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 Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS FRANCIS SCHMITZ AND DEAN NICKEL

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QUESTIONS PRESENTED

Pursuant to Wisconsin's "John Doe" criminal statute (Wis. Stat. § 968.26), five district attorneys petitioned the chief judges of their respective county courts for the commencement of criminal proceedings (the "John Doe Proceedings") to investigate whether the campaign committee of the incumbent Governor had coordinated "issue advocacy" with 26 U.S.C. § 501(c)(4) organizations in violation of Wisconsin's campaign-finance laws. The chief judges appointed a "John Doe Judge," who commenced the John Doe Proceedings based on her finding that there was an objectively reasonable belief that campaign-finance crimes had occurred.

The John Doe Judge issued one subpoena – upon her determination of probable cause – to each of the Petitioners, among others. A replacement John Doe Judge thereafter quashed these subpoenas upon Petitioners' request after concluding Wisconsin law did not regulate the campaign-finance activities being investigated. Whether the John Doe Proceedings are valid under state law has now been briefed in three actions pending before the Wisconsin Supreme Court, which has scheduled oral argument for April 17 and 20, 2015.

The questions presented are:

1. Whether principles of equity, comity, and federalism – as embodied by the Anti-Injunction Act and articulated in *Mitchum* and *Younger* – should have restrained the federal district court from enjoining the John Doe Proceedings, where the John Doe Judge had already provided Petitioners the only relief they

requested and where three actions addressing the validity of the John Doe Proceedings were already pending in Wisconsin state court?

2. Whether Respondents may be held personally liable for their role in the John Doe Proceedings as it relates to Petitioners, who were only served one subpoena each upon the John Doe Judge's finding of probable cause?

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INTRODUCTION

The John Doe Proceedings were commenced to investigate whether 26 U.S.C. § 501(c)(4) "issue advocacy" groups secretly coordinated their issue advocacy with incumbent Governor Scott Walker's campaign committee – in violation of Wisconsin's campaign finance laws – during Wisconsin's 2011-2012 senatorial and gubernatorial recall elections. Pursuant to the John Doe Proceedings, Petitioners Wisconsin Club for Growth and Eric O'Keefe were each served a single subpoena in October 2013 requesting documents related to the Petitioners' campaign-finance activities during the previous four years. Other individuals and organizations who participated in the 2011-2012 recall elections received similar subpoenas. The John Doe Judge issued these subpoenas upon a finding of probable cause.

Petitioners, among others, filed motions to quash the subpoenas. These motions were granted by a replacement John Doe Judge, who concluded that the activity being investigated was not regulated under state law and, even if it was, could not be regulated under the First Amendment. By quashing the subpoenas on these grounds, the John Doe Proceedings were halted. Petitioners have not had to produce any documents and have been subject to no further action. The John Doe Special Prosecutor appealed the John Doe Judge's ruling in state court, where it joined two other actions that challenge the validity of the John Doe Proceedings.

Despite the fact Petitioners obtained the only relief they sought from the John Doe Judge, Petitioners filed a Section 1983 suit in federal court on February 10,

2014, and moved the district court to enjoin the John Doe Proceedings. Rather than refrain from exercising jurisdiction in light of these unique circumstances, the district court enjoined all further action in the John Doe Proceedings on First Amendment grounds, even though the pending state-court actions had yet to resolve whether Wisconsin's campaign-finance laws actually regulated the activity (*i.e.*, coordinated issue advocacy) being investigated and whether the evidence presented to the John Doe Judge justified the commencement of the proceedings and the issuance of subpoenas and search warrants.

The fact that the Anti-Injunction Act ("AIA") does not bar an injunction issued under Section 1983 does not mean that the district court should have issued an injunction under these circumstances. Rather, principles of equity, comity and federalism – as embodied in the AIA and articulated in *Mitchum* and *Younger* – instruct that Wisconsin's courts should have the first opportunity to resolve the factual and statutory questions underlying the John Doe Proceedings' validity. Because Petitioners were subject to no further enforcement action, there was simply no need for the district court to issue an injunction.

Petitioners argue that all federal courts – like the district court – may wholly disregard principles of equity, comity and federalism whenever injunctive relief and damages are requested under Section 1983. This Court's jurisprudence does not support such a broad argument; instead, it counsels against federal interference when plaintiffs, as is the case here, have already obtained the relief they requested and have adequate opportunities to interpose defenses in on-

going state court proceedings. Whether the John Doe Proceedings are valid under Wisconsin law is a question unique to Wisconsin and it is through Wisconsin state courts that the question should first be resolved. The Seventh Circuit's reversal of the district court's injunction and its instructions to dismiss the suit, leaving all further proceedings to the courts of Wisconsin, was consistent with long-standing principles of equity, comity and federalism.

Petitioners' argument that they have set forth a retaliatory investigation claim for personal damages also fails because this Court has never recognized that a "retaliatory investigation," let alone a "retaliatory subpoena" issued upon a finding of probable cause, can constitute a distinct constitutional violation. *Hartman v. Moore*, 547 U.S. 250, 262 n.9 (2006) (reserving the question of "[w]hether the expense or other adverse consequences of a retaliatory investigation would ever justify recognizing such an investigation as a distinct constitutional violation"). Even if such retaliation claims had been previously recognized by this Court, Petitioners' personal-capacity claims against Respondents cannot survive because the activity for which Petitioners were being investigated – coordination of issue advocacy – has never been recognized as a constitutionally protected activity by this Court or any other court.

STATEMENT OF THE CASE

A. Coordinated Issue Advocacy – Wisconsin's Regulatory Background.

In 1999, the Wisconsin Court of Appeals held that the State could regulate coordinated issue advocacy. *Wisconsin Coalition for Voter Participation, Inc. v. State Elections Board ("WCVP v. SEB")*, 231 Wis.2d 670, 605 N.W.2d 654 (Wis. Ct. App. 1999). In *WCVP v. SEB*, the plaintiffs sought to enjoin an investigation by Wisconsin's State Elections Board into secret coordination between a state judge's campaign committee and a non-profit organization purportedly committed to increasing voter turn-out. The court concluded that if the organization coordinated a voter mailing with the judge's campaign committee, that mailing would be subject to the same state statutes and administrative rules regulating campaign contributions, even if the voter mailing did not constitute "express advocacy." *Id*. at 682. In reaching this conclusion, the court cited *Buckley v. Valeo*, 424 U.S. 1 (1976), and a contemporaneous federal court decision which contained a "common sense" legal analysis establishing that coordinated issue advocacy expenditures should be regulated in the same manner as campaign contributions. *Id*. at 679, 686 n.10 (citing *FEC v. The Christian Coalition*, 52 F. Supp.2d 45, 92 (D.D.C. 1999)). *WCVP v. SEB* has not been overturned and remains controlling law in Wisconsin.

In 2000, Wisconsin's State Election Board issued a formal opinion addressing coordinated issue advocacy. The SEB, citing *WCVP v. SEB*, noted that coordinated issue advocacy – consistent with this Court's treatment

of contributions in *Buckley* – was subject to state regulation:

> [S]peech which does not expressly advocate the election or defeat of a clearly identified candidate may, nevertheless, be subject to campaign finance regulation if the following two elements are present: (1) the speech is made for the purpose of influencing voting at a specific candidate's election; and (2) the speech (and or the expenditure for it) is coordinated with the candidate or his/her campaign. The Courts seemed to be willing to merge express advocacy with issue advocacy if "coordination" between the spender and the campaign is sufficient that the potential for a quid pro quo is immediate and apparent and, therefore, that the expenditure ought to be treated as a contribution.

Op. El. Bd. 00-2 (2000) (Reaffirmed 3/26/08). In 2007, Wisconsin's Government Accountability Board ("GAB") took over the responsibilities of the SEB. The GAB is a non-partisan agency, led by six retired judges, that administers and interprets Wisconsin's campaign-finance laws. In 2008, the GAB affirmed the SEB's opinion that coordinated issue advocacy was subject to state regulation. *Id.*

B. Commencement of the John Doe Proceedings to Investigate Coordinated Issue Advocacy.

In August 2012, the office of the Milwaukee County District Attorney, co-Respondent John Chisholm ("Chisholm"), petitioned the Chief Judge of the

Milwaukee County Circuit Court to commence a John Doe Proceeding in Milwaukee County, pursuant to Wis. Stat. § 968.26, to investigate whether illegal coordination between 501(c)(4) organizations and campaign committees occurred during Wisconsin's 2011-2012 senatorial and gubernatorial recall elections.[1] Pet. App. 41a. This petition was supported by an affidavit that attached and summarized emails obtained from a separate John Doe proceeding that was commenced in 2010 to investigate missing charity funds handled by the Office of the Milwaukee County Executive. After reviewing the affidavit and its contents, Chief Judge Jeffrey A. Kremers assigned the petition to Judge Barbara Kluka, a state judge who had formerly served on the Kenosha County Circuit Court. In September 2012, Judge Kluka ordered that the John Doe Proceeding commence, based on her review of the affidavit and on her conclusion that there was a reason to believe that a campaign-finance crime had been committed in Milwaukee County. She also ordered that this proceeding be conducted in secret.

The GAB was involved in the Milwaukee County John Doe Proceeding from its outset. Pet. App. 42a. The GAB also unanimously resolved to start its own

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[1] A John Doe proceeding is a state criminal proceeding (with origins pre-dating Wisconsin's statehood) that is overseen by a judge, includes the right to an attorney, involves the judicial issuance of orders, and offers the availability of motions and appeals within the proceeding. Wis. Stat. § 968.26; *State v. Washington*, 266 N.W.2d 597 (Wis. 1978) (detailing development of the John Doe statute and noting that the judge in a John Doe proceeding performs judicial functions, including making legal determinations with respect to subpoenas consistent with courtroom procedure).

investigation of the same campaign-finance activities on which the Milwaukee County John Doe Proceeding was focused. Pet. App. 31. In particular, the GAB hired Respondents Francis Schmitz (a retired federal prosecutor with nearly thirty years of service) and Dean Nickel (a career state investigator) to investigate the unreported coordination of political advocacy between 501(c)(4) organizations and candidate campaign committees. Pet. App. 3a. These organizations included Petitioner Wisconsin Club for Growth ("WCFG").

In 2013, Chisholm requested that the Wisconsin Attorney General take charge of the John Doe Proceeding because it was leading to subjects living outside of Milwaukee County. After the Attorney General declined Chisholm's request because of conflicts of interest, the District Attorneys in Columbia County, Dane County, Dodge County, and Iowa County each petitioned for the commencement of John Doe proceedings in their respective circuit courts after reviewing information that had been gathered in the Milwaukee County John Doe Proceeding. These District Attorneys supported their petitions with affidavits, each of which identified an individual within their respective counties who was believed to have coordinated political campaign advertising between campaign committees and issue advocacy organizations.

Wisconsin's Director of State Courts assigned these four petitions to Judge Kluka. Upon reviewing them and finding reason to believe that violations of Wisconsin's campaign-finance laws occurred, she commenced parallel John Doe Proceedings in each of

the four counties. The five district attorneys who had petitioned for the John Doe Proceedings (two Republicans and three Democrats) asked Judge Kluka to appoint a special prosecutor to lead all five John Doe proceedings. Based on the District Attorneys' recommendation, Judge Kluka appointed Respondent Schmitz to be the John Doe Special Prosecutor and authorized him to determine if criminal charges were appropriate.

C. Subpoenas Are Issued and Quashed.

In September 2013, Judge Kluka issued subpoenas, based on an investigator's affidavit containing a summary of probable cause and other evidence, to Petitioners WCFG and Eric O'Keefe – an officer of WCFG – that required the production of documents related to their campaign-finance activities. Judge Kluka also issued search warrants based on an affidavit signed by Respondent Nickel. Those search warrants were thereafter executed at the homes of individuals who were not parties in the lower proceedings. Pursuant to Wisconsin law, Judge Kluka issued these subpoenas and search warrants upon a probable-cause determination. *In re John Doe*, 689 N.W.2d 908, 909 (Wis. 2004).

In October 2013, Petitioners were among several subpoena recipients who filed motions to quash in which they claimed that the theory of criminal liability underlying the John Doe Proceedings was invalid under state law and that any coordination of issue advocacy constituted core political speech that was protected under the First Amendment. In December 2013, Respondent Schmitz responded to these motions, as well as motions filed by the two individuals who had

material seized pursuant to Judge Kluka's search warrants, wherein he argued that, under Wisconsin's campaign-finance laws and *WCVP v. SEB*, contributions to a candidate's campaign must be reported whether or not they constitute express advocacy.

In January 2014, Judge Gregory Peterson—who was appointed to replace Judge Kluka after she had recused herself for unspecified reasons—granted Petitioners' motions to quash and ordered the return of seized property to those upon whom the search warrants had been executed. Judge Peterson concluded that state law did not regulate the activities being investigated and found it unlikely that *WCVP v. SEB* could withstand constitutional scrutiny in light of cases this Court has decided since *WCVP v. SEB* was decided. However, Judge Peterson subsequently acknowledged in an order staying the return of the seized property that the legal theory underlying the John Doe Proceedings was "not frivolous" and that he "simply happen[ed] to disagree" with "an arguable interpretation of the statutes." R. 5 Ex. A at Ex. 49.[2]

D. State Appellate Proceedings Arising from the John Doe Proceedings.

In November 2013, unnamed petitioners filed a petition for supervisory writ with the Wisconsin Court of Appeals that argued, *inter alia*, Judge Kluka violated her legal duty by (1) consolidating the John Doe Proceedings, (2) appointing Respondent Schmitz as special prosecutor, and (3) subjecting those involved in

[2] "R." citations are to the district court record.

the John Doe Proceedings to secrecy orders. On January 30, 2014, the Wisconsin Court of Appeals denied the petition after finding (1) the proceedings were properly consolidated; (2) Judge Kluka had inherent authority to appoint a special prosecutor; and (3) the secrecy orders were proper. On February 19, 2014, the unnamed petitioners petitioned the Wisconsin Supreme Court for review of this decision.

On February 10, 2014, unnamed petitioners petitioned for the commencement of an original action in the Wisconsin Supreme Court that challenged the statutory and constitutional validity of the John Doe Proceedings.

On February 21, 2014, Respondent Schmitz filed a petition for supervisory writ and writ of mandamus with the Wisconsin Court of Appeals, challenging Judge Peterson's ruling on the motions to quash. In April 2014, unnamed intervenors petitioned the Wisconsin Supreme Court to bypass the Court of Appeals with regard to the petition.

On December 16, 2014, the Wisconsin Supreme granted these various petitions, consolidated the actions and ordered the parties to brief fourteen different issues, ranging from the legality of the appointments of the John Doe Judge and John Doe Special Prosecutor, to the validity of the John Doe Proceedings under Wisconsin's campaign-finance law ("Chapter 11") and the First Amendment.[3] For

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[3] *See* Order, *Three Unnamed Petitioners v. Peterson*, 2013AP2504-2508-W; *Two Unnamed Petitioners v. Peterson*, 2014AP296-OA;

example, the parties are to brief "[w]hether pursuant to Wis. Stat. ch. 11, a criminal prosecution may, consistent with due process, be founded on an allegation that a candidate or candidate committee 'coordinated' with an independent advocacy organization's issue advocacy."

Eight opening briefs were filed on February 2, 2015. Response briefs were filed on March 5, 2015. Oral arguments are scheduled to be held by the Wisconsin Supreme Court on April 17 and 20, 2015.

E. The Nature of the Complaint.

Notwithstanding the fact the John Doe Judge granted the only relief they requested (*i.e.*, quashing of the subpoenas) and the fact that John-Doe related actions were already pending before the Wisconsin Court of Appeals and the Wisconsin Supreme Court, the Petitioners filed a federal complaint against Respondent Schmitz, Respondent Nickel, John Doe Judge Peterson, co-Respondent Chisholm and two Assistant District Attorneys in Chisholm's office: co-Respondent David Robles ("Robles") and co-Respondent Bruce Landgraf ("Landgraf"). Petitioners also moved the district court for a preliminary injunction to halt the John Doe Proceedings, despite the fact they were already halted by the John Doe Judge's ruling of January 10, 2014. The Petitioners alleged that, because WCFG engaged only in issue advocacy, Wisconsin law and the First Amendment prohibited the

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Schmitz v. Peterson, 2014AP417-421-W (Wis. Dec. 16, 2014), available at http://media.jrn.com/documents/2013AP2504and2014AP296and2014AP417.pdf.

State's regulation of its activities, even if it did include coordinated issue advocacy.

Petitioners further alleged that the John Doe Proceedings were commenced in bad faith and that Respondents used the John Doe Proceedings to retaliate against the Petitioners for their conservative political speech. Petitioners sought personal damages against all the defendants except for Judge Peterson.

F. Procedural History.

Respondents moved to dismiss the complaint under various immunity arguments and, in particular, argued they were entitled to qualified immunity because the John Doe Proceedings did not violate Petitioners' clearly-established right to secretly coordinate issue advocacy with a candidate's campaign committee. Respondents also asserted that dismissal was warranted under the federalism principles and abstention doctrines articulated in *Younger*, *Pullman* and *Burford*. *Younger v. Harris*, 401 U.S. 37 (1971); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). In April 2014, the district court denied the Defendants' motions to dismiss after concluding (1) that the right at issue – which the district court characterized as the right to express political opinions without fear of government retaliation – was clearly established and (2) that the court need not refrain from exercising jurisdiction under any abstention doctrine.

Respondents opposed Petitioners' preliminary injunction motion and submitted declarations of Chisholm, Landgraf, Robles, Schmitz, Nickel, members of the GAB (including its Director and General

Counsel), and the district attorneys of Dane and Iowa Counties—the district attorneys who petitioned for the John Doe Proceedings in the counties in which Petitioners were located—to refute the Petitioners' claims of bad faith and retaliation. Prior to the scheduled date for the injunction hearing, Respondents informed the district court they intended to call witnesses to rebut Petitioners' bad-faith allegations and to defend against Petitioners' attacks on Defendants' declarations and credibility. However, the district court granted the Petitioners' motion for a preliminary injunction without an evidentiary hearing – or even argument – after concluding that any campaign-finance law regulating coordinated issue advocacy violated the First Amendment.[4] The district court ordered the Respondents and the John Doe Judge to cease all activities related to the John Doe Proceedings – under threat of contempt – and to permanently destroy all copies of information and other materials obtained through the investigation.

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[4] Petitioners' claim that the "key historical facts" are "not in dispute" is inaccurate. Pet. at 1. Far from being subject to "a campaign of intimidation and harassment that continue[d] for years on end" (Pet. at 33), Petitioners were served, through counsel, one subpoena each in October 2013. They successfully quashed that subpoena and have been subject to no other enforcement action. Petitioners' citation to facts unrelated to actions taken against them or predating the John Doe Proceedings commenced in the counties they are located are irrelevant. The declarations submitted by Respondents demonstrating their good-faith participation in the John Doe Proceedings have not been rebutted by any sworn testimony. In fact, Petitioners informed the district court they did *not* want an evidentiary hearing in which witnesses could be called.

G. The Seventh Circuit's Rulings.

The day after the district court entered the injunction, a Seventh Circuit panel of Chief Judge Diane Wood, Judge Frank Easterbrook and Judge William Bauer ("the Panel") stayed the portions of the injunction that required Defendants to return or destroy the information obtained in the John Doe Proceedings. The Panel also consolidated the various appeals regarding the Respondents' motions to dismiss and the preliminary injunction.

Following briefing and extended oral argument, the Panel reversed the injunction and remanded with instructions to dismiss the suit, "leaving all further proceedings to the courts of Wisconsin." Pet. App. 16a. Although the Panel recognized that Section 1983 authorizes anti-suit injunctions, it also recognized that "principles of 'equity, comity, and federalism' . . . determine whether anti-suit injunctions are appropriate. Pet. App. 2a (citing *Mitchum v. Foster*, 407 U.S. 225, 243 (1972). The Panel observed that under long-standing and fundamental principles of federalism, as embodied in the AIA, "state courts are free to conduct their own litigation, without ongoing supervision by federal judges, let alone threats by federal judges to hold state judges in contempt." Pet. App. 6a. These principles, the Court emphasized, were even more important to uphold in the instant case in light of specific injunction and abstention factors.

First, the Panel noted that Petitioners would not have suffered irreparable injury because they had already "obtained effective relief from Judge Peterson before the federal judge acted – indeed, before filing this suit." Pet. App. 7a.

Second, the Panel noted that Petitioners had an adequate remedy at law because the John Doe Judge already granted their motion to quash, which was the only relief Petitioners requested in the John Doe Proceedings.

Third, the Panel noted that normal jurisprudential principles, such as the rule against unnecessary constitutional adjudication, rendered the district court's injunction "unnecessary at best, advisory at worst" because John Doe Judge Peterson already quashed the subpoenas as a matter of state law. Pet. App. 7a-8a (citing *Pullman*).

Fourth, The Panel found that the policy against federal interference in state litigation is especially strong when the state proceedings are criminal in nature, such as the John Doe Proceedings. App. 8a. (citing *Younger* and *Sprint Communications*).

In discussing these four factors, the Panel clarified that it was not invoking any "mandatory-abstention command[s]" but, instead, was relying on normal principles of equity, comity and federalism in evaluating the district court's approach. Pet. App. 8a. The Panel concluded the district court imprudently gave these principles "no weight." *Id*.

The Panel also concluded that Respondents could not be found to have acted in "bad faith" under the objective standard employed by the district court – that no reasonable person could have believed that the John Doe proceeding could lead to a valid conviction – because "until the district court's opinion in this case, neither a state nor a federal court had held that Wisconsin's (or any other state's) regulation of

coordinated fund-raising and issue advocacy violates the First Amendment." Pet. App. 10a-10b. Because it was not clearly established that coordinated issue advocacy was forbidden under state law or the First Amendment, the Panel held that Respondents possessed qualified immunity from liability in damages. *Id*.

Petitioners filed a petition for rehearing and rehearing *en banc*. No Seventh Circuit judge requested a vote on the petition for rehearing *en banc* and all of the judges on the Panel voted to deny rehearing. Accordingly, the petition was denied.

REASONS FOR DENYING THE PETITION

I. Principles of Federalism Required the District Court to Refrain from Interfering with the John Doe Proceedings.

A. *Mitchum* Instructs That Principles of Equity, Comity and Federalism Must Restrain Federal Courts When Asked for Injunctive Relief Under Section 1983.

Mitchum's holding was very narrow: "[t]oday we decide only that the District Court in this case was in error in holding that because of the anti-injunction statute, it was absolutely without power in this [Section] 1983 action to enjoin a proceeding pending in a state court under any circumstances whatsoever." *Mitchum*, 407 at 243. Although *Mitchum* recognized the AIA does not represent an absolute bar to injunctive relief requested under Section 1983, it does not suggest that district courts can ignore the federalism principles that are embodied by the AIA. The *Mitchum* Court emphasized this point immediately

after concluding that Section 1983 falls within the "expressly authorized" exception of the anti-injunction act ("AIA"): "In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Id*.[5] Thus, *Mitchum* did not displace the federalism principles previously embraced by the Court; rather, it reaffirmed the importance of those principles and its previous instructions to district courts to refrain from interfering with state-court proceedings when it is inappropriate or unnecessary to do so. *See, e.g., Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 297 (1970) ("Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy.").

The Court has continued to embrace these core principles of federalism when testing the propriety of an injunction, even one issued under Section 1983. For instance, in *O'Shea v. Littleton* the Court held that federalism principles precluded injunctive relief in a Section 1983 action alleging that state judges subjected Petitioners to unconstitutional and selectively

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[5] Similarly, in his concurring opinion, Chief Justice Burger took pains to "add a few words to emphasize what the Court is and is not deciding today": "The Court holds only that [the AIA] . . . does not apply to a suit brought under [Section] 1983 seeking an injunction of state proceedings . . . it does nothing to 'question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding.'" *Id*. at 243-44.

discriminatory enforcement by the criminal justice system. 414 U.S. 488, 499 (1974). Citing *Mitchum*, the Court held that enjoining the judicial officers in state criminal proceedings would be "a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings [that would be] in sharp conflict with the principles of equitable restraint which this Court has recognized in [previous] decisions. . . ." *Id*. at 502.

The Court reaffirmed these federalism principles – in the context of the AIA – in *Rizzo v. Goode*, 423 U.S. 362 (1976), where it found injunctive relief requested in a Section 1983 action would be improper because it interfered with the manner in which a police department chose to investigate complaints of misconduct: "[e]ven though an action brought under [Section] 1983, as this was, is within those exceptions [to the AIA], the underlying notions of federalism which Congress has recognized in dealing with the relationships between federal and state courts still have weight." *Id*. at 379. In holding that the injunction was improper, the Court again cited *Mitchum*'s instruction that, "[w]here an injunction against a criminal proceeding is sought under [Section] 1983, 'the principles of equity, comity, and federalism" must nonetheless restrain a federal court.'" *Id*. The Court has not since qualified *Mitchum* or this instruction. *See, e.g., City of Los Angeles v. Lyons,* 461 U.S. 95, 112 (1983) ("[*Mitchum*'s] holding did not displace the normal principles of equity, comity and federalism that should inform the judgment of federal courts when asked to oversee state law enforcement authorities.") (omitting citations); *see also Huffman v. Pursue, Ltd*.,

420 U.S. 592, 549 n.1 (1975) (same)[6]; *Gibson v. Berryhill*, 411 U.S. 564, 573 (1973) (same); *Cousins v. Wigoda*, 409 U.S. 1201, 1206 (1972) ("[T]he cases cited in *Mitchum* make clear that the federal courts will not casually enjoin the conduct of pending state court proceedings . . . .").

Thus, "the fact that an injunction may issue under the [AIA] does not mean that it *must* issue"). *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 151 (1988) (emphasis in original). In *Chick Kam Choo*, the Court described the AIA as "a necessary concomitant of the Framers' decision to authorize, and Congress' decision to implement, a dual system of federal and state courts" that represented a "considered judgment as to how to balance the tensions inherent in such a system."

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[6] Petitioners citations to this Court's footnotes in *Huffman* and *Trainor v. Hernandez*, 431 U.S. 434, 444 n. 8 (1977), suggests that those post-*Mitchum* cases stand for the proposition that injunctive relief is always appropriate under Section 1983. Pet. at 20-21. However, *Huffman* and *Trainor* reversed injunctions, issued under Section 1983, against state civil proceedings based on the federalism considerations embodied in the AIA and reaffirmed in *Mitchum* and *Younger*; indeed, *Huffman* again emphasized that *Mitchum* was "in no way questioning or qualifying 'the principles of equity, comity, and federalism' canvassed in *Younger*.'" *See also Trainor*, 431 U.S. at 444 ("[T]he principles of *Younger* and *Huffman* are broad enough to apply to interference by a federal court with an ongoing civil enforcement action such as this, brought by the State in its sovereign capacity."). Petitioners' citation to *City of Los Angeles* is similar unavailing. Pet. at 21. There, the Court reversed injunctive relief, also issued under Section 1983, after observing that "federal courts must recognize '[t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" *City of Los Angeles*, 461 U.S. at 112 (omitting citations).

Id. at 146. Although the injunctive relief requested in *Chick Kam Choo* fell within one of the statutory exceptions to the AIA, as is the case here, the Court did not hold that the injunction *must* issue; rather, the Court advised the district court to decide whether it would be "appropriate" to enter an injunction under the circumstances presented by that case.

In light of the unique factual and legal circumstances of the John Doe Proceedings, it was inappropriate for the district court to issue an injunction. As the Panel noted, Petitioners would not have suffered irreparable injury absent the injunction because they had already "obtained effective relief from Judge Peterson before the federal judge acted – indeed, before filing this suit." Pet. App. 7a. Because it was undisputed that the state court provided Petitioners an adequate remedy at law to preserve their alleged federal rights, the district court's use of Section 1983 to enjoin the John Doe Proceedings cannot be justified. Congress enacted Section 1983 because "state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." *Mitchum,* 407 U.S. at 240. This case does not present circumstances which Section 1983 was designed to remedy because, simply put, the remedy had already been provided before the filing of the federal suit. *See Davidson v. Cannon*, 474 U.S. 344, 359-60 (1986) ("In particular, Congress intended [Section 1983] 'to provide a federal remedy where the state remedy . . . was not available in practice.'") (citing *Monroe v. Pape*, 365 U.S. 167, 174 (1961).

Thus, although Section 1983 allows "federal courts [to] step in where the state courts were unable or unwilling to protect federal rights," *Allen v. McCurry*, 449 U.S. 90, 101 (1980) (citing *Monroe*, 365, U.S. at 176), that was clearly unnecessary here. *See also Fennner v. Boykin*, 271 U.S. 240, 244 (1926) ("The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection . . . . An intolerable condition would arise, if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some federal court.") (omitting citations). Indeed, Petitioners have even gone on the record stating that the Wisconsin state court judges involved in actions related to the John Doe Proceedings are even better suited to address their constitutional concerns than a federal court. In a filing made in the district court in April 2014, the Petitioners attached a letter from their attorneys stating that the "John Doe Judge or the judges in the various state court proceedings . . . are in a far better position to make meaningful decisions balancing the constitutional rights of the targets, witnesses, and public against any legitimate law enforcement objectives of those proceedings." R. 152-1 at 2.

B. There is No Circuit Split Regarding the AIA and *Mitchum.*

Petitioners argue that the Seventh Circuit conflicts with post-*Mitchum* decisions from other courts of appeals that have addressed Section 1983 suits and considerations of "equity, comity and federalism."

However, decisions in every court of appeal reflect *Mitchum*'s rationale that the federalism principles embodied in the AIA must still be appropriately applied by a district court in determining whether injunctive relief is necessary, even in suits brought under Section 1983 or under other statutory exceptions to the AIA. There is no "circuit split" in this regard, as demonstrated by these representative decisions:

First Circuit: *De Cosme v. Sea Containers, Ltd.*, 874 F.2d 66, 68-69 (1st Cir. 1989) (affirming denial of injunctive relief requested under statutory exception of the AIA where, "[i]n addition to the equitable requirements of irreparable injury and inadequate remedy at law that must be met before an injunction issues, the principles of comity and federalism are additional restraints against enjoining a state court proceeding").

Second Circuit: *Giulini v. Blessing*, 654 F.2d 189, 192-93 (2d Cir. 1981) (concluding that the exercise of principles of equity, comity and federalism provided an "acceptable basis" for denial of injunctive relief because state criminal proceedings, in which plaintiffs' constitutional claims were interposed as defenses, were pending at the time when they commenced the federal action); *Bedrosian v. Mintz*, 518 F.2d 396, 399 (2d. Cir. 1975) (holding injunction improper because "[t]he mere fact that [Section] 1983 constitutes an 'expressly authorized' exception to the absolute bar against federal injunctions directed at state proceedings provided by [the AIA] in no way qualifies 'the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding'") (omitting citations); *Anonymous v. Bar*

Association of Erie County, 515 F.2d 435 (2d Cir. 1975) (similar); *Gajon Bar & Grill, Inc. v. Kelley*, 508 F.2d 1317, 1319 (2d Cir. 1974) ("The use of such [injunctive] power [under Section 1983] calls for consideration of the principles of equity, comity and federalism, upon which the [AIA] is based, which require that this power be exercised sparingly, which is to say only where it is 'absolutely necessary' to stave off the threat of 'irreparable . . . great and immediate injury' to the exercise of constitutional rights."); *Citizens for a Better Environment, Inc. v. Nassau Cnty*., 488 F.2d 1353, 1359 (2d Cir. 1973) (similiar").[7]

Third Circuit: *Matter of Davis*, 691 F.2d 176, 178 (3d Cir. 1982) (notwithstanding action was based on a statutory exception to the [AIA], injunctive relief was not "justified" under the federalism principles articulated in *Mitchum* and *Younger*); *Conover v. Montemuro*, 477 F.2d 1073, 1089 n. 33 (3d Cir. 1972) ("[u]nder *Mitchum*, then, federal courts have the power, in [Section] 1983 cases, to enjoin state criminal proceedings . . . [but w]hether that power should be exercised in any particular case depends upon [federalism] considerations").

Fourth Circuit: *Moye v. City of Raleigh*, 503 F.2d 631, 633-34 (4th Cir. 1974) (finding no entitlement to

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[7] Petitioners misconstrue *Nassau* as "rejecting [the] application of AIA." Pet. at 22. Although *Nassau* correctly observed that the AIA is not an absolute bar to injunctions issued under the AIA's statutory exceptions, it does not reject the federalism principles embodied by the AIA, as articulated in *Mitchum*, that must still restrain a district court under appropriate circumstances. Third Circuit cases post-dating *Nassau* that Respondents cite here confirm this approach.

the injunctive relief sought where "the defendant has not shown extraordinary circumstances involving great and immediate threat to federally protected rights which cannot be protected in the defense of the action before the state court" and where the equitable relief "would constitute a 'disruptive interference with the operation of the state criminal process.'") (omitting citations); *Lynch v. Snepp*, 472 F.2d 769, 771 (1973) (reversing grant of injunctive relief after observing "[t]hat the federal court had jurisdiction under [Section] 1983 and was not prevented from exercising it by [the AIA because] . . . [t]he application of [federalism] principles must always be considered by federal judges in the course of determining whether or not to exercise jurisdiction to restrain state courts in a suit brought under [Section] 1983"); *see also Bluefield Community Hosp., Inc. v. Anziulewicz*, 737 F.2d 405 (1984) (similar").[8]

Fifth Circuit: *Deere & Co. v. Johnson*, 67 Fed. Appx. 253, No. 02-60978, 2003 WL 21196191, at * 2 (5th Cir. 2003) (affirming denial of injunctive relief arising under statutory exception to the AIA because it "would not further the interests of federalism or promote the institutional integrity of either the federal or the state courts"); *Regions Bank of Louisiana v. Rivet*, 224 F.3d 483, 495 (5th Cir. 2000) (reversing injunction arising under statutory exception to the AIA based on

[8] Petitioners misconstrue the breadth of the Fourth Circuit's ruling in *Timmerman v. Brown*, 528 F.2d 811 (4th Cir. 1975). Pet. at 22. Although the Fourth Circuit correctly observed that Section 1983 is an authorized exception to the AIA, it went on to "note that the exceptions to federal nonintervention suggested in *Younger* have continued to be recognized." *Id*. at 815.

"principles of comity and federalism" where state court was in the best position to resolve state law issues); *Response of Carolina v. Leasco Response, Inc.*, 498 F.2d 314, 320 n. 16 (1974) (similar); *American Radio Ass'n v. Mobile S.S. Ass'n, Inc.*, 483 F.2d 1 (5th Cir. 1973) (similar); *Duke v. State of Tex.*, 477 F.2d 244, 248 (5th Cir. 1973) (similar).

Sixth Circuit: *Kelley v. State of Ohio*, No. 86-3364, 1987 WL 37428 (6th Cir. May 20, 1987) (affirming denial of injunctive relief arising under Section 1983 after acknowledging "basic doctrine of equity jurisdiction")*; see also Lamb Enterprises, Inc. v. Kiroff*, 549 F.2d 1052, 1062 (6th Cir. 1977) (similar).

Eighth Circuit: *Daewoo Elecs. v. Western Auto Supply Co.*, 975 F.2d 474, 478 (8th Cir. 1992) (noting that "[t]he fact that an injunction may issue under the Anti–Injunction Act does not mean that it must issue" and that "[t]he injunction must be an otherwise proper exercise of the [court's] equitable power") (omitting citations); *Goodrich v. Supreme Court of the State of California*, 511 F.2d 316 (8th Cir. 1975) (similar).

Ninth Circuit: *Merle Norman Cosmetics, Inc. v. Victa*, 936 F.2d 466, 468 (9th Cir. 1991) (denial of injunctive relief requested under statutory exception to the AIA was affirmed due to principles of equity, comity, and federalism and where plaintiff could raise defenses in state court); *Landi v. Phelps*, 740 F.2d 710 (9th Cir. 1984) (similar); *Cadena v. Perasso*, 498 F.2d 383 (9th Cir. 1974) (similar).

Tenth Circuit: *Planned Parenthood of Kansas and Mid-Missouri v. Moser*, 747 F.3d 814, 824 (10th Cir. 2014) ("injunctive relief under 1983 may not be

appropriate . . . [where] equitable principles may limit the right to the injunction"); *Horton v. Clark*, No. 90-5254, 1991 WL 240115 (10th Cir. Nov. 15, 1991) (similar); *First Nat. Bank and Trust Co. of Wyoming v. Lawing*, 731 F.2d 680, 683 (10th Cir. 1984) ("*Younger* and all its progeny reflect the principles of equity, comity, and federalism that a federal judge must consider in determining whether to exercise his discretion by granting the injunction once one of the statutory exceptions [to the AIA] has been met").

Eleventh Circuit: *Pompey v. Broward County*, 95 F.3d 1543 (11th Cir. 1996) (affirming denial of injunctive relief in Section 1983 action under the principles of equity, comity, and federalism).

As these representative decisions reflect,[9] the courts of appeal uniformly agree that the principles of federalism embodied in the AIA must still restrain a federal district court from issuing an injunction – even if that injunction is requested under Section 1983 or any other statutory exception to the AIA – when the unique legal and factual circumstances underlying the federal complaint demand it.[10]

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[9] The Court of Appeals for the District of Columbia does not appear to have directly addressed *Mitchum*'s emphasis on the principles of comity, equity and federalism.

[10] The cases Petitioners cite from the Second, Fourth, Fifth, Sixth, Eighth and Tenth Circuits – not otherwise addressed above – do not reflect a "conflict" with the Seventh Circuit. Rather, each of Petitioners' cited cases stand for the simple proposition that the AIA does not present an absolute bar to injunctive relief requested under Section 1983 after *Mitchum*. In none of Petitioners' cases do the courts reject the federalism principles embodied by the AIA –

C. The Seventh Circuit Ruling is Consistent with the Abstention Principles Articulated in *Younger* and *Pullman*.

The Seventh Circuit clarified that it was not invoking any "mandatory-abstention command[s]" as the basis for its ruling. Pet. App. 8a. However, even if it had, its ruling would be consistent with such abstention commands.

Contrary to Petitioners' arguments, the Panel's ruling falls within the scope of *Younger* abstention as articulated in *Sprint Commc'ns., Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013). *Sprint* concerned the reach of *Younger* abstention with regard to a state *civil* proceeding. *Id*. at 592 ("That proceeding was civil, not criminal in character, and it did not touch on a state court's ability to perform its judicial function."). Here, by contrast, the John Doe Proceedings bear all the hallmarks of the type of judicial state criminal proceedings to which *Younger* abstention applies: the proceedings are brought by the state in its sovereign capacity; they are governed by Wisconsin's criminal statutes; they are petitioned for by a state prosecutor; they are commenced and overseen by a state judge; they involve criminal procedural due process protections; and they require probable cause findings for the issuance of subpoenas, search warrants and

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as articulated in *Mitchum* and *Younger*. Moreover, even if Petitioners' cited cases conflicted with the Seventh Circuit, they would also conflict with the other cases Respondent cites here that were issued by the same courts of appeal. Any such internal conflicts should be resolved by those courts of appeal rather than this Court.

criminal complaints. Accordingly, *Younger* abstention applies to the John Doe Proceedings notwithstanding the fact that – due to the unique statute by which they were authorized (Wis. Stat. § 968.26) – they defy neat categorical definition as to what type of "criminal proceedings" they represent or to which type of state proceedings previously addressed by this Court they are most analogous.[11]

Moreover, *Sprint* does not stand for the proposition, as Petitioners argue, that *Younger* abstention can apply only after charges have been brought and criminal prosecution ensues. For instance, in *Hicks v. Miranda*, the Supreme Court found that a district court committed error when it rejected the claim that *Younger* required dismissal of the case even though "no state criminal proceedings were pending against" the plaintiffs. 422 U.S. 332, 348 (1975).[12] As the Court observed, "[a]bsent a clear showing that [plaintiffs] could not seek the return of their [seized] property in the state proceedings and see to it that their federal claims were presented there, the requirements of

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[11] The Seventh Circuit noted that courts of appeal have taken different positions on whether grand jury proceedings fall within the Younger abstention doctrine. Pet. App. 6a. However, as the John Doe Proceedings are not identical to grand jury proceedings, this case is not the proper vehicle for resolution of whether *Younger* applies to grand jury proceedings. Indeed, Wisconsin's statutes have separate and distinct provisions governing grand jury proceedings. *See, e.g.,* Wis. Stat. § 968.40 ("Grand Jury").

[12] Criminal charges were pending against two other individuals with whom the plaintiffs apparently worked; subsequent to filing their federal complaint, plaintiffs were charged with similar criminal offenses. *Miranda*, 422 U.S. at 348.

Younger v. Harris could not be avoided on the ground that no criminal prosecution was pending against [plaintiffs in the federal lawsuit] on the date the federal complaint was filed." *Id*. at 349. Because the *Sprint* Court concluded that its prior *Younger* abstention rulings fall within the enumerated "exceptional" categories – "[w]e have not applied *Younger* outside these three 'exceptional' categories," 134 S. Ct. at 591 – the "ongoing state criminal prosecutions" category is inclusive of Wisconsin's unique John Doe Proceedings even if charges have yet to be brought, as is the case here, where Petitioners have successfully presented their federal claims.

Pullman abstention, too, was appropriate under the circumstances. There are now three actions being briefed in the Wisconsin Supreme Court that address the campaign-finance issues in this case and that may foreclose the need to address constitutional claims made by Petitioners in federal court. Thus, it was error for the district court to refuse to abstain under *Pullman*, as the Seventh Circuit observed. Pet. App. 8a (citing *Pullman* for proposition that "[s]ometimes district judges must abstain to allow state courts to resolve issues of state law").

II. Respondents Cannot Be Held Personally Liable for Service of One Allegedly "Retaliatory" Subpoena Issued by a John Doe Judge Upon a Finding of Probable Cause.

The only retaliatory action Petitioners allege specific to them was the issuance of a subpoena. They now seek personal damages against Respondents on the basis of that subpoena notwithstanding the fact that (1) none of the Respondents petitioned for the

John Doe Proceedings in the counties in which Petitioners are located; (2) none of the Respondents provided affidavits in support of such petitions; (3) none of the Respondents issued the subpoena served on Petitioners; and (4) none of the Respondents issued the secrecy order to which Petitioners were subject upon service of the subpoena. This subpoena was issued, under Wisconsin law, after the John Doe Judge reviewed investigator affidavits and exhibits and found probable cause. *In re John Doe*, 689 N.W.2d 908, 909 (Wis. 2004) ("Because a John Doe proceeding is a criminal investigative tool . . . we turn to Wis. Stat. § 968.135, entitled 'Subpoena for documents' . . . [which] requires a showing of probable cause . . . .") (omitting citations). Under these circumstances, Petitioners' personal-capacity claims against the Respondents were properly denied by the Panel.

As an initial matter, the right at issue is not a broad right to be free from a "retaliatory investigation" as Petitioners now argue, but the right to be free from a retaliatory subpoena that is otherwise supported by probable cause that secret coordination of issue advocacy had occurred. *Reichle v. Howards* directs that the constitutional right at issue must be framed in this particularized manner when determining whether qualified immunity exists. 132 S. Ct. 2088, 2093-94 (2012) (the right at issue must constitute more than "a broad general proposition"). In *Reichle*, the Court rejected the broad argument – similar to that made by Petitioners here – that "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" and held that a general right to express political opinions without fear of government retaliation is not sufficiently "particularized." *Id.* at

2093-94. Instead, the Supreme Court held that secret service agents, who allegedly arrested plaintiff for his political viewpoints, were entitled to qualified immunity because the specific right at issue was the right "to be free from a retaliatory arrest that is otherwise supported by probable cause," which the Court concluded was not clearly established at the time of the arrest. *Id*. at 2094-97.

Here, similarly, the question is not whether the First Amendment prohibits government officials from subjecting an individual to a retaliatory investigation, but whether it was clearly established that Petitioners had the right to be free from a retaliatory subpoena that is otherwise supported by probable cause of secret coordination of issue advocacy. The answer is "No." Indeed, the right to be free from a "retaliatory" John Doe subpoena could not be considered clearly established when the right to be free from a grand jury subpoena – which does not require a judicial finding of probable cause – is not a clearly established right. *See, e.g., United States v. R. Enterprises, Inc*., 498 U.S. 292, 297 (1991) ("the Government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause because the very purpose of requesting the information is to ascertain whether probable cause exists"); *Branzburg v. Hayes*, 408 U.S. 665, 682, 688 (1972) (concluding that "(c)itizens generally are not constitutionally immune from grand jury subpoenas . . . " and acknowledging that "the longstanding principle that 'the public . . . has a right to every man's evidence' . . . is particularly applicable to grand jury proceedings") (omitting citation).

Petitioners cite no cases postdating *Reichle* as evidence of a "circuit split" that an allegedly "retaliatory" investigative action – such as issuance of a subpoena – constitutes a distinct constitutional violation. Moreover, the only cases Petitioners cite that involve a "retaliatory" issuance of a subpoena do not support Petitioners' argument that Respondents be held personally liable for issuance of that subpoena. First, in *Lacey v. Maricopa County*, the Ninth Circuit held that a special prosecutor was not entitled to qualified immunity because, *inter alia*, he arrested plaintiffs for publishing a grand jury subpoena that he had issued to them even though he knew the subpoena was invalid because a grand jury had never been empaneled. 649 F.3d 1118 (9th Cir. 2011). Here, by contrast, the John Doe Judge issued a valid subpoena on a finding of probable in a proceeding that was not commenced by any of the Respondents.

Second, in *Rehberg v. Paulk*, the Eleventh Circuit held that a prosecutor and special investigator were entitled to qualified immunity for "retaliatory" subpoenas issued as part of a larger "retaliatory investigation":

> But even if we assume *Rehberg* has stated a constitutional violation by alleging that Hodges and Paulk initiated an investigation and issued subpoenas in retaliation for Rehberg's exercise of First Amendment rights, Hodges and Paulk still receive qualified immunity because Rehberg's right to be free from a retaliatory investigation is not clearly established. The Supreme Court has never defined retaliatory investigation, standing alone, as a constitutional

> tort, *Hartman*, 547 U.S. at 262 n. 9 . . . and neither has this Court. Without this sort of precedent, Rehberg cannot show that the retaliatory investigation alleged here violated his First Amendment rights.

611 F.3d 828, 850-51 (11th Cir. 2010). As *Rehburg* makes clear, a retaliatory investigation claim has never been held to be a distinct constitutional violation by this Court, let alone a "retaliatory" subpoena.[13] Nor does precedent from the Seventh Circuit suggest that a "retaliatory" action that is otherwise supported by probable cause violates clearly established First Amendment rights. *See, e.g., Thayer v. Chiczewski*, 705

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[13] Unlike the receipt of a single subpoena issued upon a finding of probable cause, the other cases petitioners cite are either factually distinguishable or affirm the denial of personal-capacity claims. Pet. at 27-28. *Izen v. Catalina*, 382 F.3d 566 (2d Cir. 2004) (plaintiff was subject to multi-year undercover money-laundering investigation leading to a grand-jury indictment); *Pendleton v. St. Louis Cnty*., 178 F.3d 1007, 1010-11 (8th Cir. 1999) (defendants were alleged to have contacted employers of plaintiffs to have them terminated or disciplined in the course of a criminal investigation); *White v. Lee*, 227 F.3d 1214, 1228-1229 (9th Cir. 2000) (HUD officials conducted an eight-month investigation, which exceeded the 100-day statutory time limit, in which plaintiffs were interrogated and in which officials told a major newspaper that plaintiffs had "broken the law"); *Smith v. Plati*, 258 F.3d 1167 (10th Cir. 2001) (granting qualified immunity in action in which retaliation was alleged); *Bennett v. Hendrix*, 423 F.3d 1247, 1249 (11th Cir. 2005) (plaintiffs alleged county sheriff's department, in retaliation of opposing a county referendum, "set up roadblocks near their homes, stopped their cars without reason and issued false traffic citations, accessed government databases to obtain confidential information on the plaintiffs, [and] attempted to obtain a warrant for their arrest on trumped-up environmental charges").

F.3d 237, 253 (7th Cir. 2012) (alleged First Amendment right to be free from retaliatory arrest otherwise supported by probable cause was not clearly established) (citing *Reichle*).

Even assuming that the issuance of a retaliatory subpoena could stand alone as a constitutional tort, Petitioners' claim would still fail based on the very test they suggest would apply in setting forth a valid retaliatory investigation claim. *See, e.g., Bennett*, 423 F.3d at 1250. In particular, Petitioners cannot even establish that they meet the first element of the test: that the speech for which they are being investigated was constitutionally protected. Here, the specific right at issue – as the Seventh Circuit determined – was the right to secretly coordinate issue advocacy. No such right exists, as the Seventh Circuit Panel correctly observed: "until the district court's opinion in this case, neither a state nor a federal court had held that Wisconsin's (or any other state's) regulation of coordinated fund-raising and issue advocacy violates the First Amendment." Pet. App. 9a-10a.

CONCLUSION

For these reasons, Respondents request that this Court deny Petitioners' Petition for Writ of Certiorari.

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