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

CYNTHIA ARCHER,

Plaintiff,

v. Case No. 15-CV-922

JOHN CHISHOLM, *et al.*,

Defendants.

STATE OF WISCONSIN'S AMICUS CURIAE BRIEF IN OPPOSITION TO MOTION TO PRESERVE EVIDENCE

In *State ex rel. Two Unnamed Petitioners v. Peterson*, 866 N.W.2d 165 (Wis. 2015), the Wisconsin Supreme Court determined that David Budde, Robert Stelter, and Aaron Weiss (the "Investigator Defendants") obtained numerous documents as part of an unlawful state-law investigation, meaning that they have no right to possess such documents.[1] Through the present motion, Dkt. 50, the Investigator Defendants have launched a collateral attack upon that state-court ruling and its subsequent decisions, seeking an order from this Court requiring them to violate the state court's judgment. The unmistakable goal of this highly unusual request is to permit the

[1]Throughout this brief, "documents" will refer to the documents and material things that the Investigator Defendants would like this Court to order preserved.

Investigator Defendants to retain many documents that they were never lawfully entitled to possess, given that such documents were seized from citizens that the Wisconsin Supreme Court has found were wholly innocent of any wrongdoing.

The State of Wisconsin files this amicus curiae brief because it has a core sovereign interest in protecting the comity and respect owed to the Wisconsin judiciary. Granting the Investigator Defendants' motion would violate basic principles of state-federal judicial comity and mutual respect. *See, e.g.*, *Hoover v. Wagner*, 47 F.3d 845, 850 (7th Cir. 1995); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993). Specifically, entering the requested order would directly contradict the Wisconsin Supreme Court's decisions and threaten to compromise its judgment.

Such a grave affront to the Wisconsin judiciary is also entirely unnecessary. The Wisconsin Supreme Court did not hold, and could not possibly have held, that the Investigator Defendants may never obtain information necessary for their defense in the present lawsuit. The Investigator Defendants retain the same rights as any defendant in a federal civil rights lawsuit: they can seek to obtain relevant information *lawfully*, through discovery processes open to all litigants. To the extent such lawful processes prove insufficient, the Wisconsin Supreme Court's order specifically

provides a mechanism to obtain any necessary information from the disputed documents, which documents will be securely stored by that court's clerk.

Accordingly, the Investigator Defendants' motion should be denied.

BACKGROUND

In *Two Unnamed Petitioners*, the Wisconsin Supreme Court rejected the legal theories that were the lynch pin for the John Doe proceedings, holding that it was "utterly clear that the special prosecutor has employed theories of law that do not exist in order to investigate citizens who were wholly innocent of any wrongdoing." *Two Unnamed Petitioners*, 866 N.W.2d at 211. "[T]he special prosecutor was the instigator of a 'perfect storm' of wrongs that was visited upon the innocent Unnamed Movants and those who dared to associate with them." *Id.* at 211–12. In short, the State's highest court held that the investigation was illegal—root and branch—because it was targeted at entirely lawful conduct. "[O]ur conclusion today ends this unconstitutional John Doe investigation." *Id.* at 212.

In the process of wrongfully investigating this "utterly" lawfully conduct, the prosecution team seized "[m]illions of documents, both in digital and paper copy," among other items. *Id.* at 183. Indeed, "[t]he special prosecutor obtained virtually every document possessed by the Unnamed Movants relating to every aspect of their lives, both personal and professional, over a five-year span (from 2009 to 2013)." *Id.* Consistent with

its conclusion that the investigation was unlawful, the Wisconsin Supreme Court ordered that "the special prosecutor and the district attorneys involved in this investigation must cease all activities related to the investigation, return all property seized in the investigation from any individual or organization, and permanently destroy all copies of information and other materials obtained through the investigation." *Id.* at 212.

On December 2, 2015, the Wisconsin Supreme Court entered a decision disposing of the special prosecutor's reconsideration motion, providing, *inter alia*, that the documents must be filed under seal with the clerk of that court. *See* Dkt. 53-5:21–28 (Dec. 2, 2015, Decision at ¶¶ 29–38). The court also held that it was not imposing "an immediate deadline for [the special prosecutor] and his prosecution team to complete the obligations we impose." Dkt. 53-5:21 (Dec. 2, 2015, Decision at ¶ 29). As relevant here, the court ordered that the prosecutors may continue to possess "all of its work product and all of the evidence gathered in the investigation, subject to the previous orders issued by the John Doe judge, during the time that it would be preparing any petition for U.S. Supreme Court review and until the conclusion of proceedings in that Court." Dkt. 53-5:27 (Dec. 2, 2015, Decision at ¶ 38).

The court provided that even after the prosecution team turns over the documents—presumably, "30 days" after the conclusion of U.S. Supreme Court proceedings, if any, Dkt. 53-5:21 (Dec. 2, 2015, Decision at ¶ 29)—"the

documents and electronic data *will not be destroyed, but will be stored by the clerk of this court in a sealed and secure manner pending further order of this court*." Dkt. 53-5:28 (Dec. 2, 2015, Decision at ¶ 38) (emphasis added). The court also explained that the documents "could also potentially be available for use in related civil proceedings, if there is a request and a determination that such use is proper under the circumstances." Dkt. 53-5:28 (Dec. 2, 2015, Decision at ¶ 38).

ARGUMENT

I. Granting The Investigator Defendants' Motion Would Offend Basic Principles Of State-Federal Judicial Comity.

A. "Cooperation and comity, not competition and conflict, are essential to the federal design." *SKS & Assocs., Inc. v. Dart*, 619 F.3d 674, 679 (7th Cir. 2010) (quotation omitted). "Comity—'that is, a proper respect for [a sovereign's] functions,'—fosters 'respectful, harmonious relations' between governments." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2041 (2014) (citations omitted); *see also Younger v. Harris*, 401 U.S. 37, 54–55 (1971) (defining comity as "a proper respect for state functions" and "a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."). "[R]ecognition of the importance of comity has a concomitant appreciation of the fact that the federal courts are not the only

guardians of rights and privileges guaranteed by our United States Constitution." *Baldwin v. Lewis*, 442 F.2d 29, 32 (7th Cir. 1971).

Consistent with these principles of mutual respect, federal courts "will interfere with the administration of justice in the state courts only in rare cases where exceptional circumstances of peculiar urgency are shown to exist." *Ex parte Hawk*, 321 U.S. 114, 117 (1944) (quotation omitted). Comity principles counsel that "a federal court . . . assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13 (1987). Such interests are at their highest ebb where a federal court order would impose obligations upon parties contrary to those imposed by a state court, such that "compliance with the laws of both [courts]" would be "impossible." *Hartford Fire Ins. Co.*, 509 U.S. at 799.

Comity interests are also particularly acute when the state-court order has not yet been fully carried out. As Chief Justice John Marshall explained, "[t]he jurisdiction of a Court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process, subsequent to the judgment, in which jurisdiction is to be exercised." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 23 (1825).

The Seventh Circuit's decision in *Hoover v. Wagner*, 47 F.3d 845 (7th Cir. 1995), is instructive as to the proper application of comity considerations

when federal courts are asked to countermand state-court orders. There, the plaintiffs sought relief in federal court to enjoin police from enforcing a state-court order that required the plaintiffs to cease certain activities near abortion clinics. *Id.* at 846. The Seventh Circuit held that such an order from a federal court would violate basic principles of equity and comity. *Id.* at 850–52. The court explained that when equitable remedies are "sought to be applied to officials of one sovereign by the courts of another, they can impair comity, the mutual respect of sovereigns." *Id.* at 850. The court refused to order the requested injunction because "[t]he relief that the plaintiffs seek is at once an insult to the judicial and law enforcement officials of Wisconsin, an interference with an ongoing state court proceeding." *Id.* at 850–51. Entering the injunction that would effectively nullify the state-court order would thus be an "affront to comity" and an "abuse of discretion." *Id.* at 851; *accord O'Keefe v. Chisholm*, 769 F.3d 936, 939 (7th Cir. 2014).

B. The order requested by Investigator Defendants would violate the above-described comity principles, thus undermining the "mutual respect" due to the Wisconsin Supreme Court. *Hoover*, 47 F.3d at 850.

The Investigator Defendants ask this Court to directly contradict the Wisconsin Supreme Court's orders. Specifically, they ask this Court to order them to retain the documents, many of which the Wisconsin Supreme Court held the prosecutors obtained during an unlawful and unconstitutional state-

law investigation. Dkt. 51-1:22. Such an order would be entirely contrary to the Wisconsin Supreme Court's well-considered conclusion, providing that thirty days after U.S. Supreme Court proceedings end, "[t]he prosecution team should be completely divested of all such documents, materials, and electronic data," by turning them over to the clerk's office for safekeeping. Dkt. 53-5:25 (Dec. 2, 2015, Decision at ¶ 34).

Comity principles are implicated where, as here, "compliance with the laws of both [courts]" would be "otherwise impossible." *Hartford Fire Ins. Co.*, 509 U.S. at 799. Comity counsels against this Court creating such an inter-jurisdictional conflict with Wisconsin's highest court, where a party is ordered to do one thing by the state court, and then ordered to do the opposite by a federal court. The Investigator Defendants' requested relief would result in precisely the sort of "interference with an ongoing state court proceeding" that the Seventh Circuit admonished and ultimately rejected as disrespectful of another sovereign's court's prerogatives. *Hoover*, 47 F.3d at 851.

In addition, the Wisconsin Supreme Court's mandate in *Two Unnamed Petitioners* regarding the return, preservation, and disposition of the documents still has not been carried out. The court exercised its jurisdiction over property and has ordered that certain future actions must be taken with regard to that property. If this Court grants the present motion, however, it will be trampling upon the Wisconsin Supreme Court's continuing jurisdiction

to oversee the process that it set up with regard to the return, preservation, and disposition of the documents. Comity requires a "mutual respect" between sovereigns where there are ongoing proceedings, and therefore counsels heavily against creating such inter-sovereign conflicts. *Hoover*, 47 F.3d at 851; *accord Wayman*, 23 U.S. (10 Wheat.) at 23 ("The jurisdiction of a Court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process, subsequent to the judgment, in which jurisdiction is to be exercised.").

II. The Investigator Defendants' Motion Is Entirely Unnecessary.

The above-discussed affronts to Wisconsin's judiciary that would directly result from granting the Investigator Defendants' motion are also unnecessary. At the present time, the Investigator Defendants possess the documents, and will presumably continue to do so until thirty days after the end of proceedings before the U.S. Supreme Court, if any. *See* Dkt. 53-5:21 (Dec. 2, 2015, Decision at ¶ 29). Even after such time, the relief requested here would not be entirely necessary.

As a threshold matter, the Investigator Defendants would have no basis for retaining these documents—contrary to the order of the Wisconsin Supreme Court—unless they cannot obtain necessary information to defend against this lawsuit through methods that do not offend comity principles. These alternative, lawful means include, *inter alia*, first- and third-party

discovery. *See, e.g.*, Fed. R. Civ. P. 30, 31, 33, 34, 36, 45. In light of these numerous lawful tools—available to *any* defendant in a federal civil rights lawsuit—the Investigator Defendants' motion boils down to a request that they should be permitted to benefit from their prior unlawful seizure of documents. But a "civil lawyer's need is ordinarily nothing more than a matter of saving time and expense." *Lucas v. Turner*, 725 F.2d 1095, 1100 (7th Cir. 1984) (citation omitted). Such matters of private convenience cannot justify overturning core principles of comity, especially when the "matter of saving time and expense" is being sought by parties who only have many of the disputed documents because they wrongfully seized them from "innocent" citizens. *Two Unnamed Petitioners*, 866 N.W.2d at 211.

In addition, if the lawful process available to all civil defendants proves insufficient in some way, the Wisconsin Supreme Court has created a mechanism for the Investigator Defendants to seek appropriate relief. Specifically, the documents will *not* be destroyed, such that they can never be used in this litigation if that proves necessary, but will be securely stored by the clerk of the Wisconsin Supreme Court. Dkt. 53-5:28 (Dec. 2, 2015, Decision at ¶ 38). These documents could "potentially be available for use in related civil proceedings, if there is a request and a determination that such use is proper under the circumstances." Dkt. 53-5:27–28 (Dec. 2, 2015, Decision at ¶ 38). This procedure is facially sufficient to satisfy all of the

Investigator Defendants' interests. And comity requires this Court to "assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Pennzoil Co.*, 481 U.S. at 13.

And in the extremely unlikely event that the Wisconsin Supreme Court takes some action that deprives the Investigator Defendants of their ability to defend against the present lawsuit, Defendants can make their pleas at that time. But the Investigator Defendants have made no such showing here, and a court sitting in equity should not grant the type of extraordinary relief requested. *See Hoover*, 47 F.3d at 850–51; *O'Keefe*, 769 F.3d at 939.

* * *

In sum, the Wisconsin Supreme Court carefully explained how the documents should be handled and specifically left open the possibility that some circumstances might warrant the court releasing the documents for use in other litigation. *See* Dkt. 53-5:28 (Dec. 2, 2015, Decision at ¶ 38). This Court should respect the careful and thoughtful balance that the state's highest court reached, as a matter of comity. *See Hoover*, 47 F.3d at 851.

CONCLUSION

This Court should deny the Investigator Defendants' motion, Dkt. 50.

Dated this 29th day of January, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 29, 2016, I electronically filed the foregoing **State of Wisconsin's Amicus Curiae Brief in Opposition to Motion to Preserve Evidence** with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for all participants who are registered CM/ECF users in this case, including:

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Dated this 29th day of January, 2016

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