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 OPPOSITIONOF RESPONDENTS JOHN T. CHISHOLM, DAVID ROBLES, AND BRUCE J. LANDGRAF

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QUESTIONS PRESENTED

1. Whether "the principles of equity, comity, and federalism" set forth in *Mitchum* "must restrain a federal court when asked to enjoin a state court proceeding" where the plaintiffs have already obtained adequate relief in a Wisconsin state John Doe criminal proceeding based strictly on an interpretation of state law.

2. Whether government officials, who the plaintiffs generally allege retaliated against them "for exercising their First Amendment rights," are entitled to qualified immunity when the specific right at issue—to coordinate campaign "issue advocacy" absent government regulation—is not established.

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INTRODUCTION

The Petition of Eric O'Keefe and Wisconsin Club for Growth is factually misleading and seeks to present legal issues that are ill-suited for this Court's review. The Petition urges this Court to review a unanimous decision of the Seventh Circuit, but it does so with a contrived factual background and tortuous legal analysis. It suggests that the John Doe state criminal proceedings at issue are merely investigatory, utterly lawless, and entirely manipulated by a rogue Democratic district attorney in retaliation for the Petitioners' conservative speech. The Petition misrepresents the record.

The record demonstrates that the John Doe proceedings (1) were petitioned by multiple prosecutors from both political parties, (2) were commenced by order of a Wisconsin judge who found, based on her review of the evidence and law, "reason to believe that a crime ha[d] been committed," (3) are prosecuted by a judicially-appointed, independent special prosecutor (both a former Assistant United States Attorney and Republican), and (4) are supervised by a Wisconsin judge to whom Petitioners were able to raise, and successfully did raise, their constitutional arguments. There is no factual or legal basis for Petitioners' arguments that the state proceedings are being conducted in retaliation or in bad faith warranting federal intervention and subjecting the prosecutors to personal liability. A unanimous Seventh Circuit opinion, authored by Judge Frank H. Easterbrook and joined by Chief Judge Diane P. Wood and Judge William J. Bauer, concluded the same.

It bears noting that the basis for the John Doe proceedings lies in documents maintained in confidence, subject to the John Doe judge's secrecy order. The Petitioners have repeatedly taken liberties in their submissions to the courts, and with their comments to the media, to exploit the Respondents' inability to respond publicly. For example, Petitioners assert that "the key historical facts regarding these events are not in dispute." To the contrary, Respondents have denied that assertion throughout the case. However, because of the secrecy order, the Respondents are unable to publicly air the evidence supporting them. Consequently, Petitioners' submission, like all previous submissions, provides a media moment rife with untruths, half-truths, and hyperbole, most of which cannot be publicly rebutted by Respondents. When Petitioners suggest that they are victims of the Seventh Circuit's flawed analysis and direct this Court to the district court's analysis, they ignore that the district court, as noted by the Seventh Circuit, failed to perform any meaningful review of the documentary evidence serving as a basis for the state proceedings. Indeed, after ordering the permanent destruction of the evidence as part of a preliminary injunction, the district court stated that the "the evidence reflected in [sealed] docket entries was completely irrelevant." R.243 at 13.[1]

The Seventh Circuit's decision reversing the district court was correct. In refusing to uphold the district court's injunction against ongoing John Doe criminal proceedings (and the various pending appeals arising

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

out of those proceedings), the Seventh Circuit applied the well-established rule provided in *Mitchum v. Foster*, 407 U.S. 225 (1972), that equitable relief under 42 U.S.C. § 1983 is limited by "principles of equity, comity, and federalism." Even if Petitioners' position had merit, the decision below turns largely on the unique facts of this case. Indeed, the Seventh Circuit deferred to the "principles of equity, comity, and federalism" as they apply specifically to Wisconsin's campaign finance law and Wisconsin's John Doe criminal proceedings—a proceeding employed by only two other states.

Finally, Petitioners' contention that Respondents should be stripped of qualified immunity merely because they allege that the John Doe proceedings were commenced in retaliation for their exercise of First Amendment rights is without merit. The Petitioners' so-called First Amendment right is based on their unsupported argument that they have a constitutional right to engage in "issue advocacy" coordinated with a candidate. As the Seventh Circuit recognized, there is no such established right to coordination, "let alone that the First Amendment forbids even an inquiry into that." Citing nearly 40 years of this Court's precedent, the Seventh Circuit made clear that "although the First Amendment protects truly independent expenditures for political speech, the government is entitled to regulate coordination between candidates' campaigns and purportedly independent groups." The Petitioners' belief that the First Amendment should say otherwise does not strip prosecutors of immunity when relying on those 40 years of case law.

STATEMENT OF THE CASE

This case arises out of Petitioner O'Keefe's displeasure that he and his 501(c)(4)[2] organization, Wisconsin Club for Growth ("WCFG"), were served, through their attorneys, with a subpoena as part of state criminal proceedings in Wisconsin. The subpoena was issued to O'Keefe based upon evidence that [redacted]. Because of the potential violations of state campaign finance law, both Republican and Democratic prosecutors throughout the state petitioned for "John Doe" proceedings in their respective counties pursuant to the state criminal statutes. Each of those proceedings is supervised by an appointed Wisconsin judge and is prosecuted by a judicially-appointed special prosecutor, Francis Schmitz, a former Assistant United States Attorney and Republican.

Notably, the subpoena served on O'Keefe informed him that he could provide it to his counsel and challenge its basis before the John Doe judge. O'Keefe did, and did so successfully. While acknowledging that the prosecution's interpretation of Wisconsin's campaign finance law was plausible, the John Doe

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[2] A "501(c)(4)" organization is a "social welfare" group organized under IRC 501(c)(4). A 501(c)(4) organization is granted tax-exempt status and need not disclose its donors, unless the 501(c)(4) organization is primarily for the benefit of a political party. 26 U.S.C. § 501(c)(4).

judge concluded that the state statutes did not regulate groups that do not engage in "express advocacy," and no evidence of express advocacy existed. As a result, the court quashed the subpoena.

Whether Wisconsin's campaign finance law reaches "issue advocacy" groups coordinating with candidates is an issue now pending before the Wisconsin Supreme Court as part of the appellate review of the John Doe judge's order.[3] In the meantime, the John Doe judge has issued a stay order, stating: "[I]f my decision is upheld, the ultimate and inevitable consequence will be to terminate the John Doe investigation." R. 53 Ex. I.

O'Keefe, however, has not been content with allowing Wisconsin's state appellate courts to address its state campaign finance law as part of the John Doe proceedings. Since the John Doe judge quashed the subpoena, and even after the Wisconsin Supreme Court agreed to review the issue, he has embarked on a barrage of public media attacks[4] and federal court litigation.

The current Petition is more of the same. Once again, O'Keefe relies on demonstrably false allegations,

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[3] *See* Order, *Three Unnamed Petitioners v. Peterson*, 2013AP2504-2508-W; *Two Unnamed Petitioners v. Peterson*, 2014AP296-OA; *Schmitz v. Peterson*, 014AP417-421-W (Wis. Dec. 16, 2014), http://media.jrn.com/documents/2013AP2504and2014AP296and2014AP417.pdf.

[4] Matthew DeFour, Eric O'Keefe compares John Doe subpoena targets to rape victims, WIS. STATE J., October 3, 2014, http://host.madison.com/news/local/govt-and-politics/eric-o-keefe-compares-john-doe-subpoena-targets-to-rape/article_1184498c-5e46-5eae-b3c2-033d74d900ca.html#ixzz3Qd9gmRr1.

discredited internet articles, and contrived circuit splits in hopes that this Court will grant certiorari and enjoin the state court proceedings. Perhaps most astonishingly, he misrepresents that the facts of this case, at least as he presents them now, are not in dispute. That is patently false. Not surprisingly, the Petition's factual background bears little resemblance to the background section in the Seventh Circuit's decision ordering the district court to dismiss this case.[5] Compounding that problem, the Petition also grossly misconstrues the legal basis for the Seventh Circuit decision. The unanimous Seventh Circuit's decision to dismiss the case did not split from this Court's precedent or that of any sister court. To be sure, the Seventh Circuit unanimously denied both O'Keefe's petition for reconsideration and for rehearing

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[5] Inconsistent with the federal rules, the Petitioners and their amicus supporters urge that the Seventh Circuit's decision should not have gone beyond the complaint's allegations. They fail to understand that the defendants below moved to dismiss, in part, based on Federal Rule of Civil Procedure 12(b)(1), which would include both dismissal on abstention and the Anti-Injunction Act. Evidence and arguments are not limited to the complaint when dismissal is based on Rule 12(b)(1). *Apex Digital, Inc. v. Sears, Roebuck & Co.,* 572 F.3d 440, 444 (7th Cir. 2009); *Warren v. Fox Family Worldwide, Inc*., 328 F.3d 1136, 1139 (9th Cir. 2003); *Zappia Middle East Constr. Co. Ltd. v. Emirate of Abu Dhabi*, 215 F.3d 247, 253 (2d Cir. 2000); *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1976). Even with respect to motions based on Rule 12(b)(6), the John Doe proceeding record and subpoena—documents which the plaintiffs attached to their complaint—can be considered although they may be outside of the specific allegations. *Henson v. CSC Credit Srvs.,* 29 F.3d 280, 284 (7th Cir. 1994); *Wright v. Associated Companies, Inc.,* 29 F.3d 1244, 1248 (7th Cir. 1994).

en banc despite the same arguments O'Keefe makes now as part of his Petition to this Court.

In order to provide an accurate background to this case—based on the court record rather than internet sources—these Respondents provide the following summary of the case.

I. Approval and Judicial Oversight of the State John Doe Proceedings

The Petitioners' federal case arises from five Wisconsin John Doe proceedings which were to determine whether [redacted]

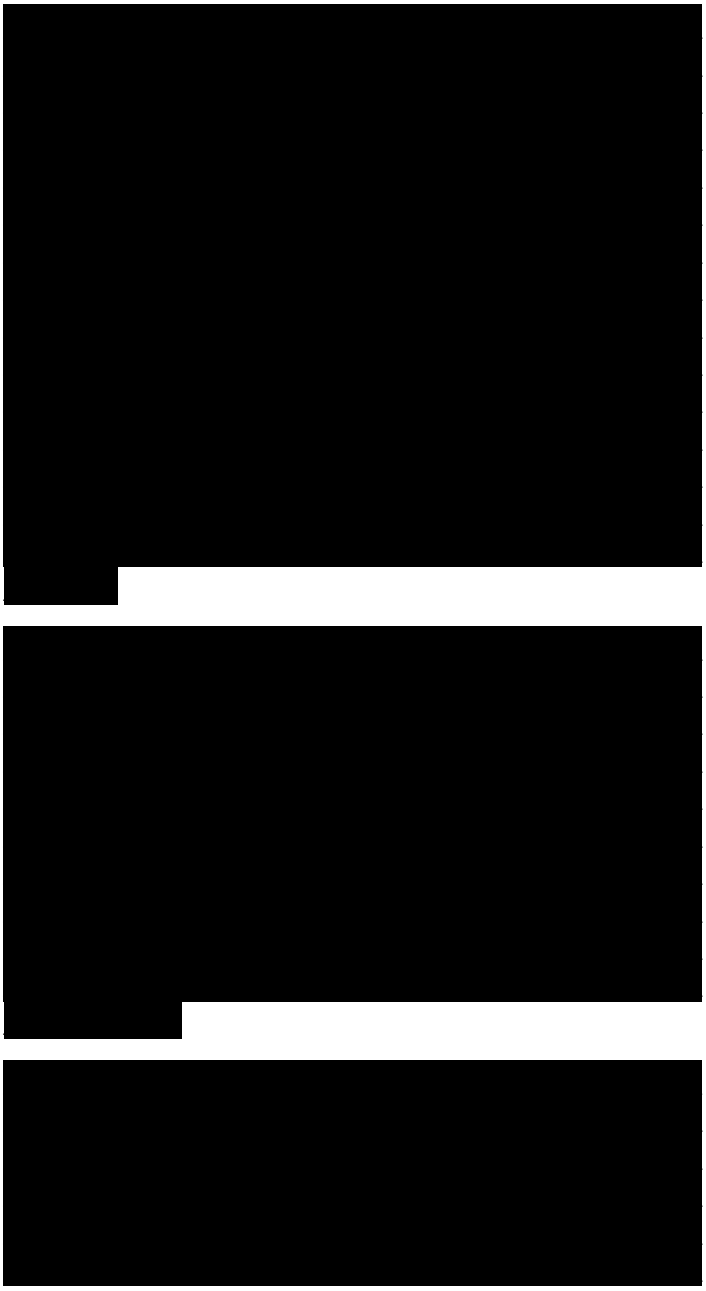
In August 2012, prosecutors from the Office of the Milwaukee County District Attorney consulted the Wisconsin's Government Accountability Board ("GAB") to discuss potential evidence of violations of Wisconsin's campaign finance laws. R.103 ¶ 13. The GAB is the agency charged with overseeing Wisconsin's campaign finance, elections, ethics, and lobby laws. The GAB's board members, employees, and contractors must be non-partisan and remain non-partisan at all times when associated with the GAB. The GAB has jointly investigated potential criminal violations of Wisconsin's campaign finance laws in the past in conjunction with state district attorneys, who rely on the GAB's expertise in the field of campaign finance and election laws. *Id.*

On August 10, 2012, the Milwaukee County District Attorney's Office petitioned the Milwaukee County Circuit Court, pursuant to Wis. Stat. § 968.26, initiating a John Doe proceeding to investigate [redacted] R.53 Ex. J. The petition was reviewed and approved by the Chief Judge for Milwaukee County Circuit Court in August 2012, who then ordered that the petition be assigned to Judge Barbara Kluka. R.53 Ex. P.[6]

The Milwaukee County petition was supported by an investigator's affidavit. The evidence summarized in that affidavit was obtained through search warrants as part of a separate 2010 John Doe proceeding. R.1 Ex. B; R.53 Ex. J, Stelter Aff. ¶ 23. That proceeding led to six convictions, including felonies for embezzlement and other campaign finance violations. *See* R.5 Ex. A at Exs. 13, 14, 16, 21, 22; R.1 ¶¶ 174-179.

The affidavit summarized and attached emails [redacted]

[6] A John Doe proceeding is a state criminal proceeding functionally equivalent to a federal grand jury proceeding, although it is before a judge rather than a jury. Just two other states, Kansas and Michigan, have "John Doe" proceedings similar to Wisconsin's. *See In Re Investigation into Homicide of T.H.*, 932 P.2d 1023 (Kan. Ct. App. 1997); MICH. COMP. L. § 767.3.



Id. ¶¶ 11-12, 19, Exs. 1-3, 9.

Upon reviewing the materials presented to her, John Doe Judge Kluka found "reason to believe that a crime ha[d] been committed in Milwaukee County" and ordered the commencement of the initial John Doe proceeding. R.53 Ex. O. The GAB Board members and select GAB staff were thereafter admitted to the John Doe proceeding to consult and assist in the investigation. R.103 ¶ 13.

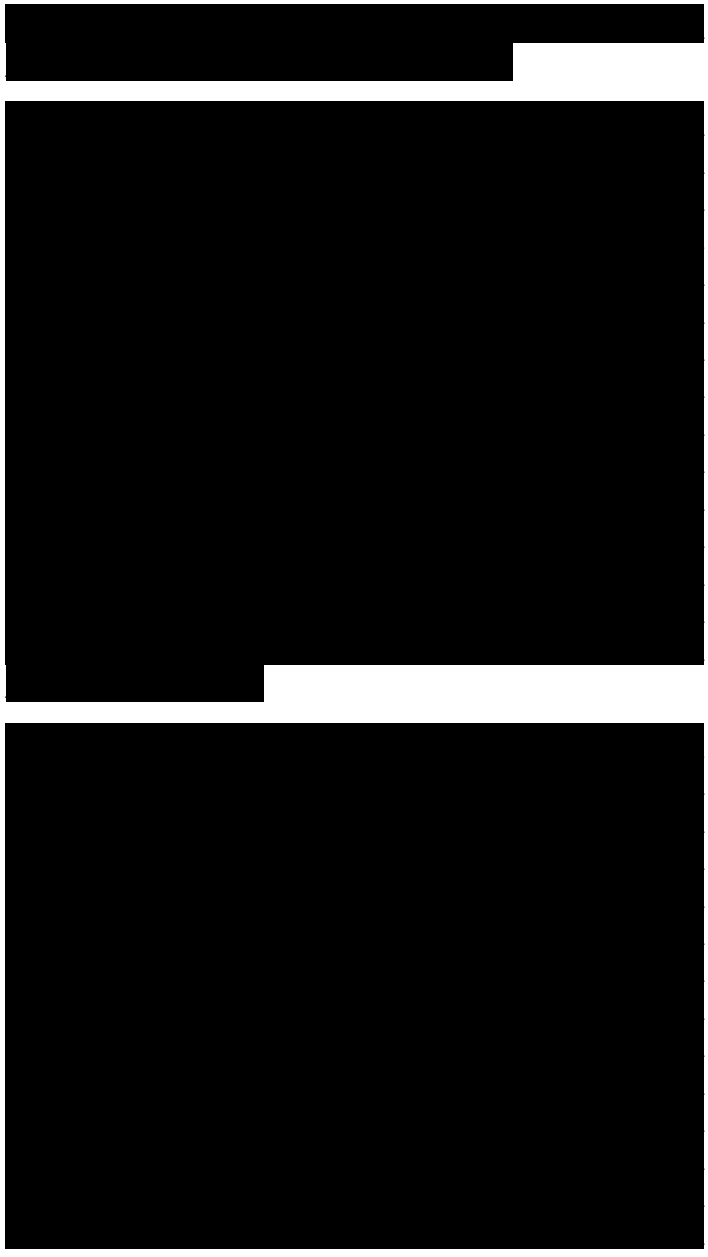
On December 10, 2012, the district attorney requested that Judge Kluka issue search warrants and subpoenas, offering in support an investigator's affidavit summarizing the evidence, including the following "Summary of Probable Cause":

[redacted]

Id. ¶¶ 21-22. Those conclusions were supported by evidence, including the following:

[redacted]

[redacted]



[redacted][7]

[redacted]

The affidavit supporting probable cause summarized the prosecutors' assessment of the evidence at that time:

[redacted]

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[7] [redacted] R.110 Ex. E. at 13. The web of groups and individuals, and their relationship to the campaign, is difficult to sort out, aptly demonstrated by a schematic published by the Milwaukee Journal Sentinel. App. 1a.

[redacted]

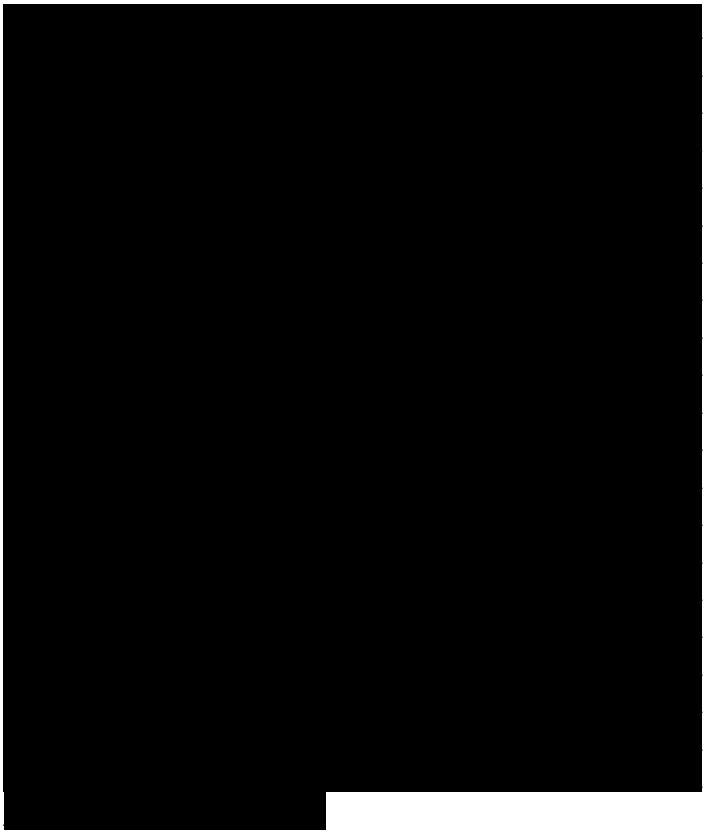
Id. ¶ 76.

A. Additional John Doe proceedings commenced

Recognizing the breadth of evidence collected, Milwaukee County District Attorney Chisholm requested in January 2013 that the State Attorney General take charge of the proceeding. R.5 Ex. A at Ex. 32 ¶ 5. [redacted] *See* R.53 Ex. J, Stelter Aff. ¶ 5. Five months later, the Attorney General declined to lead the John Doe proceeding due to a conflict of interest. R.5 Ex. A at Ex. 29. The Attorney General recommended that District Attorney Chisholm work with the non-partisan GAB to further the John Doe proceedings. *Id.* at 2-3.

Respondent Chisholm did so. *See* R.5 Ex. A at Ex. 32 ¶¶ 5-6. Although the GAB had been consulted since the initial petition in August 2012, R.104 ¶ 13 [redacted]

[redacted]



R.110 Ex. A at 2. [redacted]

Having resolved to continue the investigation, the GAB took the necessary measures to do so. Pursuant to statute, all criminal prosecutions based on campaign finance violations must be "conducted by the district attorney for the county where the defendant resides." Wis. Stat. § 11.61(2). As a result, in June 2013, the GAB met with four additional district attorneys of counties where the suspected criminal violations of Chapter 11 occurred and where relevant persons resided. R.110 Ex. G. In total, five district attorneys, including two Republican district attorneys, met with the GAB to review the evidence and discuss potential violations of the state's campaign finance laws. *Id.*; *see* R.109 at 16-17.

Based on their independent assessment of the evidence, the district attorneys petitioned for additional John Doe proceedings in Columbia, Dane, Dodge, and Iowa Counties. Petitioner O'Keefe is a resident of Iowa County. R.53 Exs. B-E. Each of those petitions was supported by an affidavit executed by the respective county's district attorney incorporating the evidence described above. *Id.* Judge Kluka reviewed those petitions and affidavits and, between July and August 2013, ordered that John Doe proceedings commence in Columbia, Dane, Dodge and Iowa Counties. R.53 Exs. K-O, Q.

B. A non-partisan Special Prosecutor appointed to lead the five John Doe proceedings

In August 2013, the five district attorneys sent a joint letter to Judge Kluka requesting that she appoint Co-Respondent Francis Schmitz, who had served for nearly thirty years as a federal prosecutor, as special prosecutor of the five John Doe proceedings. R.53 Ex. R; R.117. Schmitz had been working with the GAB in its investigation and was asked by the GAB to lead the John Doe proceedings. R.117. The joint letter explained that a special prosecutor was necessary to avoid the appearance of partisanship:

> Moreover, and just as the Attorney General himself recognized, the partisan political affiliations of the undersigned elected District Attorneys will lead to public allegations of impropriety. *Democratic prosecutors will be painted as conducting a partisan witch hunt and Republican prosecutors will be accused of "pulling punches."* An independent Special Prosecutor having no partisan affiliation addresses the legitimate concerns about the appearance of impropriety.

R.53 Ex. R. (emphasis added).

On August 23, 2013, Judge Kluka appointed Francis Schmitz as special prosecutor in each of the five John Doe proceedings. R.53 Ex. S. The appointment authorized Schmitz "to determine if criminal charges are appropriate, and if he so determines, he is authorized to issue charges and proceed through to disposition with any such charges." *Id.* Since the date

of his appointment, Schmitz has carried out those duties, making final decisions on what actions to take and the content of pleadings and other filings in the proceedings. R.117 ¶ 20. Schmitz averred in an affidavit that he is not currently a member of any political party but that he was a member of the Republican Party when he was a nominee for appointment as a United States Attorney by President George W. Bush. R.117 ¶ 11. Schmitz also averred that he voted for Governor Walker in the 2012 recall elections. R.117 ¶ 12.

C. The John Doe judge quashes subpoenas and search warrants and stays the proceedings while state appellate courts address the constitutional issues

In September 2013, Judge Kluka issued several search warrants and subpoenas. Investigator and Co-Respondent Dean Nickel executed an affidavit in support of issuance of those warrants, incorporating prior affidavits and attaching evidentiary support. Nickel summarized the additional exhibits as follows:

R.117 Ex. D ¶ 13. The exhibits supporting the September 2013 affidavit include the following:

Id. ¶ 27 n.32, Exs. 7.2, 7.3.

Each subpoena executed by Judge Kluka informed the recipients that they could show the subpoena to an attorney and challenge the subpoena in front of the John Doe judge. R.1 Ex. F at 2.

The Petitioners and others receiving the subpoenas challenged the subpoenas. Their motions to quash were heard by John Doe Judge Gregory Peterson after Judge Kluka recused herself. *See* Pet. App. 68a-73a. On January 10, 2014, Judge Peterson granted the motions on grounds that the state statutes regulating coordinated campaigning pertain only to "express advocacy." *Id.* However, his ruling conflicted with the only Wisconsin case to address the issue. *Wis. Coal. for Voter Participation, Inc. v. State Elections Bd.*, 605 N.W.2d 654, 659 (Wis. Ct. App. 1999) ("[C]ontributions to a candidate's campaign must be reported *whether or not* they constitute express advocacy."). Nonetheless, Judge Peterson believed that this Court's recent campaign finance law decisions may have undermined the reasoning of that 1999 decision. Concluding that

prosecutors lacked evidence of coordinated express advocacy, Judge Peterson ruled that the conduct being investigated was beyond the reach of the state's campaign finance law.

Notably, Judge Peterson did not order immediate return of property obtained as part of the John Doe proceedings, recognizing that the State's theory of campaign finance violation was "not frivolous" and would be reviewed. He wrote: "In fact, it is an arguable interpretation of the statutes. I simply happen to disagree. An appellate court may indeed agree with the State." R.5 Ex. A at Ex. 49.

Schmitz then petitioned the Wisconsin Court of Appeals for a supervisory writ to enforce the subpoenas. Others involved in the investigation asked the Wisconsin Supreme Court for review, bypassing the court of appeals. Recently, the Wisconsin Supreme Court granted the petition, and the case is now in briefing. *Supra*, n.2.

II. Procedural Posture of Petitioners' Federal Claims

A. The Petitioners' allegations and claims

On February 10, 2014, the Petitioners filed a federal complaint and moved the district court for a preliminary injunction. R.1; R.5-1. The Petitioners' complaint and motion alleged that the John Doe proceedings were commenced by the Respondents in retaliation for the Petitioners' conservative political speech and, specifically, their "issue advocacy" speech. *See* R.158 at 1-2. The Petitioners claimed that both Wisconsin law and the First Amendment protect their issue advocacy speech, even if coordinated with a

candidate, because they do not engage in express advocacy. R.1 ¶¶ 95, 99-101, 103; R.5-1 at 3-6. The Petitioners alleged that the subpoenas served on them—which Judge Peterson had quashed—resulted in millions of dollars in lost political donations and "chilled" their political speech. *See* R.5-1 at 27-28.

Though extensive, the Petitioners' claims, both in equity and at law, can be reduced to the following argument: Addressing bad faith prosecution in the context of the *Younger* doctrine, the Petitioners asserted that the John Doe proceedings were commenced and conducted "with no hope of a valid conviction." R.5-1 at 32 *(*quoting *Wilson v. Thompson*, 593 F.2d 1375, 1387 n.22 (5th Cir. 1979)). They believed that the Respondents were acting in bad faith "to exact retribution for and to silence conservative advocacy" because, according to Petitioners, the Defendants had "zero likelihood of obtaining a valid conviction based on their absurd legal theory." R.5-1 at 2.

The Petitioners also alleged (falsely) that Chisholm rejected the GAB's involvement in order to further his alleged political agenda. *See id.* at 18, 24-25. Furthermore, the Petitioners alleged that Schmitz's appointment as special prosecutor was to disguise Chisholm's political motives. *Id.* at 20-21.

B. The Seventh Circuit unanimously reverses the district court's injunction and refusal to dismiss the case

On May 6, 2014, following the district court's refusal to dismiss the case or any claims on various abstention and immunity doctrines, it granted the

Petitioners' motion for a preliminary injunction without an evidentiary hearing or argument. Pet. App. 64a-65a. The district court agreed with the Petitioners' argument and concluded that any campaign finance law regulating political "issue advocacy" violates the First Amendment, even if the issue advocacy is coordinated with a candidate. *Id.* 59a-61a, 64a. The district court then held that the Respondents acted in bad faith because the John Doe proceedings were "commenced and conducted 'without a reasonable expectation of obtaining a valid conviction.'" *Id.* 62a. The district court further ordered the Respondents "to cease all activities related to the [John Doe] investigation," threatened to hold the Wisconsin John Doe judge in contempt if he continued the state proceeding, and, shockingly, ordered Respondents to "permanently destroy all copies of information and other materials obtained through the investigation." *Id.* 64a-65a.

The Seventh Circuit unanimously reversed the district court. It first issued an emergency order immediately staying the district court's order requiring the permanent destruction of evidence as a "preliminary" remedy before any appellate review of the case had even occurred. Pet. App. 5a. And after an expedited briefing schedule and argument, it unanimously reversed the district court's injunction in its entirety, reversed the district court's order rejecting the immunity defense, and instructed the district court "to dismiss the suit, leaving all further proceedings to the courts of Wisconsin." Pet. App. 16a.

The Seventh Circuit's reasoning is discussed more fully below in these Respondents' Reasons for Denying

the Petition. The reasoning of the Seventh Circuit is quite simple, and its decision did not depart from or contradict the decisions of this Court or other sister courts. The Seventh Circuit found no basis for a federal court intervening in the ongoing state court matters, especially when Petitioners did not dispute—and even alleged—that they were able to, and successfully did, assert their defenses in the state proceedings when moving to quash the subpoenas served upon them. Pet. App. 6a-10a. With respect to qualified immunity and Petitioners' claims for damages,[8] the Seventh Circuit disagreed that there was any "clearly established right" to coordinated issue advocacy. *Id.* 10a-13a. In fact, the Seventh Circuit noted that there was absolutely no support in the case law for the district court's decision in that regard. Similarly, the Seventh Circuit rejected the Petitioners' attempt to recast their argument (and their own allegations) as an entirely subjective inquiry into whether the Respondents retaliated against them for "exercising their First-Amendment rights." The Seventh Circuit found that the Petitioners' argument based on such right was entirely too general to preclude applying immunity, and, moreover, the argument was merely a restatement of their erroneous argument that coordinated issue advocacy is clearly-protected speech. *Id.* 12a.

Making the same arguments as they do now, the Petitioners later petitioned for Rehearing, with Suggestion for Rehearing *En Banc.* The Seventh

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[8] The prosecutors also appealed the district court's denial of absolute prosecutorial immunity. The Seventh Circuit did not address those arguments, stating that it was sufficient to grant immunity based on qualified immunity.

Circuit unanimously denied both requests. Pet. App. 66a-67a.

REASONS FOR DENYING THE PETITION

I. It Is Well-Settled that Equitable Relief Available Under 42 U.S.C. § 1983 Is Expressly Limited By "Principles Of Equity, Comity, And Federalism" Under *Mitchum v. Foster*.

The Petitioners accuse the Seventh Circuit of circumventing the strictures placed on *Younger* abstention by *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584 (2013), and of rebuffing the rule that Section 1983 actions are an "expressly authorized" exception to the to the Anti-Injunction Act, 29 U.S.C. § 2283 ("AIA"), under *Mitchum v. Foster*, 407 U.S. 225 (1972). Pet. at 19. Both accusations are founded on a perverse reading of the opinion below. To be clear, the Seventh Circuit did not abstain under *Younger/Sprint Communications*. Pet. App. 7a-8a. Rather, it concluded that the Petitioners' request for relief contravened normal principles of equity, thereby violating a precondition to stating a valid claim under *Mitchum* and obviating any need to consider *Younger* abstention as a prudential measure. *Id.* As such, the Petitioners' concern for *Younger/Sprint Communications*, the archetypal straw man, is misplaced.

And while *Mitchum* did hold that a Section 1983 action constitutes an expressly authorized exception to the AIA, the Court specifically stated that it did "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." 407 U.S. at 243. This admonition, upon which the

Seventh Circuit rested its opinion here, is uncontroversial and relates the basic concept that requests for equitable relief under *Mitchum* are proper only if they respect these general principles. *See also id.* at 229 ("[We] hold that any injunction against state court proceedings *otherwise proper under general equitable principles* must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld. . . ." (quoting *Atlantic C. L. R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 287 (1970) (emphasis added)). The Seventh Circuit concluded that Petitioners' request to enjoin Wisconsin John Doe proceedings was improper under *Mitchum*, reasoning that Petitioners had already obtained adequate relief in Wisconsin courts based strictly on an interpretation of Wisconsin law and had failed to state a valid bad faith claim.

The Petitioners ignore the straightforward holding of the Seventh Circuit. Contrary to the Petition, the Seventh Circuit's opinion does not affect, let alone undermine, *Sprint Communications* or expand the reaches of *Younger* abstention. Nor does it depart from the settled rule that the AIA excepts Section 1983 actions from its prohibitions. Rather, the Seventh Circuit tethered its opinion to the ordinary "principles of equity, comity, and federalism" that, under the peculiar facts and posture of this lawsuit, preclude a federal role in a decidedly state matter.

A. The Seventh Circuit applied the plain language of *Mitchum*.

In reviewing the district court's order, the Seventh Circuit heeded *Mitchum*'s instruction that claimants do not escape scrutiny under the AIA by simply

identifying their cause of action as one arising under Section 1983:

> *Mitchum* held that a judge may use §1983 to support an anti-suit injunction, notwithstanding §2283, only when justified in light of "the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." 407 U.S. at 243. Yet the district court gave those principles no weight.

Pet. App. 8a-9a.

The Seventh Circuit's opinion is in lockstep with this Court's jurisprudence. The Court has over the years reaffirmed that, while Section 1983 actions "are exempt from the flat ban against the issuance of injunctions directed at state-court proceedings [under the AIA]," *Mitchum* "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." *L.A. v. Lyons*, 461 U.S. 95, 112 (1983); *see also Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 526 (1986); *Pulliam v. Allen*, 466 U.S. 522, 539 n.20 (1984); *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974). The clear import from this line of cases is that simply identifying a Section 1983 claim as such does not relieve a court of its duty to determine whether relief against state officials is equitably proper. The Petitioners, without serious appraisal, ask the Court to overturn this imperative in the face of a long and seamless line of this Court's cases.

Additionally, the Seventh Circuit's opinion echoes the Court's refusal "to slight the preconditions for equitable relief." *Lyons*, 461 U.S. at 112. The Court recognizes that "the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the States' criminal laws in the absence of irreparable injury which is both great and immediate." *Id.* at 112. This need goes beyond the prudential doctrines of abstention harped on by Petitioners; it bears on whether "an adequate basis for equitable relief" has been stated in the first instance. *O'Shea*, 414 U.S. at 499 (concluding that the *Mitchum* edict altogether "preclude[d] equitable intervention in the circumstances present here"). The Petitioners do not explain why the Court should want to audit the adequacy of their claims, a fact-intensive inquiry in even a garden-variety civil rights case.

A number of federal circuits have, like the Seventh Circuit, referred to *Mitchum*'s language in acknowledging the Court's concern for equity, comity, and federalism. *See*, *e.g.*, *Wyly v. Weiss*, 697 F.3d 131, 139-40 (2d Cir. 2012); *Video Gaming Techs., Inc. v. Bureau of Gambling Control*, 356 Fed. Appx. 89, 92-93 (9th Cir. 2009); *NAACP v. Brackett*, 130 Fed. Appx. 648, 652 (4th Cir. 2005); *Zurich Am. Ins. Co. v. Superior Court for Cal.*, 326 F.3d 816, 824-25 (7th Cir. 2002); *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999); *Kerr-McGee Chemical Corp. v. Hartigan*, 816 F.2d 1177 (7th Cir. 1987); *Lamb Enterprises, Inc. v. Kiroff*, 549 F.2d 1052 (6th Cir. 1977); *American Radio Ass'n v. Mobile S.S. Ass'n*, 483 F.2d 1, 6-7 (5th Cir. 1973). No federal circuit has

disavowed *Mitchum*'s language in a manner that would support the Petitioners' position.

The Seventh Circuit concluded that the Petitioners had not stated an appropriate claim for equitable relief under *Mitchum*. Pet. App. 6a-7a. Stated differently, Petitioners' request to enjoin the Respondents, as well as Judge Peterson, exceeded the permissible bounds of equity, comity, and federalism contemplated by *Mitchum*. The reasons, derived from the facts specific to this case, were fourfold:

(1) *Irreparable harm*. The Seventh Circuit found that, because the Petitioners obtained effective relief prior to filing the lawsuit, they could not claim that they suffered irreparable harm. Pet. App. 6a-7a. Specifically, the Petitioners obtained orders from Judge Peterson quashing the subpoenas and halting the John Doe proceedings in January 2014. Those orders are subject to ongoing appellate review in Wisconsin.

(2) *Adequacy of remedies at law*. The Seventh Circuit found that Judge Peterson's consideration, and indeed grant, of the Petitioners' motion to quash the subpoenas evidenced that Wisconsin law afforded them adequate remedies. Pet. App. 7a.

(3) *Policy against unnecessary constitutional adjudication*. Because Judge Peterson halted the John Doe proceedings based on his interpretation of Wisconsin law, the Seventh Circuit decried the need for any constitutional adjudication in this case. Pet.

App. 7a-8a. By bringing the present lawsuit after Judge Peterson's decision, the Petitioners were, in essence, asking the federal court to render an advisory opinion about the constitutionality of an interpretation of Wisconsin law that was (and is) under active review by Wisconsin courts.

(4) *Policy against interference with state criminal proceedings*. Citing *Younger* and *Sprint Communications*, the Seventh Circuit restated the jurisprudential policy against federal intrusion into state proceedings that are criminal in nature. Pet. App. 8a.

The Seventh Circuit opinion further concluded that Petitioners' allegations of bad faith were insufficient to rebut *Mitchum*'s concern for equity, comity, and federalism. Pet. App. 8a-12a. The Petitioners' theory of bad faith—that the Respondents should have known that the First Amendment embodied protections against government regulation of coordinated issue advocacy—was plainly invalid. Not only has no court of any jurisdiction agreed with Petitioners that the First Amendment restricts regulation of coordinated issue advocacy, but both this Court (starting with *Buckley v. Valeo*, 424 U.S. 1 (1976)) and Wisconsin courts (starting with *Wisconsin Coalition for Voter Participation, Inc. v. State Elections Board*, 231 Wis. 2d 670 (App. 1999)) have signaled direct support for the Respondents' position that it does not.

These conclusions by the Seventh Circuit, which rejected the underlying adequacy of Petitioners' request for relief based on "normal principles of equity," Pet.

App. 8a, dispelled any need to consider *Younger* abstention. While *Younger*'s principles certainly informed the Seventh Circuit's inquiry (as *Mitchum* itself suggests, 407 U.S. at 243), the Petitioners' failure to meet the preconditions for equitable relief obviated the need to consider prudential defenses such as abstention. As such, certiorari on this issue would neither address a principle of particular importance nor reconcile a conflict among the lower federal tribunals.

B. The Petitioners manufacture a circuit split concerning an issue that is not in dispute.

In an effort to enhance the appeal of their Petition, the Petitioners argue that the opinion below creates a circuit split between the Seventh Circuit and every other federal circuit to have addressed *Mitchum*. The Petitioners misconstrue the Seventh Circuit's holding and, by doing so, manufacture an illusory divide among the circuit courts. No court—including the Seventh Circuit in its opinion—questions *Mitchum*'s holding that Section 1983 claims are an "expressly authorized" exception to the AIA. The Petitioners' citation to numerous cases across the several circuits does no more than underscore what is not in dispute.

It appears that the Petitioners wish for this Court to read into these cases something that is not there. Merely because Section 1983 claims are an "expressly authorized" exception to the AIA does not mean that injunctive relief is necessarily available. The Court has rejected this reasoning in the past:

> Title 28 U.S.C. § 2283, the anti-injunction statute, prohibits federal courts from enjoining

> state court proceedings, but the statute excepts from its prohibition injunctions which are "expressly authorized" by another Act of Congress. Last Term, after the District Court's decision here, this Court determined that actions brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983, were within the "expressly authorized" exception to the ban on federal injunctions. *Mitchum v. Foster*, 407 U.S. 225 (1972).
>
> Our decision in *Mitchum*, however, *held only that a district court was not absolutely barred by statute from enjoining a state court proceeding when called upon to do so in a § 1983 suit*. As we expressly stated in *Mitchum*, nothing in that decision purported to call into question the established principles of equity, comity, and federalism which must, under appropriate circumstances, restrain a federal court from issuing such injunctions. *Id.*, at 243.

Gibson v. Berryhill, 411 U.S. 564, 572-73 (1973) (emphasis added, footnotes omitted). This point, as noted in the previous subsection, is not disputed among the federal circuits.

C. The peculiar facts and posture of this case make it unfit for certiorari.

Even had the Petition implicated a genuine circuit split, the facts and procedural posture of this lawsuit do not form a suitable foundation upon which the Court should resolve important constitutional questions. The reasons are several:

1. The Petitioners seek to enjoin a criminal investigative proceeding that is unique to Wisconsin. The prosecutors and John Doe judge, sworn to silence under a secrecy order, use various tools to investigate potential criminal activity in furtherance of a probable cause determination. Witnesses have the right to have counsel present, bring motions before the John Doe judge, and directly petition the state's courts of appeals concerning adverse rulings. Any merits ruling by this Court, if it was to grant certiorari, would have to account for these unique characteristics. They are essential to determining whether the Petitioners suffered irreparable harm and had adequate remedies to vindicate their rights in state court. The uniqueness of Wisconsin John Doe proceedings is significant to the weight the Court should accord the jurisprudential policy against federal interference with state criminal matters.

2. The Wisconsin Supreme Court has granted review of Judge Peterson's orders, including his interpretation of Wisconsin campaign finance law, thereby raising the prospect that this lawsuit could become moot before the Court has addressed its merits.

3. The Petition does not, and could not, present the fundamental issue that underlies the Petitioners' legal crusade: Does the First Amendment unconditionally protect the Petitioners' ability to coordinate campaign finance activities regarding issue advocacy with political candidates and their campaign

committees? While this question drove the Petitioners' bad faith claims since the beginning, this lawsuit was a feeble vehicle for arriving at an answer. Indeed, the Petitioners and their counsel have since brought declaratory judgment actions to address the question squarely. *See O'Keefe v. Wis. Gov't Accountability Bd.*, Waukesha Co. Cir. Ct. Case No. 14-CV-1139 (filed May 30, 2014) (same Petitioners); *Citizens for Responsible Gov't Advocates v. Barland*, Case No. 14-C-1222 (E.D. Wis. filed October 2, 2014) (same counsel). Given the Court's preference against piecemeal consideration of important legal issues, any review by the Court is best reserved for a case that directly addresses this question.

4. Although the Seventh Circuit did not invoke abstention, it likely applies to this case. The Respondents argued on appeal that abstention under both *Younger* and *Pullman* was appropriate. If the Court concludes that certiorari is appropriate, the Respondents would renew their arguments that these abstention doctrines, parts of which were addressed just two terms ago in *Sprint Communications*, apply as alternative bases for affirmance.

For all these reasons, the Respondents respectfully ask that the Court deny writ on this issue.

II. It Is Beyond Debate That There Is No Clearly-Established First Amendment Right To Engage In Coordinated Issue Advocacy.

The Petitioners ask the Court to ignore the stated basis for their retaliation claim, *i.e.*, that the John Doe proceedings were prosecuted in bad faith to infringe upon the Petitioners' First Amendment right to engage in coordinated issue advocacy. That basis was identified by the Seventh Circuit and found not to implicate a clearly-established right so as to avoid application of the qualified immunity doctrine. Without any justification or precedent, the Petitioners urge certiorari in the hopes that the Court will overlook their stated theory of liability and address whether a general, abstract right against government retaliation may sidestep the Respondents' entitlement to qualified immunity against damages. Respectfully, the Court should decline to do so.

A. The Seventh Circuit correctly identified and analyzed the right at issue.

Qualified immunity protects government officials against claims for damages if the claimant is unable to show that the specific constitutional right upon which the claims are based was not "clearly established at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2013) (citation and quotation marks omitted). The Seventh Circuit found that Petitioners' claims were premised on the supposed First Amendment right to engage in coordinated issue advocacy. It rejected the manner in which the district court and Petitioners framed the right at issue—the right to be free from government retaliation—because

it was not specifically tailored to the dispute. Pet. App. 12a.

The Seventh Circuit followed established law in defining the right at issue with specificity and in relation to the particular allegations of the case. This Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality . . . since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014) (citing *Ashcroft*, 131 S. Ct. at 2084). Similarly, the Court has stated that the proposed right "must be defined at the appropriate level of specificity," *Wilson v. Layne*, 526 U.S. 603, 615 (1999) (citing *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)), and "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (quoting *Anderson*, 483 U.S. at 640).

Just four terms ago, the Court issued a unanimous opinion in which it emphasized the importance of this specificity requirement in the context of First Amendment retaliation claims. *Reichle v. Howards*, 132 S. Ct. 2088, 2093-94 (2012). In *Reichle*, the respondent alleged that his arrest by petitioners, although supported by probable cause, was in retaliation for his political speech. The Court rejected the respondent's attempt to satisfy the "clearly established" standard by simply stating that "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for his speech." *Id.* at 2094 (internal quotation marks omitted). The right at issue, the Court

explained, must be established in a particularized sense: "the right here is not the general to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause." *Id.* Because this right was not clearly established, the petitioners were entitled to qualified immunity.

Like this Court did in *Reichle*, the Seventh Circuit reviewed the Petitioners' First Amendment retaliation claim and found that it related specifically to Respondents' investigative activities into Petitioners' coordination with political candidates and their campaign committees to finance issue advocacy. It rejected the Petitioners' attempt to define the right as the general right to be free from retaliation for "speech." The supposed right to engage in coordinated issue advocacy, the Seventh Circuit explained, has not been clearly-established in the case law, a point that the Petitioners do not dispute in their Petition. As such, the Seventh Circuit concluded that the Respondents could not be held liable "for choosing sides on a debatable issue" and, thus, were entitled to qualified immunity. Pet. App. 10a-11a (citing *Wilson v. Layne*, 526 U.S. 603, 618 (1999); *Ashcroft*, 131 S. Ct. at 2083 ("[E]xisting precedent must have placed the statutory or constitutional question beyond debate.")).

B. Even if the Seventh Circuit incorrectly identified the right at issue, mere error correction is an insufficient reason to grant certiorari.

Supreme Court Rule 10 states that a petition to this Court "is rarely granted when the asserted error consists of erroneous factual findings or the

misapplication of a properly stated rule of law." *See also* STEPHEN M. SHAPIRO, ET AL., SUPREME COURT PRACTICE §5.12(c)(3) (10th ed. 2013) ("[E]rror correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari."). There is no question that the Seventh Circuit recognized its duty to tailor the implicated right to the dispute at hand. Pet. App. 12a-13a. Therefore, at best, the Petitioners request certiorari for a misapplication of a properly stated rule of law. This provides an insufficient basis for granting the Petition.

C. Even if the Seventh Circuit incorrectly identified the right at issue, the Petitioners ignore the fact that the investigative activity at issue was the issuance of a subpoena supported by probable cause.

The Seventh Circuit correctly identified the supposed right that the Petitioners claimed was violated by the Respondents. Nonetheless, even if the Court concludes that the Seventh Circuit incorrectly identified that right, the general right raised by the Petitioners ignores key portions of their allegations and the public record. Specifically, the Petitioners complain about the issuance of a subpoena for their records. The John Doe judge issued the subpoena upon a finding of probable cause. *See* R.1 Ex. F at 1-2; *Custodian of Records for the Legislative Tech. Serv. Bureau v. State*, 689 N.W.2d 908, 909 (Wis. 2004). Furthermore, the John Doe proceeding itself was commenced upon a finding by the John Doe judge that there was an *objectively* reasonable belief that a crime had been

committed. *State ex rel. Reimann v. Circuit Court,* 571 N.W.2d 385, 389 (Wis. 1997).

These facts are fatal to the Petitioners' retaliation claim. The right at issue should not be whether there is a clearly-established general right against government officials allegedly retaliating against citizens for speech. It should be whether there is a clearly-established right against government officials issuing an allegedly retaliatory subpoena supported by probable cause, within a judicially-supervised Wisconsin John Doe proceeding.

For obvious reasons, there is no case which clearly establishes this right, and there is no circuit split upon which to justify certiorari. The Petitioners can only conjure a circuit split by avoiding the specific facts of the John Doe proceedings, and the cases to which they cite all pre-date *Reichle*. If *Reichle* lends insight into how the Court might address the Petitioners' proposed right at issue, then the Petitioners must frame the right with more specificity. *Reichle* instructs that probable cause is paramount in defining the contours of the right. Consequently, the Petitioners' arguments regarding qualified immunity were sufficiently addressed just four terms ago in *Reichle*. Certiorari is unnecessary to give guidance to the lower federal courts, particularly given the unique circumstances of this lawsuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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APPENDIX

APPENDIX

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APPENDIX A

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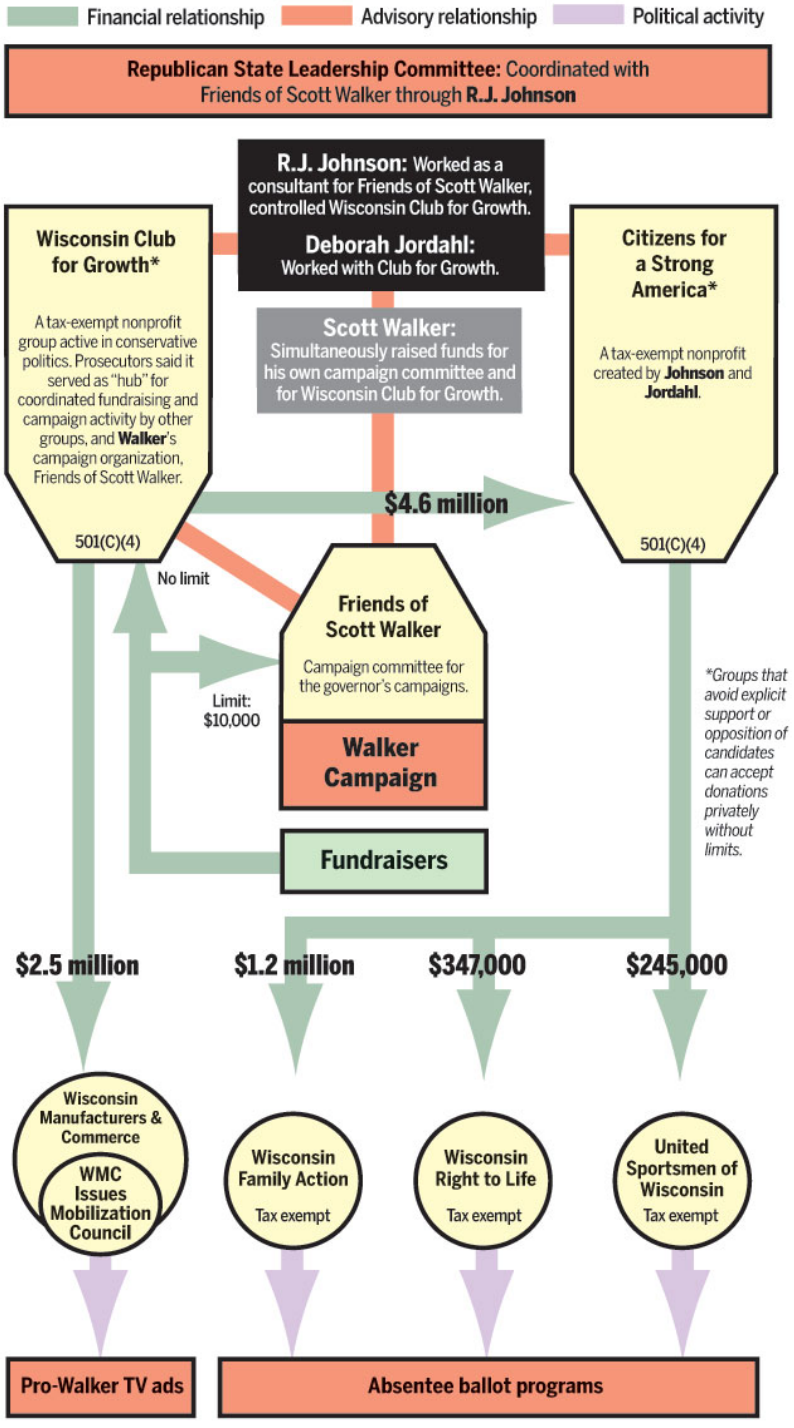
Prosecutors' view of recall fundraising roles

Prosecutors' view of recall fundraising roles

They allege illegal fundraising coordination between the Scott Walker campaign, which can take only limited-size donations, and Wisconsin Club for Growth, which can privately accept donations in unlimited amounts.



Source: State's Response to Motion to Quash Subpoenas: The Legal Predicate for the John Doe Investigation. Dec. 9, 2013 Journal Sentir