No. 14-872

IN THE

Supreme Court of the United States

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

Petitioners,

v.

JOHN T. CHISHOLM, *et al*.,

Respondents.

On Petition for a Writer of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE AND BRIEF FOR *AMICUS CURIAE* CAUSE OF ACTION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF FOR *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b) of the Rules of this Court, Cause of Action Institute ("Cause of Action") moves for leave to file the attached *amicus curiae* brief in support of the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit in *O'Keefe v. Chisholm*, 769 F.3d 936 (7th Cir. 2014). Cause of Action timely notified all parties of its intention to file, as required by Rule 37.2(a). Petitioners consented. Respondents Francis Schmitz, John Chisholm, Bruce Landgraf, and Davis Robles denied consent. Respondent Dean Nickel did not respond.

In this case, the Seventh Circuit wrongly split with six other circuits and held that a retaliatory investigation cannot trigger personal-capacity liability unless the underlying pretext law or regulation is forbidden, even when the retaliation is calculated to, and actually does, chill First Amendment rights. *See O'Keefe,* 769 F.3d at 942. As this Court recognized in *Carlson v. Green*, 446 U.S. 14, 21 (1980), personal-capacity liability is a powerful deterrent to government abuse. The Seventh Circuit's ruling undermines this deterrent, creating yet another barrier to government accountability and incentivizing government officials to declare "open season" on critics and political opponents.

Cause of Action is a nonpartisan, nonprofit government oversight organization that, *inter alia*, defends individuals and small businesses from agency overreach to promote the rule of law and protect economic freedom. Therefore, it has a particular and substantial interest in promoting legal rules,

including personal-capacity liability for retaliatory investigations, that effectively check agency overreach.

Accordingly, Cause of Action respectfully requests that the Court grant this motion for leave to file the attached *amicus curiae* brief.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. Government Officials Should Be Accountable For Retaliatory Inquisitions That Chill Political Speech And Association	3
II. This Case Is An Ideal Vehicle For This Court To Clarify That Personal-Capacity Liability Attaches to Retaliatory Investigations	13
CONCLUSION	15

TABLE OF AUTHORITIES

CASES Page(s)

Bantam Books, Inc. v. Sullivan,
372 U.S. 58 (1963) 9

Bennett v. Hendrix,
423 F.3d 1247 (11th Cir. 2005) 2, 5, 9, 14

Bloch v. Ribar,
156 F.3d 673 (6th Cir. 1998) 5

Brock v. Local 375, Plumbers Int'l Union,
860 F.2d 346 (9th Cir. 1988) 10

Brown v. Socialist Workers '74 Campaign Comm.,
459 U.S. 87 (1982) 10

Buckley v. Valeo,
424 U.S. 1 (1976) 10

Cantwell v. Connecticut,
310 U.S. 296 (1940) 9, 13

Carlson v. Green,
446 U.S. 14 (1980) 2, 13

Cause of Action v. Treasury Inspector Gen. for Tax Admin,
No. 13-1225, 2014 U.S. Dist. LEXIS
140595 (D.D.C. Sept. 29, 2014)..... 7

Citizens United v. Fed. Election Comm'n,
558 U.S. 310 (2010) 10, 13

Citizens United v. Gessler,
773 F.3d 200 (10th Cir. 2014) 10, 13

City of Arlington v. Fed. Commc'ns Comm'n,
133 S. Ct. 1863 (2013) 11, 12, 14

TABLE OF AUTHORITIES—Continued

Page(s)

City of Lakewood v. Plain Dealer Publ'g Co.,
486 U.S. 750 (1988) 13

Doe v. Reed,
561 U.S. 186 (2010) 10

Dombrowski v. Pfister,
380 U.S. 479 (1965) 9

Donahoe v. Arpaio,
986 F. Supp. 2d 1091 (D. Ariz. 2013)..... 9

Envtl. Def. Fund, Inc. v. Ruckelshaus,
439 F.2d 584 (D.C. Cir. 1971) 12

Garcia v. City of Trenton,
348 F.3d 726 (8th Cir. 2003) 2-3, 5, 14

Hannah v. Larche,
363 U.S. 420 (1960) 11

Hartman v. Moore,
547 U.S. 250 (2006) 14

Keenan v. Tejeda,
290 F.3d 252 (5th Cir. 2002) 5

LabMD, Inc. v. Fed. Trade Comm'n,
No. 14-12144, 2015 U.S. App. LEXIS 781
(11th Cir. Jan. 20, 2015) 8, 11, 12, 14

Laird v. Tatum,
408 U.S. 1 (1972) 9

Lane v. Franks,
134 S. Ct. 2369 (2014) 13

McCutcheon v. Fed. Election Comm'n,
134 S. Ct. 1434 (2014) 1

TABLE OF AUTHORITIES—Continued

Page(s)

NAACP v. Alabama ex rel. Patterson,
357 U.S. 449 (1958) 10

O'Keefe v. Chisholm,
769 F.3d 936 (7th Cir. 2014) 3, 5, 14

O'Keefe v. Schmitz,
19 F. Supp. 3d 861 (E.D. Wisc. 2014) 5

Oklahoma Press Publ'g Co. v. Walling,
327 U.S. 186 (1946) 11

Scott v. Rosenberg,
702 F.2d 1263 (9th Cir. 1983) 2

Shelton v. Tucker,
364 U.S. 479 (1960) 13

Thomas v. Independence Twp.,
463 F.3d 285 (3rd Cir. 2006) 5, 14

Thunder Basin Coal Co. v. Reich,
510 U.S. 200 (1994) 11, 14

United States v. Morton Salt Co.,
338 U.S. 632 (1950) 11, 14

White v. Lee,
227 F.3d 1214 (9th Cir. 2000) 2, 5, 9, 13

Withrow v. Larkin,
421 U.S. 35 (1975) 13

Z St., Inc. v. Koskinen,
No. 12-401, 2014 U.S. Dist. LEXIS 71638
(D.D.C. May 27, 2014) 2, 9

TABLE OF AUTHORITIES—Continued

Page(s)

Zherka v. Ryan,
No. 13-3940, 2014 U.S. Dist. LEXIS
140564 (S.D.N.Y. Sept. 30, 2014)..... 2, 9, 12

CONSTITUTION

U.S. CONST. amend. I.....*passim*

U.S. CONST. art. III 11

STATUTES

5 U.S.C. § 552..... 7

26 U.S.C. § 6103..... 7

42 U.S.C. § 1983..... 5

RULES

FED. R. CIV. P. 12(b)(1)..... 14

FED. R. CIV. P. 12(b)(6)..... 14

COURT BRIEFS AND FILINGS

Appellees' Brief, *O'Keefe v. Chisholm*,
769 F.3d 936 (7th Cir. 2014) (No. 14-1822).... 4, 5

Complaint, *LabMD, Inc. v. Fed. Trade Comm'n*, 2014 U.S. Dist. LEXIS 65090 (N.D. Ga. May 12, 2014) (No. 14-810)..... 8

Complaint, *Zucker v. Consumer Prod. Safety Comm'n*, No. 13-3355 (D. Md. filed Nov. 12, 2013)..... 6

TABLE OF AUTHORITIES—Continued

Page(s)

Memorandum in Support of Motion for Summary Judgment, *Cause of Action v. Treasury Inspector Gen. for Tax Admin.*, No. 13-1225 (D.D.C. filed Jan. 30, 2015) 7

Transcript of Oral Argument, *LabMD, Inc. v. Fed. Trade Comm'n*, 2014 U.S. Dist. LEXIS 65090 (N.D. Ga. May 12, 2014) (No. 14-810) 9

OTHER AUTHORITIES

A. Douglas Melamed, *The Wisdom of Using the "Unfair Method of Competition" Prong of Section 5*, GCP (Nov. 2008), *available at* http://goo.gl/8HjTMt 13

Buckyballs, *Save Our Balls*, YOUTUBE (July 27, 2012), http://goo.gl/sB0evm (last visited Feb. 15, 2015) 6

Cause of Action, *About,* http://www.causeofaction.org/about (last visited Feb. 18, 2015)..... 1

Chuck Ross, *Audio Tapes Reveal How Federal Regulators Shut Down Gun Store Owner's Bank Accounts*, DAILY CALLER (Jan. 14, 2015), http://goo.gl/BzWfAJ 6

Dep't of Justice, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947) 12

TABLE OF AUTHORITIES—Continued

Page(s)

Jim Epstein, *The Government's Bogus Lawsuit Against Buckyballs' Creator Craig Zucker Ends In a Settlement*, REASON.COM (May 18, 2014), http://goo.gl/dOow0Z 6

Joshua Wright, *Recalibrating Section 5: A Response to the CPI Symposium,* CPI ANTITRUST CHRONICLE (Nov. 2013), *available at* http://goo.gl/hVJZcO 8, 12, 13

Max Minzer, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853 (2012) 12

Selwyn Raab, *Donovan Cleared of Fraud Charges by Jury in Bronx*, N.Y. TIMES (May 26, 1987), http://goo.gl/YxcdqF 1

STAFF REPORT, THE DEPARTMENT OF JUSTICE'S "OPERATION CHOKE POINT" H. COMM. ON OVERSIGHT & GOV'T REFORM (May 29, 2014), *available at* http://goo.gl/Mdxln3 6

STAFF REPORT, LOIS LERNER'S INVOLVEMENT IN THE IRS TARGETING OF TAX-EXEMPT ORGANIZATIONS THE H. COMM. ON OVERSIGHT & GOV'T REFORM (March 11, 2014), *available at* http://goo.gl/dILgEF 7

Stuart Taylor, Jr., *District attorney's wife drove case Against Wis. Gov. Walker, insider says*, LEGAL NEWSLINE (Sept. 9, 2014), http://goo.gl/PudGE3 4

TABLE OF AUTHORITIES—Continued

Page(s)

TREAS. INSPECTOR GEN. FOR TAX ADMIN., INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW (2013), *available at* http://goo.gl/gqtus6 7

INTEREST OF THE *AMICUS CURIAE* [1]

Amicus curiae Cause of Action is a nonprofit, nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law protect taxpayer interests and economic opportunity.[2] As part of this mission, Cause of Action works to expose and prevent federal agency misuse of discretionary power by, *inter alia*, defending small businesses and individuals in administrative, civil, and criminal cases and appearing as *amicus curiae* before this and other federal courts. *See, e.g.*, *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (citing brief).

Cause of Action devotes significant attention to highlighting the problems of government overreach and accountability. The decision below, if allowed to stand, implicates both of those concerns and, accordingly, this case is of great interest to *amicus*.

SUMMARY OF ARGUMENT

The notion that an agency's investigatory power is strong enough to destroy a citizen's reputation or business is too obvious to be denied.[3] Yet, agencies

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[1] No counsel for a party authored this brief in whole or in part, and neither the parties nor their counsel, nor anyone except *amicus* and its counsel, financially contributed to preparing this brief. Cause of Action timely notified all parties of its intention to file, as required by Rule 37.2(a). Petitioners consented. Respondents Francis Schmitz, John Chisholm, Bruce Landgraf, and Davis Robles denied consent. Respondent Dean Nickel did not respond.

[2] *About*, http://www.causeofaction.org/about (last visited Feb. 15, 2015).

[3] *See, e.g.*, Selwyn Raab, *Donovan Cleared of Fraud Charges by Jury in Bronx*, N.Y. TIMES (May 26, 1987), http://goo.gl/YxcdqF

enjoy narrow judicial review, high deference, and broad investigative discretion. Consequently, government officials have both means and opportunity to abuse inquisitorial power through targeting and retaliatory investigations against political opponents and critics. Personal-capacity liability is an exceptionally effective deterrent to such abuse. *See Carlson v. Green*, 446 U.S. 14, 21 (1980).

The majority rule is that a citizen may maintain personal-capacity liability claims for retaliation, even if the laws and regulations providing inquisitorial pretext are valid. *See, e.g.*, *Bennett v. Hendrix,* 423 F.3d 1247, 1250 (11th Cir. 2005); *White v. Lee*, 227 F.3d 1214, 1237 (9th Cir. 2000); *see also Zherka v. Ryan*, No. 13-3940, 2014 U.S. Dist. LEXIS 140564, at *13 (S.D.N.Y. Sept. 30, 2014); *Z St., Inc. v. Koskinen*, No. 12-401, 2014 U.S. Dist. LEXIS 71638, at *5 (D.D.C. May 27, 2014). This rule is consistent with the "axiomatic" principle that when the actions of government officials affect citizens' First Amendment rights, "the officials must use [the] least intrusive measures necessary to perform their assigned functions," *White*, 227 F.3d at 1237 (citations omitted), and is given effect through judicial review and scrutiny of the information used by an agency to justify its actions. *See Scott v. Rosenberg*, 702 F.2d 1263, 1275 (9th Cir. 1983) ("Certainly, governmental agencies must be wary of complaints which cannot be investigated without interfering with first amendment rights. Malicious or unsubstantiated allegations could easily be used to harass unpopular religions and their leaders."); *Garcia v. City of Trenton,* 348 F.3d 726, 729

("It's a cruel thing they did to me. . . . Which office do I go to get my reputation back? Who will reimburse my company for the economic jail it has been in for two and a half years?").

(8th Cir. 2003) (holding that plaintiff sufficiently stated a claim for retaliation after mayor enforced a valid parking time limit against her for criticizing government).

The Seventh Circuit wrongly inverted the majority rule by conditioning Petitioners' well-pled retaliation claim on the unconstitutionality of the pretext Wisconsin campaign-finance laws. *See O'Keefe v. Chisholm,* 769 F.3d 936, 942 (7th Cir. 2014). Due to the narrow review, deference, and discretion agencies enjoy, this inversion invites an "open season" on dissent, prevents effective government oversight, and conflicts with this Court's authorities bulwarking the First Amendment from government discouragements.

Therefore, this Court should grant certiorari and reverse the holding below.

ARGUMENT

I. Government Officials Should Be Accountable For Retaliatory Inquisitions That Chill Political Speech And Association.

In 2011, Wisconsin Governor Scott Walker proposed reforming the public-employee collective-bargaining process through legislation known as "Act 10." Defenders of the status quo responded with vandalism, boycotts, and physical intimidation. A whistleblower confirmed that Respondent Chisholm considered it his "personal duty" to fight reform, leading "an anti-Walker cabal of people in his office who were just fanatical about union activities and

unionizing."[4] Prosecutors hung blue fists (symbolizing opposition to Act 10) on the walls of the office, and conducted a criminal investigation as a campaign to dig up dirt on Walker, his aides, and his allies, with the aim of intimidating Walker and reversing his policies.[5]

Respondents' campaign against Act 10 included targeting Petitioners for a retaliatory investigation under the pretext of Wisconsin campaign-finance law violations. In fact, Respondents targeted nearly the entire Wisconsin conservative movement that publicly supported Act 10, including Petitioners and other groups that had little to do with one another or with Walker; timed their activities, including raids and disclosures, for maximum political impact; ignored reports of materially identical conduct by leftist groups, including labor unions and other Act 10 opponents; employed heavy-handed tactics specifically to chill speech and associational rights;[6] and relied on

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[4] Stuart Taylor, Jr., *District attorney's wife drove case against Wis. Gov. Walker, insider says*, LEGAL NEWSLINE (Sept. 9, 2014), http://goo.gl/PudGE3.

[5] *Id*.

[6] Specifically, Respondents' "secret criminal investigation" expanded eighteen times over a two-year period. Appellees' Br. at 12, *O'Keefe v. Chisholm*, 769 F.3d 936 (7th Cir. 2014) (No. 14-1822). The investigation included: witness intimidation; home raids, most involving private residences of individuals whose only crime was their apparent tie to Governor Walker; demanding false testimony from a witness, and charging her with four felonies when she refused; mobbing targets' homes and illuminating them with bright floodlights; grabbing business papers, computer equipment, phones, and other devices, while their targets were restrained under police supervision and denied the ability to contact their attorneys; and serving Petitioners with subpoenas demanding the disclosure of donor information, correspondence with their associates, and financial materials. *Id*.

a legal theory that has been rejected as a matter of state law, demonstrating its pretextual nature. App. to Pet. Cert. 18a, 29a, 43a, 44a. By all indications, Respondents' conduct was designed to, and did, violate Petitioners' free speech and association rights. Consequently, Petitioners sued Respondents under 42 U.S.C. § 1983 for unlawful government retaliation, disparate treatment and First Amendment violations.

The United States District Court for the Eastern District of Wisconsin found that Petitioners "easily" stated a plausible claim for First Amendment retaliation and held that Respondents could be liable for that retaliation in their personal capacities. *O'Keefe v. Schmitz*, 19 F. Supp. 3d 861, 864-67 (E.D. Wisc. 2014), *rev'd sub nom. O'Keefe v. Chisholm*, 769 F.3d 936 (7th Cir. 2014). The Seventh Circuit reversed and ruled that Respondents were not accountable for retaliation unless the pretext state law was unconstitutional, something not required by other circuits. *Compare O'Keefe*, 769 F.3d at 941, *with Thomas v. Independence Twp.*, 463 F.3d 285, 296 (3rd Cir. 2006), *and Keenan v. Tejeda,* 290 F.3d 252, 259 (5th Cir. 2002), *and Bloch v. Ribar,* 156 F.3d 673, 680-81 (6th Cir. 1998)*, and Garcia,* 348 F.3d at 729, *and White*, 227 F.3d at 1214, *and Bennett*, 423 F.3d at 1255.

If it stands, the ruling below immunizes government officials from personal-capacity liability in all but the most limited of circumstances. As government targeting and retaliation is not unique to Wisconsin,

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at 7-19. The subpoenas stated that disclosing the content of the subpoenas or the fact of their existence was grounds for contempt, but the investigators then leaked this supposedly secret information to friendly press. *Id*. at 13, 20.

such an outcome will have wide-ranging and troubling consequences for government accountability. For example, Cause of Action's matters involving agency targeting and retaliation include:

- Federal agencies targeting politically disfavored businesses, such as gun shops engaged in Second Amendment-protected activity, using threats of audit or legal action to pressure banks into denying them access to credit and banking facilities.[7]
- The Consumer Product Safety Commission ("CPSC") retaliating against the CEO of a small company who posted a humorous video critical of the agency by filing an unprecedented $58 million personal-liability claim against him under the responsible corporate officer doctrine.[8] The CEO sued CPSC in the United States District Court for the District of Maryland to stop the abuse.[9] Shortly thereafter, CPSC withdrew the personal-liability claim and settled the case.
- Opposing the Internal Revenue Service ("IRS") and White House targeting of government critics through tax law administration. The Treasury

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[7] *See* STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, THE DEPARTMENT OF JUSTICE'S "OPERATION CHOKE POINT" (2014), *available at* http://goo.gl/Mdxln3; Chuck Ross, *Audio Tapes Reveal How Federal Regulators Shut Down Gun Store Owner's Bank Accounts*, DAILY CALLER (Jan. 14, 2015), http://goo.gl/BzWfAJ.

[8] Buckyballs, *Save Our Balls*, YOUTUBE (July 27, 2012), http://goo.gl/sB0evm (last visited Feb. 15, 2015).

[9] Compl., *Zucker v. Consumer Prod. Safety Comm'n*, No. 13-3355 (D. Md. filed Nov. 12, 2013); Jim Epstein, *The Government's Bogus Lawsuit Against Buckyballs' Creator Craig Zucker Ends In a Settlement*, REASON.COM (May 18, 2014), http://goo.gl/dOow0Z.

Inspector General for Tax Administration ("TIGTA") found that as early as May 2010, IRS targeted organizations applying for tax-exempt status "based upon their names or policy positions instead of indications of potential political campaign intervention."[10] A House Committee on Oversight and Government Reform investigation concluded that IRS targeted and punished conservative organizations, while liberal applicants generally won approval.[11]

On September 29, 2014, Cause of Action prevailed on summary judgment in a case under the Freedom of Information Act, 5 U.S.C. § 552, and TIGTA was ordered to admit the existence of records showing unauthorized disclosures of 26 U.S.C. § 6103 "return information" to the White House by IRS. *See Cause of Action v. Treasury Inspector Gen. for Tax Admin.*, No. 13-1225, 2014 U.S. Dist. LEXIS 140595 (D.D.C. Sept. 29, 2014). TIGTA now refuses to disclose these records, claiming that § 6103 (which was passed to protect taxpayers) protects the political officials and government employees who may have demanded access to or made unauthorized disclosures. *See* Mem. in Supp. of Mot. for Summ. J., *Cause of Action v. Treasury Inspector Gen. for Tax Admin.*, No. 13-1225 (D.D.C. filed Jan. 30, 2015).

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[10] TREAS. INSPECTOR GEN. FOR TAX ADMIN., INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW 5 (2013), *available at* http://goo.gl/gqtus6.

[11] STAFF OF H. COMM. OVERSIGHT & GOV. REFORM, LOIS LERNER'S INVOLVEMENT IN THE IRS TARGETING OF TAX-EXEMPT ORGANIZATIONS 3 (2014), *available at* http://goo.gl/dILgEF.

- Defending a small cancer pathology firm from targeting and retaliation because the CEO criticized the Federal Trade Commission's ("FTC") investigation of his company.[12] The CEO made a critical blog post on September 17, 2012; the next day, FTC employees visited his website approximately 75 times. The CEO posted a video trailer calling FTC's investigation a "government shakedown" and "abusive beltway tactics" on July 19, 2013; three days later, FTC staff recommended enforcement proceedings. FTC's attorney told a federal judge that FTC monitored his website to be sure he was "unimpeded in his First Amendment rights."[13]

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[12] Compl., *LabMD, Inc. v. Fed. Trade Comm'n*, 2014 U.S. Dist. LEXIS 65090 (N.D. Ga. May 12, 2014) (No. 14-810). FTC has trapped LabMD in administrative proceedings for five years, the outcome of which are a foregone conclusion. FTC Commissioner Joshua Wright analyzed his own agency's conduct over a period of nearly twenty years and found that in "100 percent of cases where the ALJ ruled in favor of the FTC, the Commission affirmed; and in 100 percent of the cases in which the ALJ ruled against the FTC, the Commission reversed." Joshua Wright, *Recalibrating Section 5*, CPI ANTITRUST CHRONICLE, at 4 (Nov. 2013), *available at* http://goo.gl/hVJZcO. The Eleventh Circuit acknowledged this but still rejected LabMD's plea for judicial review on finality grounds. *See LabMD, Inc. v. Fed. Trade Comm'n*, No. 14-12144, 2015 U.S. App. LEXIS 781, at *8-9 (11th Cir. Jan. 20, 2015).

[13] The district court judge was not impressed:

> Are you telling me as an officer of the court that after a critical blog post, that somebody at the FTC, in order to make sure . . . he was not impeded in his First Amendment rights, decided the next day to 75 times make sure that the same post was up there and, therefore, it could come in and make an argument like you have just made, that the purpose of that access was

Application of the Seventh Circuit rule in any of the above cases would only complicate accountability efforts. However, the larger problem is that the Seventh Circuit rule, by immunizing officials from personal-capacity liability for retaliation unless the pretext law is constitutionally infirm, invites future inquisitorial abuse against political opponents and government critics, and creates an irreconcilable conflict with this Court's First Amendment authorities prohibiting government discouragements of free speech and association.

It is well established that the inquisitorial process chills First Amendment rights. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66-67 (1963). The Court therefore bulwarks the First Amendment from government's heavy-handed retaliatory frontal attacks, as in the instant case, and from its infinite more subtle discouragements. *See Laird v. Tatum*, 408 U.S. 1, 12-13 (1972); *Dombrowski v. Pfister*, 380 U.S. 479, 489-90 (1965); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) (the power to regulate must not unduly "infringe the protected freedom").[14] Consequently, it

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> to make sure that he was unimpeded in the exercise of his First Amendment rights?

Tr. of Oral Argument at 25, *LabMD, Inc. v. Fed. Trade Comm'n*, 2014 U.S. Dist. LEXIS 65090 (N.D. Ga. May 12, 2014) (No. 14-810).

[14] *See Bennett,* 423 F.3d at 1249; *White*, 227 F.3d at 1237; *Zherka*, 2014 U.S. Dist. LEXIS 140564, at *13; *Z St., Inc. v. Koskinen*, No. 12-401, 2014 U.S. Dist. LEXIS 71638, at *5 (D.D.C. May 27, 2014) (plaintiff alleged IRS targeted him for contradicting "current policies of the U.S. Government"); *Donahoe v. Arpaio*, 986 F. Supp. 2d 1091, 1135 (D. Ariz. 2013) (summary judgment denied where plaintiff alleged retaliatory investigation and harassment for critical speech).

has prohibited compelled disclosure of an organization's members and donors. *Brown v. Socialist Workers '74 Campaign Comm.,* 459 U.S. 87, 101-02 (1982); *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (Court has not "drawn fine lines between contributors and members but [has] treated them interchangeably."); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 462 (1958) (recognizing "the vital relationship between freedom to associate and privacy in one's associations"). It has applied "exacting scrutiny" to disclosure requirements, *Doe v. Reed*, 561 U.S. 186, 196 (2010), requiring only "a reasonable probability" that disclosure of contributors' names will subject them to threats, harassment, or reprisals to resist disclosure. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 367 (2010); *see also Brock v. Local 375, Plumbers Int'l Union*, 860 F.2d 346, 350 (9th Cir. 1988). And, it has held that a citizen's right to speak through an advocacy organization is every bit as broad as that of any media company or journalist. *Citizens United,* 558 U.S. at 352-53; *see also Citizens United v. Gessler,* 773 F.3d 200, 212 (10th Cir. 2014).[15]

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[15] In striking down Colorado campaign disclosure laws on an "as-applied" basis, the Tenth Circuit rejected the "media company"/"advocacy groups" distinction:

> The Secretary refers to Citizens United as a "drop-in" advocate, but . . . it is anything but. In terms of providing the requisite context for its messages, it is similar to exempted blogs and opinion shows on radio and cable television. . . . The disclosure exemptions are not limited to major Colorado metropolitan newspapers. They cover small weekly papers, quarterly national journals, online newspapers, and blogs originating from anywhere in the world. The Secretary has tried to explain why such entities should be exempted but not Citizens United and he has failed.

Gessler, 773 F.3d at 215-16.

Agencies enjoy narrow judicial review, high discretion, and broad inquisitorial power. *See City of Arlington v. Fed. Commc'ns Comm'n*, 133 S. Ct. 1863, 1868-69 (2013) (deference to agency's jurisdictional interpretation); *United States v. Morton Salt Co.*, 338 U.S. 632, 641-43 (1950) (inquisition free from judicial review).[16] Yet, narrow judicial review combines with the enticements of power to incentivize government overreach, as Respondents did here. *See Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 218-19 (1946) (Murphy, J., dissenting);[17] *see also Hannah v. Larche*, 363 U.S. 420, 496 (1960) (Douglas, J.,

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[16] Deference has expanded even to divest district courts of jurisdiction over constitutional claims that the agency itself deems outside the purview of an administrative enforcement case. *See, e.g.*, *LabMD*, 2015 U.S. App. LEXIS 781, at *9-11 (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), and holding that the FTC Act's general appellate review for final cease-and-desist orders bars Article III review of all constitutional claims, even those declared by the agency to be outside the ambit of the administrative case, until after the agency process is complete).

[17] As Justice Murphy said:

> Administrative law has increased greatly in the past few years, and seems destined to be augmented even further in the future. But attending this growth should be a new and broader sense of responsibility on the part of administrative agencies and officials. Excessive use or abuse of authority . . . will eventually undo the administrative processes themselves. . . . To allow a nonjudicial officer, unarmed with judicial process, to demand the books and papers of an individual is an open invitation to abuse of that power. . . . Many invasions of private rights thus occur without the restraining hand of the judiciary ever intervening.

Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186, 218-19 (1946) (Murphy, J., dissenting).

dissenting) ("Secret inquisitions are dangerous things" because they breed "arbitrary misuse of official power[.]"). Doctrinal accretions continuously broaden agency discretion and improperly so.[18] The judicial "hard look" needed to keep agencies honest has gone missing, leading to a troubling dissonance between agency practice and due process.[19]

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[18] *Compare* Dep't of Justice, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT § 10(e) (1947) (judicial review includes deciding all relevant questions of law, interpreting constitutional and statutory provisions, and determining the meaning or applicability of the terms of any agency action), *with City of Arlington*, 133 S. Ct. 1863, *and LabMD*, 2015 U.S. App. LEXIS 781, at *9-11 (barring judicial review of all constitutional claims, even those the agency declares outside the ambit of the administrative case). *But see Zherka*, 2014 U.S. Dist. LEXIS 140564, at *14-15 ("Leaving plaintiff to pursue administrative remedies through the very agency he asserts has targeted him for retaliatory investigation would be . . . no remedy at all[.]").

[19] *See, e.g.*, *Envtl. Def. Fund, Inc. v. Ruckelshaus,* 439 F.2d 584, 598 (D.C. Cir. 1971) (judicial review should confine and control agency discretion for "judicial review alone can correct only the most egregious abuses" and "ensure that the administrative process itself will confine and control the exercise of discretion"); WRIGHT, *supra* note 12, at 4-5; Max Minzer, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853, 904 (2012) (there are "significant reasons to be concerned about the agencies as retributive entities" based on legitimacy and competence because agencies generally lack the attributes to make "retributive sanctions legitimate" and are "unlikely to have the expertise necessary for retribution"). Wright's study of his own Commission confirms Justice Murphy's warning that narrow review frees agencies to invade private rights:

> [FTC's] combination of institutional and procedural advantages . . . gives the agency the ability, in some cases, to elicit a settlement even though the conduct in question very likely may not be anticompetitive. This is because firms typically prefer to settle . . . rather than going

Personal-capacity liability is an exceptionally effective check on retaliatory investigations. *See, e.g.*, *Carlson*, 446 U.S. at 21. It gives practical effect to the axiom that agencies directly affecting First Amendment rights must use the "least intrusive measures necessary to perform their assigned functions." *White,* 227 F.3d at 1237 (citations omitted). The Seventh Circuit's ruling effectively removes this check on government overreach. Therefore, this Court should grant *certiorari*, overrule the Seventh Circuit, and hold government officials using inquisitorial power to retaliate and in a manner that would deter a person of "ordinary firmness" from speaking or associating should face personal-capacity liability.

II. This Case Is An Ideal Vehicle For This Court To Clarify That Personal-Capacity Liability Attaches To Retaliatory Inquisitions.

The constitutional legitimacy of Wisconsin's campaign-finance laws is not before the Court.[20]

> through lengthy and costly administrative litigation in which they are both shooting at a moving target and have the [procedural] chips stacked against them.

WRIGHT, *supra* note 12, at 5. The data show FTC always wins on its home court. *Id*. at 4; A. Douglas Melamed, *The Wisdom of Using the "Unfair Method of Competition" Prong of Section 5*, at 21-22, GCP (Nov. 2008) (studying data from 1987-2007), *available at* http://goo.gl/8HjTMt. But such an outcome cannot be reconciled with the Court's due process jurisprudence. *See Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975).

[20] These laws, however, are obviously problematic. *Citizens United,* 558 U.S. at 352; *City of Lakewood v. Plain Dealer Publ'g Co*., 486 U.S. 750, 757 (1988); *Shelton v. Tucker*, 364 U.S. 479,

Instead, the relevant question here is whether government officials who abuse inquisitorial power to chill First Amendment rights are accountable.

Historically, retaliation has been actionable as the "but-for" cause of official action offending the Constitution. *Hartman v. Moore*, 547 U.S. 250, 256 (2006). Thus, the majority rule holds government actors accountable even if the pretext law is facially valid and well-pled retaliation claims survive Rule 12(b)(1) and (6) challenges because the retaliation, not the pretext, is the inquiry's focus. *See Garcia,* 348 F. 3d at 729; *Thomas*, 463 F.3d at 296; *Bennett*, 423 F.3d at 1255.

The Seventh Circuit tacked from this well-recognized channel reasoning that personal-capacity liability for retaliation should attach only if "no reasonable person could have believed that the John Doe proceeding could lead to a valid conviction" in light of federal law. *O'Keefe*, 769 F.3d at 940. However, there is no precedent for this deviation.

Given *Morton Salt*, *City of Arlington*, *Thunder Basin*, and *LabMD*, the decision below means a fig-leaf's worth of pretext renders courts powerless to prevent government retaliation against political speech. Such a result cannot be squared with this Court's First Amendment authorities. Therefore, this case presents an ideal vehicle for the Court to close the open issue in *Hartman*, 547 U.S. at 262 n.9, by ruling that government officials may be held liable for subjecting citizens to retaliatory investigations for First Amendment-protected speech and association.

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486 (1960); *Cantwell*, 310 U.S. at 308; *Gessler*, 773 F.3d at 211-12; *see also Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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