitive and constitutionally protected materials without pause, leaving them unaware as to what they had seized. When details of the investigation finally came to light in legal challenges filed by the targets, the Wisconsin Supreme Court called it a "storm of wrongs."

3. This lawsuit does not challenge the basis or even the scope of John Doe I or John Doe II. Instead, it challenges the secretive and unlawful manner in which the Defendants conducted it. Defendants wanted to amass as much politically sensitive material as possible, for as long as possible, before any person could bring Defendants' theory or conduct before a proper court. In their zeal, Defendants took affirmative steps to conceal their repeated use of nearly

identical search warrants throughout the country. In so doing, Defendants violated the Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701-2712, which required that they provide notice to the targets of their investigation when seizing their materials. MacIver Institute seeks relief on behalf of itself and on behalf of other similarly situated individuals under the SCA.

The Parties

4. Plaintiff The John K. MacIver Institute for Public Policy, Inc. is a Wisconsin corporation recognized as a non-profit entity under Section 501(c)(3) of the Internal Revenue Code. It educates individuals on free markets, individual freedom, personal responsibility, and limited government through research and public education. It accomplishes this purpose through traditional media, social media, and its website. Its principal office is in Dane County, Wisconsin.

5. Defendant Francis Schmitz served as special investigator for the Wisconsin Government Accountability Board ("GAB") starting on or about August 7, 2013. Approximately three weeks later, he was formally appointed as a special prosecutor in a multi-county "John Doe" investigation. Subject to the control and supervision of the GAB, Defendant Schmitz conducted, and was responsible for, the day-to-day operations of Defendants' investigation, including the issuance of multiple search warrants and subpoenas at issue in this case.

6. Defendant John Chisholm is the District Attorney for Milwaukee County, Wisconsin, a position he has held since 2007. Defendant Chisholm was part of the Milwaukee District Attorney team dedicated to the Defendants' investigation. In addition to his personal role in directing the investigation of MacIver Institute and other similarly situated individuals and groups, Defendant Chisholm had supervisory control over the investigatory activities of

Defendants Landgraf, Robles, and Stelter against MacIver Institute and other similarly situated individuals and groups, and specifically exercised that control.

7. Defendants Bruce Landgraf and David Robles are Milwaukee County Assistant District Attorneys. They were investigators dedicated to the Defendants' investigation of MacIver Institute and other similarly situated individuals and groups, and took specific acts that violated MacIver Institute's statutory rights. For example, in October 2013, Robles and Landgraf actually signed and notarized at least one of the search warrant applications at issue in this lawsuit.

8. Defendant Robert Stelter is an investigator with the Milwaukee County District Attorney's Office. Over the course of Defendants' investigation, Stelter signed multiple affidavits for warrants and subpoenas. Stelter is one of Defendant Chisholm's "trusted investigators" who was personally involved in Defendants' investigation.

9. Defendant Kevin J. Kennedy was the Director and General Counsel for the GAB, a position he held between 2007 and the June 30, 2016, dissolution of the GAB. In close consultation with Defendant Chisholm, Defendant Kennedy personally conducted and co-directed the Defendants' investigation. He also exercised supervisory control over Defendant Schmitz, who worked for and received pay from the GAB.

10. Defendant Jonathan Becker was the Administrator of the Ethics and Accountability Division of the GAB for all relevant periods. He was responsible for the search for a special investigator for the GAB and a special prosecutor for the coordinated John Doe investigation, among other tasks. He was a core member of the investigative team throughout the investigation.

11. Defendant Shane Falk was Staff Attorney for the GAB for all relevant periods. He helped decide who would receive the warrants and subpoenas at issue, helped decide how they would be obtained and served, reviewed drafts of the subpoena and search warrant applications, and was a core member of the investigative team throughout the investigation.

Jurisdiction and Venue

12. Jurisdiction is proper in this Court under 28 U.S.C. § 1331. This case presents a federal question regarding whether Defendants' conduct violates the Stored Communications Act, 18 U.S.C. §§ 2701-2712.

13. The Western District of Wisconsin is the proper venue for this action under 28 U.S.C. § 1391(b)(1) because all Defendants reside in Wisconsin and several Defendants, including Defendants Kennedy, Becker, and Falk, reside in the Western District of Wisconsin. The Western District of Wisconsin is also the proper venue for this action under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claim occurred in the Western District. For example, the MacIver Institute is located in the Western District of Wisconsin, along with many likely members of the class. They ultimately received information about the seizures of their electronic communications in the Western District of Wisconsin, and had Defendants complied with their legal duty, would have originally received the legally required notice in this district.

Factual Allegations

14. For more than seventeen months, Defendants conducted a wide-ranging, secret "John Doe" investigation of MacIver Institute and scores of other individuals and groups throughout the country. Although the validity of their legal theory is not at issue here,

Defendants pursued their dragnet by invoking a theory of state campaign finance regulation later held to be "unsupported in either reason or law."[1]

15. Defendants requested, obtained, and catalogued millions of personal and politically sensitive emails, contact lists, calendar entries, telephone records, and bank records from MacIver Institute and scores of other individuals and groups that had triggered Defendants' interest.

16. Although Defendants seized information spanning almost five years, MacIver Institute neither knew nor could have known of these seizures because Defendants took affirmative acts to conceal them. Other similarly situated individuals subject to the more than 150 subpoenas and search warrants issued by Defendants also did not receive notification of the seizures.

17. Defendants seized this information without a warrant or authorization from a court of competent jurisdiction and without notice to their targets. To this day, only Defendants know the full sweep of their digital dragnet.

I. John Doe Investigations in Wisconsin

18. A John Doe proceeding is an independent investigatory tool used to ascertain whether a crime has been committed, and if so, by whom. Although its origins are in common law, it is now a statutory proceeding codified in Wis. Stat. § 968.26.[2]

19. On the request of a district attorney, a judge commences a John Doe proceeding and acts as a tribunal. The John Doe judge is not the equivalent of a court and does not exercise

[1] *Wis. ex rel. Two Unnamed Petitioners v. Peterson*, 866 N.W.2d 165, 179 (Wis. 2015).

[2] In October 2015, the Wisconsin legislature substantially amended the John Doe statute to address Defendants' abuses in this case. *See* 2015 Wis. Act 64. For purposes of this proceeding, all citations are to the 2009 version.

general jurisdiction. His orders are not the orders or judgments of a circuit court or court of record.

20. The Defendants considered other means of obtaining information, documents, and testimony for their investigation, including an independent GAB civil investigation or the use of a grand jury. But they settled on using the John Doe.

21. John Doe investigations offer many advantages to law enforcement officials. For instance, a John Doe investigation confers the power to subpoena witnesses and documents, take testimony under oath, compel the testimony of a reluctant witness, and issue search warrants under appropriate circumstances. In addition, the Wisconsin Rules of Evidence do not apply to John Doe proceedings, and an accused does not have a right to testify through an examination by his or her lawyer, have that lawyer cross-examine other witnesses, or have his or her lawyer argue before the John Doe judge. Further, before the Wisconsin legislature recently overhauled the law, John Doe investigations were frequently accompanied by onerous secrecy orders that prohibited recipients of warrants or subpoenas from even disclosing that they had been served.

II. The Milwaukee County District Attorney Begins the John Doe Investigation

22. On August 10, 2012, the Milwaukee County District Attorney's office filed a petition in the Milwaukee County Circuit Court to open a John Doe investigation for the ostensible purpose of investigating alleged criminal campaign finance violations involving campaign coordination. The Milwaukee County District Attorney's Office asserted that it had reason to believe a criminal violation of campaign finance law had been committed within its jurisdiction. In support of the District Attorney's petition, investigator Robert Stelter submitted an affidavit that cited materials, including stored electronic communications, that Defendants had

already obtained in the prior John Doe investigation, John Doe I. This filing was secret, and it was over a year before any target even had reason to suspect that John Doe II had been opened.

23. In or around August of 2012, then-Chief Justice of the Wisconsin Supreme Court Shirley Abrahamson assigned Reserve Judge Barbara Kluka as the John Doe judge. On September 5, 2012, Judge Kluka authorized commencement of John Doe II.

24. Shortly after the commencement of John Doe II, Defendant Chisholm requested a secrecy order from the John Doe judge providing that all aspects of the proceeding must remain secret for all purposes. Judge Kluka granted the request, issuing an all-encompassing secrecy order which, on information and belief, was submitted by the District Attorney. This secrecy order would later be described as "screamingly unconstitutional" by Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit.

25. Because of the Defendants' abuses in this case, the Wisconsin legislature amended the John Doe statute to prevent a district attorney or John Doe judge from requiring secrecy by the witnesses or targets to the proceeding.

III. The GAB and John Doe II

26. Under its Enabling Statute as it existed during the relevant periods,[3] the GAB was responsible for administering Wisconsin laws relating to elections, ethics, and lobbying (i.e., Chapters 5-12 and subchapter III of Chapter 13 and subchapter III of Chapter 19). The GAB had certain investigatory and rulemaking authority, as well as the ability to seek civil remedies for violations of the laws it administered. *See* Wis. Stat. § 5.05(1).

[3] Because of the Defendants' abuses in this case, the Wisconsin legislature dismantled the GAB, replacing it with an elections commission. *See* 2015 Wis. Act 118. Those changes took effect on June 30, 2016.

27. Specific statutory procedures governed GAB investigations. *See id.* For example, during an investigation, the GAB had authority to subpoena witnesses and property, but could only do so after an affirmative vote by at least four members of the GAB and "after providing notice to any party who is the subject of an investigation." *Id.* § 5.05(1)(b). The GAB could also authorize a special investigator to request a circuit court to issue a search warrant if "such action is legally appropriate." *Id.* § 5.05(2m)(c)4.

28. Shortly after the commencement of John Doe II, Judge Kluka admitted GAB board members and staff, including GAB Defendants Kennedy, Becker, and Falk, as parties to the John Doe investigation through an amendment to the Secrecy Order. After their admission to the John Doe investigation, the GAB Defendants acted together with the DA Defendants to use compulsory John Doe process, including warrants and subpoenas, to request, obtain, and catalogue millions of sensitive personal and political records.

29. The GAB played a substantial role in preparing and drafting the search warrants and subpoenas. According to GAB Board meeting minutes:

> G.A.B[.] staff has spent considerable time reviewing and revising the supporting documentation for the search warrants and subpoenas to ensure consistency along with the correct references to parties and documents. Shane Falk and Nate Judnic have done most of the review and revision with assistances from Molly Nagappala.

Wis. GAB Closed Session Minutes at 1 (Oct. 2, 2013), attached as **Exhibit A**.

30. The GAB Defendants sought access to the John Doe investigation to circumvent the requirements of its Enabling Statute. For example, Defendants sought warrants and subpoenas in John Doe II in an effort to obtain and review millions of sensitive personal and political documents without providing notice or obtaining a warrant from a Wisconsin circuit court. *See* Kevin J. Kennedy, Memorandum at 3 (May 21-22, 2014), attached as **Exhibit B**.

31. The GAB Defendants assigned two GAB staff counsel, Nathan Judnic and Defendant Falk, to review the financial and bank records of the John Doe targets that were obtained from the search warrants and subpoenas issued in December of 2012. *See* Action Items Update at 2 (July 24, 2013), attached as **Exhibit C**; *see also* Investigation Planning – Meeting Notes at 4 (Aug. 15, 2013), attached as **Exhibit D**; Investigation Status Update – Meeting Notes at 7 (Aug. 26, 2013), attached as **Exhibit E**. GAB staff also assisted in summarizing the documents obtained from the warrants and subpoenas served in December 2012 in order to determine whether supplemental warrants and subpoenas would be required and to whom they would be issued. *See* Ex. D at 2; Ex. E at 8-10.

32. The GAB Defendants attempted to hide their ongoing, substantive role in directing the criminal investigation, not just from the targets, and not just from the public at large, but even from other government officials. The GAB Defendants and DA Defendants used private "Gmail" accounts to discuss the investigation, despite having official email accounts with the State of Wisconsin. *See* Investigation Planning – Meeting Notes, Ex. D at 3. Notwithstanding their use of "offline" email accounts, the GAB admonished that "team members should communicate with the understanding that their communications could become public or subject to discovery at some point." *Id.*

33. On June 20, 2013, the GAB voted to commence an investigation into whether there was probable cause that a violation of campaign finance laws had occurred or was occurring. Closed Session Minutes at 4 (June 20, 2013), attached as **Exhibit F**.

34. By the time of this vote, the GAB Defendants had already been working with the DA Defendants from Milwaukee County to conduct the John Doe investigation for approximately ten months. During the fall of 2012 and into December of that year, Defendants

Robles and Falk communicated regarding targets, legal theories, and Robles' draft of a December 2012 affidavit for seizures of electronically stored communications. And in April 2013, for example, Defendant Falk wrote Defendant Robles urging him to consider the MacIver Institute as part of the "Badger Doe" (Defendants' code name for John Doe II), charging that MacIver had "received funding" and "coordinat[ed] their message/propaganda with the other involved parties."

IV. Special Prosecutor Francis Schmitz and the Multi-County Doe

35. As the documents began to pour in without required notice from the already expansive John Doe II, the ordinary boundaries of a John Doe investigation quickly became insufficient. First, the investigation produced too many documents for the DA Defendants to review on their own. Some seized documents sat for weeks or months without review. Second, the breadth of the investigation had quickly swept beyond Defendant Chisholm's jurisdiction into other Wisconsin counties (and out of state). The Special Prosecutors' Fund was believed to be inadequate to fund this sprawling operation.

36. The DA and GAB Defendants decided that the GAB would choose the special prosecutor and simultaneously appoint and pay that person as a GAB special investigator. *Id.* at 2-4. The GAB would also hire other investigators and a digital forensic company to assist in managing the voluminous document review. *Id.* at 2, 4-5. Defendant Chisholm indicated that Defendant Robles would be the primary point of contact from his office, while Defendants Landgraf and Chisholm and their team of investigators would also be dedicated to the investigation. *Id.* at 3. The genius of this model was that funding and staff support would come from the GAB, but the John Doe "secrecy order" and secret search warrants for electronic records would allow Defendants to avoid notifying targets and witnesses, rendering them unable

to challenge Defendants' theories or methods. With this object in mind, each Defendant completed tasks assigned by the group.

37. According to meeting notes between the GAB Defendants and DA Defendants, Defendant Becker was personally involved in—and in fact primarily responsible for—the hunt for a special prosecutor and determining how he or she would be paid:

> 4) Special Prosecutors/Investigators
>
> . . .
>
> i. Bruce [Landgraf] and David [Robles] still have no idea how this is funded. Jon [Becker] informed them that [two attorneys] will do it for $240 per hour, which is a significant reduction from their $325 per hour fees. Bruce mentioned that we really have to get someone for $100 per hour. He indicated that exhausting the special prosecutor fund for one case would have significant implications with the other DAs across the state.
>
> ii. Jon mentioned that perhaps the GAB could also retain the same person acting as special counsel as the GAB investigator and then supplement his or her pay with GAB funds. Bruce and David liked that idea. Would be limited to the investigation process though.

See Badger John Doe Meeting Notes at 2-3 (July 2, 2013), attached as **Exhibit G**; *see also* GAB Closed Session Minutes, Ex. F at 4 ("Mr. Chisholm indicated that . . . he trusts the G.A.B.'s judgment on who the special prosecutor should be.").

38. As Defendant Becker contacted individuals to find a special prosecutor for the John Doe investigation, Defendant Falk worked to draft a legal memorandum discussing the claims, elements, statutes of limitations, and operative statutes and cases that could be used in a subsequent prosecution. *See* Badger John Doe Meeting Notes, Ex. G at 4; Action Items Update, Ex. C at 2; Investigation Status Update, Ex. E at 7. The GAB soon authorized the use of special investigators and a forensic IT company in its June 20, 2013 closed session meeting. *See* GAB Closed Session Minutes, Ex. F at 5-6.

39. On June 26, 2013, six days after commencing its investigation, the GAB Defendants met with and referred the matter to the district attorneys for Milwaukee, Columbia, Dane, Dodge, and Iowa Counties at its offices in Madison, Wisconsin. During the meeting, the GAB informed the district attorneys of its desire to investigate conservative-leaning groups both across Wisconsin and the country, including MacIver Institute, and the district attorneys discussed the initiation and coordination of four additional John Doe investigations (to supplement the already-pending Milwaukee County investigation) and the appointment of a single special prosecutor to conduct all five proceedings as a unified John Doe investigation.

40. By July of 2013, the GAB Defendants had located a special prosecutor for the John Doe investigation. On July 16, 2013, Defendant Becker called Defendant Schmitz and asked him if he was interested in working on the John Doe investigation, including by serving as a special prosecutor. Defendant Schmitz accepted the offer. *See* Declaration of Francis Schmitz, *O'Keefe v. Schmitz*, Case No. 14-cv-00139 (E.D. Wis. Aug. 22, 2014), attached as **Exhibit H**; *see also* Actions Items Update, Ex. C at 1.

41. Shortly thereafter, the DA Defendants worked with district attorneys in the four other counties to seek authorization to commence John Doe investigations in those counties. Once commenced, then-Chief Justice Abrahamson appointed Judge Kluka to each proceeding, who in turn appointed Defendant Schmitz as special prosecutor in each county proceeding at the request of the DA Defendants. *See* Letter Seeking Appointment of Special Prosecutor (Aug. 21, 2013), attached as **Exhibit I**. In the letter requesting the appointment, the five district attorneys argued that appointment of a special prosecutor was warranted because the proceeding were "one overall undertaking and should be managed by one prosecutor with general authority in all five counties." *Id.* at 1. The five district attorneys, including Defendant Chisholm, also expressed

their understanding that "John Doe judges are not courts of record," citing *State v. Washington*, 266 N.W.2d 597, 607 (1978). *Id.* at 4 n.2.

42. On August 7, 2013, consistent with the prior agreement by the DA and GAB Defendants, Defendant Schmitz signed a GAB Agreement for Special Investigator, which stated that he would investigate violations of campaign finance laws "at the direction of the Government Accountability Board's Ethics & Accountability Division Administrator." *See* Wis. GAB Agreement for Special Investigator at 1 (August 17, 2013), attached as **Exhibit J**. The GAB also provided Defendant Schmitz office space in Madison, Wisconsin from which to work. Schmitz Declaration, Ex. H at 2.

43. Defendant Schmitz, acting as the GAB Defendants' agent, personally obtained the signatures of at least some of the five county prosecutors who signed a joint letter requesting Schmitz's secret appointment as special prosecutor. *See* Investigation Planning – Meeting Notes, Ex. D at 2.

44. The GAB Defendants would eventually convince the GAB to hire four more special investigators to work on the John Doe. In addition, the GAB Defendants retained Digital Intelligence, a private company, to serve as the main depository and custodian of evidence obtained, including a trove of materials from a prior John Doe investigation, the records obtained from the dozens of search warrants and subpoenas from December 2012, and any subsequent process issued. *See* Action Items Update, Ex. C at 1. These actions all took place with purpose and intent of seizing voluminous materials from individuals throughout the country without notice as required by law.

V. The Rapid-Fire Seizure of Materials throughout the Country

45. In October, 2013, with the coordinated John Doe structure in place, Defendants only increased their seizure of materials, capturing millions of sensitive personal and political electronic records from MacIver Institute and scores of other individuals or groups that had prompted Defendants' interest. Over the course of the John Doe investigation, Defendants requested, obtained, and catalogued details regarding MacIver Institute's private affairs, including the contents of MacIver Institute's email communications, calendar entries, and contact lists, through secret compulsory process.

46. Defendants gathered this information without notice to MacIver Institute and without a warrant from a court of competent jurisdiction. Defendants also failed to provide notice regarding over 100 nearly identical search warrants they used to seize materials throughout the country.

47. MacIver Institute still does not know the extent of the sensitive information that Defendants requested, obtained, and catalogued. MacIver Institute and other similarly situated individuals and groups only learned of the seizures and their scope after the Wisconsin Supreme Court ordered Defendant Schmitz to provide "written notices to all individuals and organizations whose documents or electronic data were *obtained* by the prosecution team. . . . The notice should describe, *with particularity*, the nature and scope of the documents or electronic data that the prosecution team *obtained*." *Wisconsin ex rel. Three Unnamed Petitioners v. Peterson*, 875 N.W.2d 49, 61-62 (Wis. 2015) (emphasis supplied).

48. Despite the court's order, Defendant Schmitz has refused to provide such notices to date. Instead, on December 28, 2015, he notified MacIver Institute and at least some other targets of the investigation of the scope of some of the records *requested* as part of the John Doe

investigation. *See, e.g.*, Notice from Francis D. Schmitz to MacIver Institute (December 28, 2015), attached as **Exhibit K.** Thus, while MacIver Institute and other individuals were finally informed on December 28, 2015 of the scope of what Defendants *sought* with their process in the John Doe investigation, Defendants have still not informed the targets of their investigation of the scope of what Defendants "obtained" in response to that process. Nonetheless, the notice demonstrates that Defendants failed to give notice to MacIver Institute as required by the Stored Communications Act.

49. Ultimately, Defendant Schmitz indicated that he had sent out 159 notices to individuals and organizations whose records were either obtained in the course of John Doe II or obtained in the course of John Doe I and used in John Doe II. Francis D. Schmitz, Former Special Prosecutor's Statement of Compliance (January 4, 2016), attached as **Exhibit L.** The seizures of the email accounts alone returned more than five million emails. *See* Wis. GAB Closed Session Minutes at 5 (March 19, 2014), attached as **Exhibit N**.

VI. Defendants Deliberately Avoided Notice Requirements to Keep Their Seizures Secret

50. In their quest to obtain and catalogue sensitive personal and political documents without legal challenge, Defendants intentionally took measures to keep John Doe II and their seizures secret despite established federal law to the contrary. Indeed, the GAB Defendants specifically joined John Doe II seeking to avoid issuing process under their own Enabling Statute, which required "prior notice" to issue a subpoena, Wis. Stat. § 5.05(1)(b), and a "circuit court" (that is, a court of general jurisdiction) to issue a warrant, *id.* § 5.05(2m)(c)(4).

51. As part of Defendants' effort to hide their investigation, Defendants intentionally seized the email accounts of MacIver Institute and every member of the class without notice or a warrant issued by a court of general criminal jurisdiction, violating MacIver Institute's and the

other class members' rights under the Stored Communication Act ("SCA"), 18 U.S.C. §§ 2701-2712.

52. "A governmental entity may require a provider of remote computing service to disclose the contents of any wire or electronic communication" that is "held or maintained on that service" on behalf of a subscriber or customer in only two situations:

> (A) *without required notice* to the subscriber or customer, if the governmental entity obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction; or
>
> (B) *with prior notice* from the governmental entity to the subscriber or customer if the governmental entity—
>
> > (i) uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; or
> > (ii) obtains a court order for such disclosure under subsection (d) of this section;
>
> except that delayed notice may be given pursuant to section 2705 of this title.

18 U.S.C. § 2703(b) (emphasis added).

53. Furthermore, the SCA prohibits a governmental entity from requiring an electronic communication service provider to disclose "the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less," except pursuant to a warrant issued by "a court of competent jurisdiction." 18 U.S.C. § 2703(a).

54. Lastly, a governmental entity may only require a provider of electronic communication service or remote computing service to disclose other records pertaining to the account (not including the subscriber's name, address, phone connection records, length and type of service, network addresses, and means of payment) upon a warrant or order of a court of

competent jurisdiction, consent of the subscriber or customer, or as part of an investigation of telemarketing fraud. 18 U.S.C. § 2703(c).

55. On October 19, 2013, Defendants sought, obtained, and executed a warrant to seize the email account of Plaintiff MacIver Institute Senior Fellow Brian Fraley, an email account in the maciverinstitute.com domain owned by MacIver Institute, from Google, Inc., a provider of an electronic communication service and a provider of a remote computing service. Among other web services, Google, Inc. provided Plaintiff MacIver Institute with email hosting, including the ability to send, receive, and store email and other documents. Defendants' warrant sought, from January 1, 2009 to October 19, 2013:

> a. The contents of all communications stored in the e-mail account identified above, including all emails stored in the account, whether sent from or received in the account, including any "chat or instant messaging," as well as e-mails held in a "Deleted" status;
>
> b. All address books, contact lists, friends lists, buddy lists, or any other similar compilations of personal contact information associated with the account;
>
> c. All records or other information regarding the identification of the account, including full name, physical address, mailing address, residential or business address; other contact or identifying information such as telephone numbers and other identifiers; including subscriber names, user names, screen names or other identities associated with the account; records of session times and durations, the date on which the account was created, the length of service, the types of service utilized, the IP address used to register the account, log-in IP addresses associated with session times and dates, account statuses, alternative email addresses provided during registration, methods of connecting, log files, and means and source of payment (including any credit or bank account number);
>
> d. Any calendar or documents stored or maintained in association with the account;
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> e. All records pertaining to communications between the provider, and any person regarding the account, including contacts with support services and records of actions taken.
>
> f. All files that are controlled by the user account associated with the account;
>
> g. All backup files or data related to the account.

Notice from Francis D. Schmitz to MacIver Institute, Ex. K at 1-2.

56. In requesting, obtaining, and executing warrants of such staggering scope—*the contents of all communications stored in the e-mail account*—Defendants used the color of Wisconsin law to require electronic communication service and remote computing service providers to disclose the contents of electronic or wire communications that the providers held on behalf of, or received by means of electronic transmission from, MacIver Institute and other members of the class, their subscribers or customers, or in electronic storage in an electronic communications system.

57. Defendants also seized virtually every other record associated with the account, including attachments, contact lists, calendar entries, and information in "backup files."

58. Defendants never provided "prior notice" to MacIver Institute before seizing its entire email account. Nor did Defendants provide delayed notice pursuant to 18 U.S.C. § 2705. Thus Defendants failed to obey the prescriptions of 18 U.S.C. § 2703(b)(1)(B).

59. Defendants did not obtain a warrant or a court order issued "by a court of competent jurisdiction." A "court of competent jurisdiction" includes certain courts of the United States and "a court of general criminal jurisdiction of a State authorized by the law of that State to issue search warrants." 18 U.S.C. § 2711(3). On information and belief, Defendants never sought, obtained, or executed a warrant from a Wisconsin court of general criminal jurisdiction.

60. Under established Wisconsin law, a John Doe judge is not a "court of general criminal jurisdiction." "A John Doe judge is not the equivalent of a court, and a John Doe proceeding is not a proceeding in a court of record." *Wisconsin v. Washington*, 266 N.W.2d 597, 607 (Wis. 1978); *see In re John Doe Proceeding*, 660 N.W.2d 260, 276 (Wis. 2003) ("A John Doe judge does not, however, enjoy the statutory powers of a court."). A John Doe judge sits as a "tribunal" and any order issued by the John Doe judge "is not a judgment or order of circuit

court." *In re John Doe Proceeding*, 660 N.W.2d at 268 ("Thus, it is well settled that a John Doe judge's actions are not directly appealable to the court of appeals because an order issued by a John Doe judge is not an order of a 'circuit court' or a 'court of record.'"); *Washington*, 266 N.W.2d at 604 ("The John Doe is, at its inception, not so much a procedure for the determination of probable cause as it is an inquest for the discovery of crime in which the judge has significant powers.").

61. Defendants never provided notice to MacIver Institute nor did they seize its communications pursuant to a warrant from a court of competent jurisdiction. In seizing MacIver Institute's communications from its providers, Defendants violated 18 U.S.C. § 2703(b).

62. Furthermore, Defendants compelled electronic communication service providers to disclose contents of MacIver Institute's wire or electronic communications that were in electronic storage for 180 days or less without a warrant from a court of competent jurisdiction and violated 18 U.S.C. § 2703(a).

63. Lastly, Defendants compelled electronic communication service providers to disclose other records associated with MacIver Institute's account that were not the content of communications or the subscriber's name, address, phone connection records, length and type of service, network addresses, and means of payment without a warrant or order from a court of competent jurisdiction or MacIver Institute's consent and not as part of an investigation of telemarketing fraud, and so violated 18 U.S.C. § 2703(c).

64. Defendants were not merely negligent in failing to provide notice. Indeed, during 2013 and perhaps before, Defendants sent "preservation letters" to several internet service providers, including Google, that, upon information and relief, specifically referenced 18 U.S.C. § 2703. On or about October 8, 2013, Defendants obtained a warrant from Judge Kluka that

requested from Google several sets of electronic records virtually identical to those requested in the MacIver warrant. On October 17, 2013, Defendant Robles had a discussion with an attorney for Google, Mark Eckenwiler. In the conversation, Mr. Eckenwiler requested the inclusion of a new sentence in the search warrants stating that the warrants sought information for those accounts that was preserved pursuant to 18 U.S.C. § 2703(f). The following day, Robles disclosed the conversation to Judge Kluka and requested a modified Google warrant in a new affidavit notarized by Defendant Landgraf. Judge Kluka (who recused herself for an unspecified conflict only days later) issued the new Google warrant the next day, October 19, 2013. The warrant sought the contents of MacIver Institute's email account and expressly included the requested reference to 18 U.S.C. § 2703(f).

65. Additionally, Defendants continued to resist disclosure of their electronic seizures. When certain targets and witnesses received other process in October 2013, they filed motions to suspend inspection of the documents, to return seized property, and to quash subpoenas. These motions raised statutory and constitutional challenges not only to the apparent theory of Defendants' investigation, but also to the process itself: they claimed that the targets would suffer independent injury if confidential discussions among political associates were reviewed. Rather than disclosing that, in fact, other materials had been seized via electronic search warrant and were subject to the same arguments, Defendants kept mum. Indeed, they gloated at the possibility of being able to clandestinely review seized electronic materials even while the targets' statutory and constitutional challenges to the known process (i.e., the physical search warrants and subpoenas for documents) were being litigated. In an October 25, 2013 email, Defendant Stelter remarked:

> Seeing as we are getting hit with lots of high powered attorney's [sic] that are probably going to be successful at delaying our ability to look at any of the

> evidence seized during the execution of our search warrants last month, it seems that a review of all the email we will get in will be even more critical. . . .
>
> I would expect the email from all the providers should be coming in within the next week. . . . From the correspondence I'm reading from the various attorney's [sic] they don't seem to have a clue that we have and will be getting all their clients [sic] emails. So . . . we should be able to keep moving forward even without looking at all the evidence seized during the execution of the warrants.

Email from Robert Stelter (Oct. 25, 2013), attached as **Exhibit M**.

66. For his part, Defendant Falk agreed with Defendant Stelter that the team could and should be examining this electronic material, since the source was "separate" from the process that had been disclosed to the targets and was at issue on their motions to quash and return of property.

67. Defendants had received the electronic records seized in October 2013 and were making preparations to begin reviewing them when the new John Doe judge entered his order quashing the subpoenas on January 10, 2014. It is still not clear whether Defendants actually avoided review of this final batch of seized electronic communications in late 2013, or between the date of the initial order (January 10) and the date that the John Doe judge clarified that Defendants were to cease review of all materials not previously viewed (February 24, 2014). Nonetheless, Defendants' failure to provide notice to the targets and account-holders—like their failure to provide notice to all of the other persons whose electronic communications had been seized up to that date—kept the targets from asserting their rights, and, at least in Defendants' view, allowed them to keep reviewing emails even after the targets thought their motions had been granted and the investigation had been halted.

68. Defendants continued to refuse to provide notice even after this late date. Even after the investigation had been halted in early 2014 and Wisconsin's appellate courts began to grapple with some of the targets' legal arguments, Defendants refused to notify individuals and

groups that their electronic communications had been seized from internet service providers. By this point, the only possible purpose for Defendants' continued silence was to keep injured individuals and groups from being able to assert their rights in court.

69. As late as July 2015, when certain individuals and entities asked Defendant Schmitz to notify all impacted individuals of the electronic record seizures, Defendant Schmitz refused to do so. Defendant Schmitz notified MacIver and other similarly-situated groups and individuals that their electronic records had been requested only in late December 2015, when the Wisconsin Supreme Court compelled him to do so. As set forth above, even this notification did not comply with the Wisconsin Supreme Court's order or the requirements of the Stored Communications Act.

VII. Class Action Allegations

70. MacIver Institute seeks certification of a class of individuals or entities that had emails or other electronic records seized in John Doe II and who did not receive notice from one or more Defendants prior to the seizure (the "Class").

71. Members of the Class are so numerous that their individual joinder is impractical.

72. Common questions of law and fact exist for all Class members regarding: (1) whether the warrant was issued by a "court of competition jurisdiction"; (2) whether they received the required notice; (3) the absence of good faith by Defendants; and (4) Defendants' liability under the SCA for their conduct.

73. MacIver Institute's SCA claim is typical of the claims of the members of the Class as all members of the Class are similarly affected by Defendants' unlawful conduct. MacIver Institute has no interests that are antagonistic to the interests of other members of the

Class. MacIver Institute and all members of the Class have sustained compensable injury arising out of the unlawful conduct for which Defendants are liable.

74. MacIver Institute is a fair and adequate representative of the Class because its interests do not conflict with the interests of the Class members it seeks to represent. MacIver Institute has retained competent and experienced counsel, and will vigorously prosecute this action. The interests of Class members will be fairly and adequately protected by MacIver Institute and its counsel.

75. Common issues predominate over individual issues in this case because the overriding issues of liability and damages under the SCA can be determined on a class-wide basis.

76. Class treatment is the superior method of adjudicating the class members' SCA claims because it avoids the inefficiencies and inconsistencies of piecemeal litigation and ensures that all class members receive their day in Court.

Count I

Compelling Disclosure of Communication Contents and Records from Providers of Electronic Communication Service and Remote Computing Service Without Notice or Warrant in Violation of the Stored Communications Act

77. MacIver Institute incorporates by reference the allegations in all paragraphs of this Class Action Complaint as though fully set forth in this paragraph.

78. Defendants sought, obtained, and executed warrants for records contained in the email accounts of MacIver Institute and other members of the class. These accounts were maintained by providers of electronic communication service and remote computing service.

79. Defendants sought, obtained, and executed warrants to seize the contents of MacIver Institute's email communications from a remote computing service. For example,

Defendants sought, obtained, and executed a warrant to seize "[t]he contents of all communications stored in" MacIver Institute's email account.

80. Defendants also sought, obtained, and executed warrants to seize the contents of MacIver Institute's email communications in electronic storage from an electronic communication service. For example, Defendants sought, obtained, and executed a warrant to seize "[a]ll backup files" in MacIver Institute's account, including those in storage for 180 days or less.

81. Defendants also sought, obtained, and executed warrants to seize records and other information that pertained to MacIver Institute and other members of the class from a provider of electronic communication and remote computing service. MacIver Institute and other members of the class were customers and subscribers of the provider of that electronic communication and remote computing service. For example, Defendants sought, obtained, and executed a warrant to seize MacIver Institute's "address books, contact lists," "calendar or documents stored or maintained in association with the account," "files that are controlled by the user account associated with the account," and virtually every other document associated with MacIver Institute's account from its provider of electronic communication and remote computing service.

82. Defendants never provided MacIver Institute with notice prior to seizing their email accounts, nor did they seek and receive a court order permitting delayed notice.

83. A John Doe judge is not a court of competent jurisdiction as defined by the Stored Communications Act. Warrants and court orders issued by a John Doe judge do not permit a governmental entity to seize the contents of emails or records or other information pertaining to a subscriber of an electronic communications or remote computing service without notice.

84. Defendants seized the contents of MacIver Institute's electronic communications that were in electronic storage for 180 days or less from a provider of an electronic communication service without a warrant issued by a court of competent jurisdiction, in violation of 18 U.S.C. § 2703(a). Defendants seized contents of its electronic communications from a remote computing service without a warrant issued by a court of competent jurisdiction and without either notice or delayed notice to MacIver Institute in violation of 18 U.S.C. § 2703(b). Defendants seized records pertaining to MacIver Institute (other than names, addresses, connection records, lengths of service, telephone, network addresses, or means of payment) from an electronic communication and remote computing service without a warrant issued by a court of competent jurisdiction, a court order from a court of competent jurisdiction, MacIver Institute's consent, or a request for information relevant to telemarketing fraud, in violation of 18 U.S.C. § 2703(c).

85. As a direct result of Defendants' violations of the Stored Communications Act, MacIver Institute and other members of the class have suffered damages.

Prayer for Relief

WHEREFORE, MacIver Institute requests the following relief against Defendants:

A. A declaratory judgment declaring that the Defendants deprived MacIver Institute and other members of the class of statutory rights under the Stored Communications Act, 18 U.S.C. §§ 2701-2712;

B. An injunction under 18 U.S.C. § 2707(b)(1): (i) requiring the DA Defendants to contact MacIver and each class member and provide a confidential, true and accurate copy of the class member's electronic communications and data that were seized; (ii) prohibiting any Defendant, their officers, agents, servants,

employees, and attorneys, and any person in active concert with any of these, from disclosing any record of MacIver or a class member that was obtained by an electronic search warrant in John Doe II; and (iii) prohibiting any Defendant, their officers, agents, servants, employees, and attorneys, and any person in active concert with any of these, from obtaining any additional records of MacIver or the class members in violation of the Stored Communications Act; and

C. Damages in an amount to be determined at trial, or, if they are greater than actual damages, then the statutory damages awardable under the Stored Communications Act, and including costs, attorneys' fees, and punitive damages.

Demand for Jury Trial

MacIver Institute demands a trial by jury on all claims or issues so triable.

Dated: August 1, 2016

Respectfully submitted,

GRAVES GARRETT, LLC

Todd P. Graves
Edward D. Greim
Dane C. Martin
J. Benton Hurst
1100 Main Street, Suite 2700
Kansas City, Missouri 64105
Tel: 816-256-3181
Fax: 816-817-0863
tgraves@gravesgarrett.com
edgreim@gravesgarrett.com
dmartin@gravesgarrett.com
bhurst@gravesgarrett.com
(Pro hac vice pending)

Counsel for The John K. MacIver Institute for Public Policy, Inc.