No. 16-2417

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CYNTHIA ARCHER,

Plaintiff-Appellant,
v.

JOHN CHISHOLM, DAVID ROBLES, BRUCE LANDGRAF,
ROBERT STELTER, DAVID BUDDE, AND AARON WEISS,

Defendant-Appellees.

On Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 2:15-cv-00922-LA
The Honorable Lynn Adelman

Appellant's Opening Brief

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Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the undersigned counsel of record for Appellant Cynthia Archer hereby certifies that Baker & Hostetler LLP and Hansen Reynolds Dickinson Crueger LLC are the only law firms whose attorneys have appeared for Ms. Archer in this case and that Ms. Archer has no parent or affiliate corporation.

Dated August 2, 2016

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Introduction

Appellees targeted Plaintiff-Appellant Cynthia Archer for criminal investigation in retaliation for her political advocacy and her political affiliation with Wisconsin Governor Scott Walker. As part of their campaign to thwart Governor Walker's political career and policy agenda, Appellees orchestrated a predawn raid on Ms. Archer's home by armed officers with a battering ram, relying on a warrant that they obtained by concealing and misrepresenting evidence, that had never been meaningfully reviewed by any magistrate, and that may not even have been signed by any magistrate. They tipped off the press to embarrass Ms. Archer, ransacked her home, unlawfully detained her, and subsequently subjected her to a series of interrogations revealing their true purpose: taking down Governor Walker. Appellees' unconstitutional and unconscionable conduct devastated Ms. Archer's career and her life.

The district court's decision dismissing Ms. Archer's claims on the pleadings is riddled with errors. It disregarded Ms. Archer's well-pleaded allegations in favor of over 300 pages of extra-complaint documents, nearly all of which were secret before this case and many of which contain purposefully false, incomplete, and misleading information. It blessed retaliatory criminal investigations, so long as the targets are public servants. And it unmoored the

concept of prosecutorial immunity from historical precedent and from reason, holding that the existence of probable cause to investigate people *other than* Ms. Archer for crimes having no relation to her immunized the prosecutors' investigative conduct pertaining to Ms. Archer.

The decision below, if affirmed, would blow a hole through the constitutional rights of public servants like Ms. Archer, ratify egregious misconduct by public officials in their exercise of extraordinary law-enforcement power, and all but close the door on claims vindicating the right to be free from official retaliation carried out through abusive investigation. The judgment should be reversed and the case remanded.

Jurisdictional Statement

Plaintiff-Appellant brought the instant action under 42 U.S.C. § 1983. This case was filed in Milwaukee County Circuit Court and removed on the basis of federal-question jurisdiction, 28 U.S.C. § 1331. The Decision and Order and Judgment were entered by the District Court on May 26, 2016, and disposed of all claims. Plaintiff-Appellant timely filed her Notice of Appeal on June 9, 2016. Jurisdiction is proper in the United States Court of Appeals for the Seventh Circuit based on 28 U.S.C. § 1291.

This matter is not a direct appeal from the decision of a magistrate judge. There have been no prior or related appellate proceedings in this case, nor have there been post-judgment motions filed below.

No party appears in this case in his or her official capacity.

Statement of the Issues

1. Whether investigatory actions undertaken in retaliation for political advocacy and political affiliation that cause the victim pecuniary harm and significant emotional distress are actionable under 42 U.S.C. § 1983.

2. Whether the search of a home and the administrative detention of its occupants based on a non-particularized warrant that the defendants know was not reviewed by a neutral and detached magistrate and was supported by an affidavit that purposefully misstated material facts relevant to probable cause is actionable under 42 U.S.C. § 1983.

3. Whether prosecutors are entitled to absolute immunity for investigative conduct that did not result in any probable-cause determination because the prosecutors had probable cause to investigate other people for unrelated crimes.

4. Whether the Anti-Injunction Act bars a federal court from enjoining a state Supreme Court decision including a contingent requirement that

parties to federal-court litigation relinquish unlawfully seized materials, where the parties would need to seek state-court approval before using those materials in the federal litigation.

Statement of the Case

A. Parties

Plaintiff-Appellant Cynthia Archer is a career public servant who has spent decades in Wisconsin government. Between 2006 and 2011—when Defendants leaked to the media that she was under secret criminal investigation—Ms. Archer was a political appointee in the administrations of Scott Walker. Appendix, A18, ¶¶ 16–18.

The Defendant-Appellees are the District Attorney of Milwaukee County, John Chisholm, two of his assistant district attorneys, David Robles and Bruce Landgraf (sometimes, the "Prosecutor-Appellees"), and three investigators in his office, David Budde, Robert Stelter, and Aaron Weiss (sometimes, the "Investigator-Appellees"). The position of district attorney is an elected office, and Mr. Chisholm has campaigned as a member of the Democratic Party. A22, ¶ 36. Mr. Chisholm hired and promoted the other Appellees based on their shared partisan views. A22, ¶¶ 37–38. For example, Mr. Robles was a member of an anti-Walker Facebook group. A24, ¶ 49. Mr. Budde displayed a recall Walker sign at his home. A24, ¶ 49. And Mr.

Landgraf was identified by a state-court judge in open court as abusing his prosecutorial power for partisan purposes. A30, ¶ 82.

B. Cynthia Archer Associates with Scott Walker and Advocates for His Policies

Ms. Archer has spent decades in various positions in Wisconsin state and local government, typically in Republican administrations. A18, ¶¶ 14–15. In 2006, then-Milwaukee County Executive Scott Walker hired her as a budget director for the Milwaukee Department of Administrative Services. A18, ¶ 16. Mr. Walker relied on her to carry out his policy agenda, and, in 2008, appointed her as Director of Administrative Services. A18, ¶¶ 17–18.

As Director of Administrative Services, Ms. Archer was effectively third-in-command in Milwaukee County and was instrumental in developing and implementing Mr. Walker's policy agenda. A19, ¶ 19. She advocated for Mr. Walker's policies within the County government, including before the County Board of Supervisors and in published editorials.[1] Appellees knew of Ms. Archer's political affiliation with Mr. Walker and her advocacy in support of his policies. A19, ¶ 22.

[1] The district court dismissed Ms. Archer's claims on the pleadings with prejudice. On appeal, Ms. Archer has presented additional facts that are consistent with her pleadings to illustrate what facts could be alleged in a new amended complaint. *See Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012); *Dawson v. Gen. Motors Corp.*, 977 F.2d 369, 372 (7th Cir. 1992).

When Mr. Walker became governor of Wisconsin, he invited Ms. Archer to join his transition team and appointed her Deputy Secretary of Administration, placing her among the highest echelon of government officials in the state. A19–20, ¶¶ 23–24. Her appointment was due to her political affiliation with Mr. Walker and her prior experience in supporting, advocating for, and implementing his policy agenda. A20, ¶ 25.

As part of the Walker administration, Ms. Archer played a lead role in crafting and advocating in favor of 2011 Wisconsin Act 10, A20, ¶ 27, a controversial bill reforming public-sector union bargaining, A21–22, ¶¶ 31–35. Ms. Archer assumed this role because of her commitment to Governor Walker's agenda; it was not inherent in her duties as Deputy Secretary of Administration. A20, ¶ 27. Defendants knew that Ms. Archer played a crucial role in drafting Act 10, supporting its passage, and implementing its provisions once enacted. A21, ¶¶ 29–30.

C. Appellees Agree To Retaliate Against Mr. Walker's Associates

In 2010, County Executive Walker emerged as the leading Republican contender for Governor and Milwaukee Mayor Tom Barrett emerged as the

leading Democratic contender. Mr. Chisholm is a political ally of Tom Barrett, Scott Walker's two-time gubernatorial opponent.[2] A23, ¶¶ 40–41.

Around this time, Mr. Chisholm and the other Appellees reached an agreement to conduct a criminal investigation into Mr. Walker and his associates to harm his chances of election. A27, ¶ 66. The Appellees chose a "John Doe" proceeding as the primary, but not exclusive, vehicle for targeting Mr. Walker and his associates. The John Doe procedure is "an investigatory tool used to ascertain whether a crime has been committed and if so, by whom." *State ex rel. Reimann v. Cir. Ct. for Dane Cty.*, 571 N.W.2d 385, 390 (Wis. 1997). It provides law-enforcement officers "the benefit of powers not otherwise available to them," such as "the power to subpoena witnesses . . . and to compel the testimony of a reluctant witness." *State v. Washington*, 266 N.W.2d 597, 604 (Wis. 1978). A John Doe proceeding does not require probable cause to initiate. It can be opened or expanded if there is "reason to believe that a crime has been committed" within the jurisdiction. Wis. Stat. § 968.26(2)(am).

[2] Their close relationship continues to this day, with Mr. Barrett endorsing Mr. Chisholm's current re-election bid. John Chisholm, Press Release, "Milwaukee Mayor Tom Barrett endorses District Attorney John Chisholm" (July 12, 2016), *available at* http://urbanmilwaukee.com/pressrelease/milwaukee-mayor-tom-barrett-endorses-district-attorney-john-chisholm.

D. Appellees Carry out Their Retaliatory Mission

Appellees ostensibly relied on a year-old tip from Thomas Nardelli, Mr. Walker's Chief of Staff, to open the John Doe proceeding. A28, ¶ 70. In April 2009, Mr. Nardelli had informed Defendant Budde that a few thousand dollars had gone missing from a local charity. A28, ¶ 70. The crime was not directly connected to Mr. Walker's office—the culprit was an employee of the charity—but Mr. Walker's office had given funds to the charity. A28, ¶ 70.

Within four days of opening the investigation on the pretense of identifying the "source" of the missing funds, A28, ¶ 71, Appellees expanded the investigation to target Mr. Walker's associates in a variety of ways unrelated to the charitable funds. A29, ¶¶ 73–76. The John Doe judge was a rubber stamp for Appellees' agenda. Due to his lack of oversight, Appellees obtained orders expanding the investigation eighteen times in two years—an average of one expansion every five or six weeks. Every expansion concerned Mr. Walker or his affiliates. A33, ¶ 94. The John Doe judge allowed Appellees to obtain warrants for unlimited access to communications in the email accounts of individuals as to whom there was not even a pretense of probable cause. A29–30, ¶¶ 77–78. In particular, he did not scrutinize Appellees' legal or factual theories of wrongdoing by Ms. Archer. A36, 44–46, ¶¶ 107, 145–51.

Free from any meaningful supervision, Appellees raided homes and businesses, jailed witnesses who refused to provide incriminating testimony against Mr. Walker or his aides, seized electronic records of targets and non-targets, interrogated witnesses in secret sessions, and selectively leaked sealed information to local news outlets. A30–32, 37, ¶¶ 83–84, 90, 110. Much of this activity did not occur before the John Doe judge. *E.g.*, A31–32, ¶¶ 85–92. All Appellees played a direct role in the investigation. A31, ¶¶ 85–87.

Appellees' investigation intensified following the passage of Act 10, during the drive to recall Governor Walker and various Republican legislators. Appellees or their associates leaked secret information to the press suggesting that criminal complaints against Mr. Walker and his associates were imminent—their purpose being to influence the election. A51, ¶¶ 172–73.

By the time it had concluded, the investigation had grown into the largest in Milwaukee history, generating more records than any previous investigation in the history of the Milwaukee County District Attorney's office. Around the same time, homicides in Milwaukee rose by over 44 percent, and Mr. Chisholm publicly complained that he lacked investigative resources to pursue those cases.

E. Appellees Target Archer for Retaliation

Appellees first set their sights on Ms. Archer in late 2010. A35,¶ 102. Appellees knew that Ms. Archer was not involved with Mr. Walker's gubernatorial campaign, as they were simultaneously investigating Mr. Walker's campaign activities. Nevertheless, they obtained a warrant to search her County office, claiming that she had engaged in campaign work on County time in violation of Wisconsin's Misconduct in Public Office Statute. A35, ¶ 104.

During the public and political turmoil that followed the enactment of Act 10 in 2011, Appellees intensified their efforts against Ms. Archer. A36, ¶ 108. They leaked to the media that Ms. Archer was a target of their investigation. A37, ¶ 110. Mr. Stelter then applied for a warrant to search Ms. Archer's home. In the supporting affidavit, Mr. Stelter selectively quoted and misrepresented the contents of emails sent to and by Ms. Archer in order to fabricate the existence of probable cause to suspect Ms. Archer of two crimes.

The first pretextual crime was that Ms. Archer had leaked confidential information concerning a 2009 request for proposal ("RFP") for housekeeping services to bidders. Appellees had no evidence that Ms. Archer leaked information, A48, ¶ 156, and in fact identified another County Executive employee, Timothy Russell, as the source of the leaks, *id.* Yet to create the

impression that Ms. Archer assisted Mr. Russell, Mr. Stelter's affidavit alleged that an agent of the bidder sent an ex parte email to Mr. Russell, who "then forward[ed] the information to the attention of Cindy Archer." A429, ¶ 30(b). In fact, Mr. Stelter's sworn statement was false. As is apparent on its face, the email that Mr. Stelter represented was "forwarded" to Ms. Archer had been altered by Mr. Russell to remove any indication that it came from an alleged agent of the bidder, such that the email provided no indication that Ms. Archer was aware of the alleged agent's involvement. A477–78. Had Mr. Stelter not misrepresented this communication, the warrant affidavit would have accurately shown that Ms. Archer would have had no reason to believe that Mr. Russell, another County Executive employee, had used the 2009 RFP information for anything other than county business.

The second pretextual crime was that Ms. Archer improperly advantaged a bidder that Appellees believed Mr. Walker's office favored in a 2010 RFP process for lease of office space. But Appellees knew—based on the same documents they cited as justification for the warrant—that she opposed awarding that bidder the contract. A46–47, ¶¶ 151, 155. Lacking probable cause to investigate Ms. Archer, Appellees selectively quoted Ms. Archer's emails to misconstrue their meaning and deliberately omitted the relevant

information that defeated their claim to probable cause from the primary affidavit submitted in support of the warrant. A46–47, ¶¶ 151, 154, 155.

F. The John Doe Judge Fails To Review the Warrant Affidavit.

Although the John Doe judge generally failed to supervise the investigation, in the specific case of the warrant for the search of Ms. Archer's home, it is certain that the John Doe judge did not review the warrant affidavit in any meaningful respect, and he may not have even signed it.

The warrant for the search of Ms. Archer's home and supporting affidavit totaled 115 pages. And the affidavit incorporated by reference all affidavits, transcripts, and other materials associated with the John Doe proceeding, A405–06, 423, ¶¶ 3, 26, thus amounting to hundreds of thousands of pages of material. Any review of the warrant application would have had to occur early on the day of September 13, 2011, as Mr. Stelter's affidavit was sworn that day and the warrant application was approved by the John Doe judge in Milwaukee that day at 1:10 pm, giving the judge (at most) a couple of hours to review this voluminous application.

But there is no indication that the judge spent any time on it. The time sheets the John Doe judge submitted to the state reported that he did not work on the John Doe investigation at all between September 10 and September 15,

2011, and billed no travel to Milwaukee on those days.[3] The John Doe judge submitted the time sheets "under penalties of perjury," and swore that "no portion of this claim was provided free of charge." (Providing such services free of charge likely would have itself violated Wisconsin law, Wis. Stat. § 946.12(5), and would be punishable as a Class I felony.) Indeed, public records indicate that the judge was engaged on another matter in another county, at least 30 miles away, on September 13, 2011. That engagement precludes the possibility that he traveled to Milwaukee; reviewed the warrant, affidavit, exhibits, and incorporated documents; and signed the warrant, all before 1:10 in the afternoon.

The John Doe judge may not have even signed the warrant. The signature on the warrant affidavit for the search of Ms. Archer's home appears sufficiently unusual that a forensic analyst retained by Appellant was unable to confirm that the signature on the warrant is, in fact, the judge's from the documents currently available.

Appellees knew that the judge did not review the warrant and know whether he is actually the one who signed it. In fact, Defendant Robles

[3] John Doe Judge Neal Nettesheim was not an active-duty judge. Instead, he was a "Reserve Judge," which is a retired judge who is assigned to certain types of matters and bills the state by the hour. Judge Nettesheim did not live in Milwaukee and submitted expenses when he traveled to Milwaukee.

purportedly notarized the judge's signature on the warrant and would know about the procedural irregularities surrounding the warrant.

G. Appellees Execute the Warrant and Interrogate Ms. Archer

On September 14, 2011, a dozen law-enforcement officers arrived at Ms. Archer's home with a battering ram shortly before dawn. A37–38, ¶¶ 112, 116. Mr. Weiss led the raid, and Messrs. Budde and Stelter helped orchestrate it. A37–38, ¶¶ 112–13. Defendants also tipped off a reporter about the raid, and he arrived within minutes. A39, ¶¶ 118, 121. These actions were calculated to intimidate Ms. Archer. A38–39, ¶¶ 116–20. In fact, Mr. Weiss indicated to a fellow officer that they were unlikely to obtain any relevant information not found on Ms. Archer's computers, but the officers spent hours searching every corner of the home, ransacking drawers and other locations where there was no probability of finding incriminating evidence. A40, 42, ¶¶ 125, 132. Officers took possession of every email Archer wrote or received beginning in 2006, when she was working in Green Bay, despite the fact that Appellees did not allege any criminal activity before 2009. A44, ¶ 143. Many of Ms. Archer's emails have since been made available to the public.[4] A44, ¶ 143. During the

[4] Some, but not all, of Archer's emails remain available online at http://johndoewalker.americanbridge.org/, in the files labeled "CArcher." For context, "CArcher-Email5" contains 11,805 pages of Archer's emails,

search, in an apparent attempt to build rapport with Ms. Archer, Mr. Weiss admitted that the investigation was political. A41, ¶ 127. The criminal investigation of Ms. Archer was the lead story on the news that evening. A43, ¶ 137.

Subsequently, Appellees questioned Ms. Archer in seven secret sessions. A49–52, ¶¶ 161–178. The John Doe judge did not preside over the interrogations, and they did not occur in a court or judicial proceeding. A50, ¶ 167. Each Appellee was personally involved in questioning Ms. Archer. A49, ¶ 163. All Appellees understood that the purpose was intimidation, A49, ¶ 164, and the sessions were designed to achieve this purpose. A49–50, ¶¶ 165, 168, 169.

H. Appellees' Investigation into the Walker Administration Continues

In August 2012, Mr. Stelter signed an affidavit without probable cause in support of a petition by Mr. Robles for a new Walker-related John Doe proceeding, this time targeting Mr. Walker's campaign and conservative groups statewide. A33, ¶ 95. As with John Doe I, the Appellees conducted this investigation in collaboration with the Government Accountability Board ("GAB"). Communications between certain Appellees and GAB staff evidence

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covering July 1, 2008, through December 31, 2008, despite there being no allegation of criminal activity during that time.

the retaliatory motivations behind the probe. For example, when the Special Prosecutor made a public statement that Governor Walker was not a target of the investigation,[5] GAB official Shane Falk chided Mr. Schmitz for harming the campaign of Mary Burke, Governor Walker's 2014 opponent. Certain appellees were included on these communications and manifested their agreement with Mr. Falk's views through their silence.

Ultimately, the Wisconsin Supreme Court repudiated Appellees' actions. A33–35, ¶¶ 95–101. The Court identified several affidavits submitted by Mr. Stelter in support of multiple search warrants and subpoenas, *State ex rel. Two Unnamed Petitioners v. Peterson*, 866 N.W.2d 165, 181 (Wis. 2015), and concluded that they lacked probable cause, *id.* at 196, 211–12. These Appellees therefore succeeded in inflicting "a 'perfect storm' of wrongs" on Wisconsin citizens by employing "theories of law that do not exist" and "the unlimited resources of an unjust prosecution" in order "to investigate citizens who were wholly innocent of any wrongdoing." *Id.* at 211–12. The Wisconsin Supreme Court enjoined any further investigative activities. *Id.*

[5] The Prosecutor-Appellees collaborated with the Special Prosecutor in this investigation and, in fact, originated and pursued if for a year before the John Doe II Special Prosecutor was (unlawfully) appointed. *See State ex rel. Three Unnamed Petitioners v. Peterson*, 875 N.W.2d 49, 55–56 (Wis. 2015).

The Wisconsin Supreme Court also ordered the return or destruction of all documents seized during the second phase of the investigation (i.e., "John Doe II"). But on reconsideration, the Court ordered Appellees and the special prosecutor in that matter to turn over to the Wisconsin Supreme Court itself "all originals and *all copies* of documents and electronic data" obtained during the investigation "within 30 days following the completion of proceedings in the U.S. Supreme Court on any petition for certiorari review." *State ex rel. Three Unnamed Petitioners v. Peterson*, 875 N.W.2d 49, 58, 60 (2015) (emphasis added). The Court represented that these materials will "be available for use in related civil proceedings," including this one, "if there is a request and a determination that such use is proper under the circumstances." *Id.* at 61 The Appellees have never made a particularized request for any of this information.

I. Appellees' Bad-Faith Investigation Injures Ms. Archer

After the efforts to recall Governor Walker failed, the inquiries related to Ms. Archer ceased. A51, ¶ 174. No one was charged in connection with any of the pretextual inquiries used to target Ms. Archer. *Id.* But Ms. Archer's reputation was destroyed, A52, ¶ 182, she was forced to resign as Deputy Secretary of Administration, A53–54, ¶ 186, her pay was cut, *id.*, her future earning potential was impaired, A54, ¶ 188, she incurred substantial legal bills that required her to mortgage her home, A50, ¶ 166, she was harassed by

individuals in her community, A52–53, ¶ 183, she was ridiculed in the media and on radio, A53, ¶ 185, her personal relationships suffered, A52–53, ¶ 183, she suffered post-traumatic stress disorder, A52, ¶ 181, she continues to suffer mental distress to this day, *id.*, she fell into depression, A55, ¶ 190, she was committed to a psychiatric ward, *id.*, and she became suicidal, *id.*

J. Ms. Archer Seeks To Vindicate Her Civil Rights

Ms. Archer brought this action in the Circuit Court of Milwaukee County. Appellees removed to the United States District Court for the Eastern District of Wisconsin. Following removal, Ms. Archer amended her complaint and the Prosecutor-Appellees moved to dismiss, asserting prosecutorial and qualified immunity. They attached four extraneous documents to the Motion to Dismiss on which they asked the court to rely: (1) the May 5, 2010 Petition for the Commencement of a John Doe Proceeding, A389; (2) the September 13, 2011 search warrant for Ms. Archer's home and a partial copy of an accompanying affidavit, A402; (3) the remainder of the accompanying affidavit and its attachments, A431; and (4) the December 17, 2010 search warrant and accompanying affidavit for Ms. Archer's Milwaukee County office, A517. These documents were selected by Prosecutor-Appellees from the millions of pages of investigation-related documents that they possess under seal.

Following briefing on the motion to dismiss, the Investigator-Appellees filed a Motion for Judgment on the Pleadings to which they added an additional exhibit: an expansive warrant affidavit and accompanying exhibits purportedly issued on July 11, 2011. A563. Excluding duplicates, the Defendants attached 305 pages of extraneous documents to their motions on the pleadings.

The Investigator-Appellees also moved for an order enjoining them from complying with the Wisconsin Supreme Court's mandate in *Two Unnamed Petitioners* requiring the future return of material that they unconstitutionally seized during the course of the "John Doe II" investigation. Ms. Archer opposed the order as being outside the district court's jurisdiction, and the Wisconsin Attorney General filed an amicus brief opposing the motion on grounds of equity and comity.

On May 26, 2016, the district court, the Honorable Lynn Adelman presiding, granted the defendants' motions and entered final judgment dismissing Ms. Archer's claims with prejudice. The district court also granted the motion for preservation order in part by allowing the Appellees to file copies of materials ordered to be returned and/or filed with the Wisconsin Supreme Court with the clerk of the Eastern District of Wisconsin. Special Appendix, SPA39–42.

Ms. Archer filed a timely notice of appeal.

Summary of Argument

Ms. Archer's pleadings are more than sufficient to allege plausibly that Appellees' politically motivated criminal investigation violated her clearly established First and Fourth Amendment rights. The district court's decision dismissing the action with prejudice was erroneous at every turn.

In dismissing Ms. Archer's First Amendment claims, the district court trampled thirty years of Circuit precedent holding that retaliatory investigations and arrests are unconstitutional. As a matter of both law and common sense, law-enforcement officers know that they should not abuse their governmental authority by predicating criminal investigations on partisan motives. Nothing in the Supreme Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), which concerns government-employer discipline for employees' speech in their governmental roles, disturbs this precedent. Nor was the district court correct in disregarding Ms. Archer's well-pleaded allegations concerning the lack of probable cause in favor of hundreds of pages of extra-complaint materials, many of which were incomplete or marked by fraud.

The district court likewise erred in dismissing Ms. Archer's Fourth Amendment search-and-seizure and false-arrest claims. In addition to the same

improper reliance on extra-complaint materials that marred its First Amendment holding, the district court's dismissal with prejudice precluded Ms. Archer from advancing her claim that the John Doe judge *did not review* the warrant application for her home and that the application contained false and misleading information. The district court also erred in accepting this information as true in contravention of Ms. Archer's right to prove that it was false through discovery. That alone is sufficient basis for reversal.

Moreover, the district court's decision to afford the Prosecutor-Appellees absolute immunity for investigatory acts towards Ms. Archer that occurred not just before, but in the complete absence of, any probable cause determination was erroneous. The district court's conclusion that the existence of probable cause in a John Doe proceeding for one crime absolutely immunizes prosecutors who spin in another direction and investigate a different person for an unrelated crime contradicts every Supreme Court and Seventh Circuit decision on point, including *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), which posit a *functional* test that turns on the existence of probable cause to charge, not on the form of proceeding.

Finally, the district court lacked jurisdiction to enjoin the Appellees from complying with the Wisconsin Supreme Court's mandate in *Two Unnamed Petitioners*. Only where absolutely necessary to preserve its jurisdiction may a

federal court enjoin a state-court decision. Necessity cannot be satisfied in this case for several reasons, most notably because the Appellees failed to satisfy this Circuit's requirement that they seek state-court approval on a particularized basis before using these materials in federal litigation.

For these reasons, the district court's judgment should be reversed.

Standard of Review

This Court "review[s] a district court's grant of a 12(b)(6) motion *de novo*, accepting all of the well-pleaded allegations in the complaint as true." *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1080 (7th Cir. 1997).

This Court reviews the issuance of an injunction for abuse of discretion, *Protectoseal Co. v. Barancik*, 23 F.3d 1184, 1186 (7th Cir. 1994), although "legal issues [raised by an injunction] are reviewed de novo," *BBL, Inc. v. City of Angola*, 809 F.3d 317, 324 (7th Cir. 2015).

Argument

I. Ms. Archer Adequately Pleaded That Appellees Violated Her Clearly Established First Amendment Rights

A. Ms. Archer Adequately Pleaded a Claim for a Retaliatory Criminal Investigation

"To state a First Amendment claim for retaliation, a plaintiff must allege that (1) he engaged in activity protected by the First Amendment; (2) he suffered a deprivation that would likely deter First Amendment activity in the

future; and (3) the First Amendment activity was at least a motivating factor in the defendants' decision to take the retaliatory action." *Perez v. Fenoglio*, 792 F.3d 768, 783 (7th Cir. 2015) (quotation marks omitted); *see also Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir. 2005). To surmount qualified immunity, the constitutional right must also have been clearly established at the time the violation occurred. *Jacobs v. City of Chicago*, 215 F.3d 758, 766 (7th Cir. 2000). Because a qualified immunity defense "depends on the facts of the case," it is "almost always a bad ground for dismissal" on the pleadings. *Alvarado v. Litscher*, 267 F.3d 648, 651–52 (7th Cir. 2001) (quotation marks omitted).

1. A Constitutional Tort for First Amendment Retaliation Is Clearly Established in the Criminal Investigation Context

For almost three decades, this Court has consistently held that "an investigation conducted in retaliation for comments protected by the first amendment could be actionable under section 1983." *Rakovich v. Wade*, 850 F.2d 1180, 1189 (7th Cir. 1988) (en banc), *abrogated on other grounds by Spiegla v. Hull*, 371 F.3d 928 (7th Cir. 2004); *see also Johnson v. Collins*, 5 F. App'x 479, 485–86 (7th Cir. 2001) (characterizing this right as "clearly established"); *Levy v. Pappas*, No. 04 C 6498, 2006 WL 1994554, at *7 (N.D. Ill. July 13, 2006) ("A claim that defendants launched a criminal investigation in retaliation for

the exercise of first amendment rights is actionable under 42 U.S.C. § 1983."), *aff'd*, 510 F.3d 755 (7th Cir. 2007). This Court's jurisprudence is consistent with that from courts of appeals throughout the country. *See, e.g.*, *Izen v. Catalina*, 382 F.3d 566, 572 (2d Cir. 2004); *Pendleton v. St. Louis Cty.*, 178 F.3d 1007, 1010–11 (8th Cir. 1999); *Lacey v. Maricopa Cnty.*, 649 F.3d 1118, 1132 (9th Cir. 2011); *White v. Lee*, 227 F.3d 1214, 1226–29, 1237–39 (9th Cir. 2000); *Smith v. Plati*, 258 F.3d 1167, 1176 (10th Cir. 2001); *Bennett*, 423 F.3d at 1248, 1250–56.

Disregarding this precedent, the district court found it "unclear whether a retaliatory investigation . . . rises to the level of a constitutional violation." It based this finding on dicta in a footnote in *Hartman v. Moore*, 547 U.S. 250, 262 n.9 (2006), noting that the Supreme Court has not yet passed on the viability of a retaliatory investigation claim. SPA31. But the Supreme Court's inaction does not overrule this Court's decisions in *Rakovich* and *Johnson*, or the multitude of other circuit-court decisions that have found such claims to be actionable. Because "[f]ew predictions of change in legal doctrine come true," a district court "should apply existing precedents" of this Court as written, rather than assume that they will be overruled. *Heath v. Varity Corp.*, 71 F.3d 256, 257 (7th Cir. 1995); *Gacy v. Welborn*, 994 F.2d 305, 310 (7th Cir. 1993); *Wheaton College v. Burwell*, No. 1:13–cv–08910, 2014 WL 3034010, at *3 (N.D.

Ill. June 30, 2014) (following this Court's precedent because "nothing in [a related] Supreme Court[] ruling expressly overrules" that precedent, and "[i]t is solely the province of the Seventh Circuit to decide whether to revisit" its own precedent).

Moreover, the Supreme Court does not need to pass on the issue for the right to be clearly established; Seventh Circuit precedent is more than sufficient. *See Abbott v. Sangamon Cty., Ill.*, 705 F.3d 706, 732 (7th Cir. 2013) (finding right clearly established in the absence of a controlling Supreme Court precedent). And "patently obvious" constitutional violations, like Appellees' politically motivated investigation, are not entitled to immunity. *Jacobs*, 215 F.3d at 767; *see also Whitlock v. Brueggemann*, 682 F.3d 567, 586 (7th Cir. 2012). A reasonable prosecutor would know that raiding homes and interrogating citizens to harass and intimidate them for their political speech and association violates their constitutional rights.

2. Ms. Archer Engaged in Activity Protected Under the First Amendment

Ms. Archer sufficiently pleaded that she engaged in two types of clearly established First Amendment-protected activity: (1) political affiliation with Governor Walker; and (2) public advocacy for Governor Walker's policies, including without limitation Act 10. A19–21, 55, ¶¶ 14–30, 194.

Political Affiliation. The district court correctly acknowledged that political affiliation is a clearly established right, SPA29 n.15, the only conclusion consistent with voluminous precedent, *see, e.g.*, *Roger Whitmore's Auto. Servs., Inc. v. Lake Cty., Ill.*, 424 F.3d 659, 667–69 (7th Cir. 2005); *Heideman v. Wirsing*, 7 F.3d 659, 662 (7th Cir. 1993); *Dye v. Office of Racing Comm'n*, 702 F.3d 286, 298–99 (6th Cir. 2012); *Gann v. Cline*, 519 F.3d 1090, 1093–94 (10th Cir. 2008).

The district court's decision to nonetheless dismiss with prejudice Ms. Archer's claim on the ostensible basis that "the complaint alleges that . . . the defendants did not begin their so-called 'campaign of harassment' until Act 10's proposal" in mid-February 2011 badly misrepresents the amended complaint. SPA29 n.15. The complaint alleges that Ms. Archer was affiliated with Governor Walker and was therefore appointed to multiple political positions by him, A18–20, ¶¶ 16–24, that Appellees knew of Ms. Archer's affiliation, *id.*, that Appellees took adverse action against Ms. Archer because of her affiliation with Governor Walker, A38–52, ¶¶ 102–78, and that these adverse actions began in 2010, well before Act 10, A38, ¶ 102. Indeed, contemporary news stories confirm that it was public knowledge Ms. Archer was affiliated with Mr. Walker and his policies from at least 2009 onward. And even if the district court determined that affiliation was not sufficiently

alleged in the amended complaint, dismissal with prejudice was improper because Ms. Archer could amend to clarify her affiliation claim.

Political Advocacy. Political advocacy for public policies is also a clearly-established First Amendment protected interest. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) ("[T]he right to engage in vigorous advocacy" is a "core First Amendment" right.) (quotation marks omitted); *Tarpley v. Keistler*, 188 F.3d 788, 795 (7th Cir. 1999) ("Advocacy is inherently partisan, and the First Amendment guarantees freedom of such partisanship . . . ."). Ms. Archer alleged that Appellees retaliated against her because of her advocacy for Walker's policies, both as County Executive and Governor. A19–21, 55, ¶¶ 19, 20, 22, 25, 30, 194.

Considering only those allegations related to "the plaintiff's advocacy of Act 10" and disregarding Ms. Archer's advocacy on other policies, SPA29, the district court found that under *Garcetti*, Ms. Archer had no clearly established right to be free from retaliatory prosecution when advocating for the Act because of the absence of controlling Circuit or Supreme Court precedent. SPA30. The district court's conclusion is badly mistaken.

Garcetti has "nothing to do with claims of retaliatory prosecution," *Price v. Roberts*, No. 10–1574, 2011 WL 1877823, at *16 (W.D. Pa. May 16, 2011), especially "a First Amendment retaliation claim against a defendant who is not

the plaintiff's employer," *Trant v. Oklahoma*, 754 F.3d 1158, 1169 (10th Cir. 2014); *see also Lewis v. Mills*, No. 09-CV-2090, 2009 WL 3669745, at *5 (C.D. Ill. Nov. 3, 2009) (same); *Leavey v. City of Detroit*, 719 F. Supp. 2d 804, 812 (E.D. Mich. 2010) (same); *Stokes v. City of Mt. Vernon*, No. 11 CV 7675(VB), 2012 WL 3536461, at *7 (S.D.N.Y. Aug. 14, 2012) (same).[6] Instead, *Garcetti* is a public-employee-discharge case that concerns the "delicate balance between a citizen's right to speak . . . and the employer's need to effectively provide government services." *Bridges v. Gilbert*, 557 F.3d 541, 550 (7th Cir. 2009). *Garcetti*'s limitation of employee speech rights follows from the need of government employers to exercise "control over their employees' words and actions." 547 U.S. at 418. Appellees are law enforcement officers who have no need for "sufficient discretion to manage" Ms. Archer, no "heightened interests in controlling [her] speech," no need to "ensure that" Ms. Archer's "official communications are accurate," and no need to "promote [an] employer's mission." *Id.* at 422–23, 434.

[6] Courts regularly decline to apply *Garcetti* outside the government-employee disciplinary context. The government "enjoys significantly greater latitude when it acts in its capacity as employer than when it acts as sovereign," *Munafo v. Metro. Transp. Auth.*, 285 F.3d 201, 211 (2d Cir. 2002), and less deferential standards apply to different governmental interests. *See, e.g.*, *Bridges*, 557 F.3d at 550–51 (declining to apply *Garcetti* to restrictions on prisoner speech); *Watkins v. Kasper*, 599 F.3d 791, 796 (7th Cir. 2010) (declining to apply *Garcetti* to restrictions on prisoner speech, even where prisoner is also employee of state prison).

Likewise, the district court's assumption that only controlling post-*Garcetti* precedent considering a retaliatory criminal investigation into a public employee suffices to clearly establish a right is contrary to precedent. Controlling authority is not required to defeat qualified immunity, as long as there is "sufficient consensus, based on all relevant case law, indicating that the official's conduct was unlawful." *Landstrom v. Ill. Dep't of Children & Family Servs.*, 892 F.2d 670, 676 (7th Cir. 1990) (quotation marks omitted). There is a long line of precedent in the Seventh Circuit and elsewhere that all citizens have the right to be free from retaliatory criminal investigations. *See supra* Section I.A.1. While many of these cases pre-date *Garcetti*, the district court identified no authority (and counsel is aware of no authority) applying *Garcetti* outside the public-employee discipline and discharge context.

Even if *Garcetti* had some application to retaliatory criminal investigations, Ms. Archer is an appointed official and the *Garcetti* doctrine does not extend to such officials. *See Jenevein v. Willing*, 493 F.3d 551, 557–58 (5th Cir. 2007). Unlike civil servants, the relationship between appointed officials like Ms. Archer and the public necessarily involves public advocacy with those within and without the Walker administration.

Finally, the district court improperly adjudicated a factual dispute over whether Ms. Archer's advocacy was inherent to her position as Deputy

Secretary of Administration. *See, e.g.*, *Chrzanowski v. Bianchi*, 725 F.3d 734, 739 (7th Cir. 2013). *See also Garcetti*, 547 U.S. at 426 (expressly limiting holding to "expressions employees make pursuant to their professional duties"). Ms. Archer alleged that it was not, A20, ¶ 27, and the district court erred in not taking that allegation as true. *See, e.g.*, *Andrew v. Clark*, 561 F.3d 261, 268 (4th Cir. 2009) (holding that "the district court was required to accept [plaintiff's] statement as true" that activity was not part of official duties).

3. Ms. Archer Was Deprived of Her Constitutional Rights

The "deprivation" element of First Amendment retaliation is satisfied by "[a]ny deprivation under color of law that is likely to deter the exercise of free speech," including "something as trivial as making fun of an employee for bringing a birthday cake to the office to celebrate another employee's birthday." *Power v. Summers*, 226 F.3d 815, 820 (7th Cir. 2000). Cognizable deprivations have included everything from the issuance of $35 in parking tickets, *Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003), to a "prolonged and organized campaign of harassment" by law-enforcement officers, *Bennett*, 423 F.3d at 1254, and the publication of confidential information regarding an investigation, *Bloch v. Ribar*, 156 F.3d 673, 681 (6th Cir. 1998).

The complaint alleges multiple deprivations. Appellees orchestrated a raid of Ms. Archer's home before dawn, subjecting her and her partner to humiliation by a dozen armed officers, guns drawn. A38–39, ¶¶ 115–17, 119–21. They directly or indirectly leaked this news to the press, so that Ms. Archer would be publicly suspected of criminal activity. A38, 42, ¶¶ 118, 134. They rifled through her home and possessions, seizing and retaining all her emails from 2006 to 2010, and then released them to the public. A44, ¶ 143. And they questioned Ms. Archer in secret interrogations that were calculated to harass and intimidate her. A49–52, ¶¶ 161–78. As a result, Ms. Archer suffered out-of-pocket expenses for legal bills, was forced to resign as Deputy Secretary of Administration, had her pay cut, and suffered severe mental distress. A52–55, ¶¶ 179–92. Appellees' actions constitute a deprivation that "would likely deter a person of ordinary firmness from the exercise of First Amendment rights" and were motivated to that end. *Bennett*, 423 F.3d at 1254.

4. Appellees Were Motivated To Violate Ms. Archer's Rights As a Result of Her First Amendment-Protected Activity

The third element of the First Amendment retaliation tort is satisfied if the plaintiffs' speech or association is at least a substantially motivating factor in the decision to take retaliatory action. *Spiegla*, 371 F.3d at 941–42. The complaint alleges that all Appellees investigated Ms. Archer in a manner that

was intended to harass and intimidate her due to her political affiliation with Governor Walker and because of her advocacy on behalf of Act 10 and other measures. *E.g.*, A22–27, 35–37, ¶¶ 36–68, 102, 108–09. Further, the complaint alleges numerous facts establishing improper motive, including historical background, A21–22, ¶¶ 31–35, and a pattern of invidious actions against others, A28–35, ¶¶ 69–101. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–67 (1977) (recognizing these forms of evidence in ascertaining improper motive). Because state of mind can be alleged generally, *see* Fed. R. Civ. P. 9(b), those allegations more than suffice to satisfy this element of the claim. *See Armstrong v. Daily*, 786 F.3d 529, 547 (7th Cir. 2015).

5. Appellees Lacked Probable Cause To Investigate Ms. Archer

In the specific context of retaliatory criminal investigations, the courts of appeals are split as to whether the plaintiff also must allege the absence of probable cause. *Compare Skoog v. Cty. of Clackamas*, 469 F.3d 1221, 1234–35 (9th Cir. 2006) (no), *with Glober v. Mabrey*, 384 F. App'x 763, 771–72 (10th Cir. 2010) (citing *McBeth v. Himes*, 598 F.3d 708 (10th Cir. 2010)) (yes). The Ninth Circuit has the better argument. The probable-cause requirement stems from *Hartman v. More*, which involved a retaliatory-prosecution cause of action, and thus "inducement to prosecute," given that the law-enforcement officer, not the prosecutor who is immune, is the defendant, but the prosecutor ultimately

makes the charging decision, 547 U.S. at 261–62. The probable-cause requirement is a necessary element of causation given the need to link the unlawful intent with the actual deprivation across several layers of governmental decision-making. *Id.* at 260. The requirement is ill-suited for a case like this where the Defendants harboring ill motive were also responsible for the deprivation of Ms. Archer's constitutional rights. *See Skoog*, 469 F.3d at 1233–34. This case does not involve "inducement" and the probable-cause requirement should not apply.

Moreover, because "the First Amendment does not itself require lack of probable cause in order to establish a retaliatory inducement" claim, that element, which goes to causation and damages, "has no bearing on whether a defendant has violated a clearly established . . . constitutional right" and need not be clearly established under a qualified immunity analysis. *Moore v. Hartman*, 644 F.3d 415, 423–25 (D.C. Cir. 2011) (alteration in original) (quotation marks omitted), *certiorari granted, judgment vacated*, 132 S. Ct. 2740 (2012), *judgment reinstated*, *Moore v. Hartman*, 704 F.3d 1003, 1004 (D.C. Cir. 2013). Thus, there was no need for Ms. Archer to plead absence of probable cause either to state a First Amendment claim or to pierce qualified immunity.

Even if the Court determines that the absence of probable cause is necessary to state a claim for retaliatory criminal investigation, Ms. Archer has

adequately pleaded it. Probable cause is absent where a "requesting officer knowingly, intentionally, or with reckless disregard for the truth, makes false statements in requesting the warrant and the false statements were necessary to the determination that a warrant should issue." *Knox v. Smith*, 342 F.3d 651, 658 (7th Cir. 2003). The existence of probable cause is a mixed question of law and fact. *Ornelas v. United States*, 517 U.S. 690, 696 (1996); *see also Stobinske-Sawyer v. Vill. of Alsip*, 188 F. Supp. 2d 915, 920 (N.D. Ill. 2002). Mixed questions of law and fact "will rarely be dispositive in a motion to dismiss." *In re Morgan Stanley Info. Fund Secs. Litig.*, 592 F.3d 347, 360 (2d Cir. 2010). *See also McMillan v. Collection Prof'ls, Inc.*, 455 F.3d 754, 760 (7th Cir. 2006) ("[D]istrict courts must act with great restraint when asked to rule . . . on a motion to dismiss" adjudicating "issues of mixed fact and law"); *see also Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 941 n.3 (7th Cir. 2015); *Marks v. CDW Computer Ctrs., Inc.*, 122 F.3d 363, 370 (7th Cir. 1997).

Probable cause is no different, as courts normally cannot determine probable cause on a motion to dismiss (and, hence, on a motion for judgment on the pleadings). *See Craig v. Chicago Police Officers*, No. 05 C 0172, 2005 WL 1564982, at *6 (N.D. Ill. June 9, 2005) (denying motion to dismiss where the allegations that prosecution lacked probable cause were adequate); *see also Lamon v. Sandidge*, 232 F. App'x 592, 594 (7th Cir. 2007) (refusing to dismiss

action on pleadings because allegations of absence of probable cause would need to be accepted as true); *Gupta v. Owens*, No. 12 C 7855, 2014 WL 1031471, at *3 (N.D. Ill. Mar. 18, 2014) (denying motion to dismiss where complaint alleged lack of probable cause and attacks on complaint presented factual questions for discovery).

Ms. Archer pleaded in detail that Defendants targeted her without probable cause by asserting pretextual bases for their investigation into her and by submitting false information in their warrant affidavits. A43–48, ¶¶ 141–60. The district court's decision to disregard Ms. Archer's well-pleaded allegations in favor of extra-complaint materials without converting into a motion for summary judgment was fatally flawed. *Gen. Elec. Capital Corp.*, 128 F.3d at 1080.

The district court justified its consideration of the documents by citing the exception for concededly authentic documents "referred to in the plaintiff's complaint" that are "central to her claim." SPA12 n.10 (citing *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993)). But "this is a narrow exception aimed at cases interpreting, for example, a contract." *Levenstein v. Salafsky*, 164 F.3d 345, 347 (7th Cir. 1998). "What would not be cricket would be for the defendant to submit a document in support of his Rule 12(b)(6) motion that required discovery to authenticate or disambiguate . . . ."

Tierney v. Vahle, 304 F.3d 734, 739 (7th Cir. 2002). That occurred here, and the district court's reliance was improper as a matter of law in several respects.

Falsity. A document alleged to contain false information cannot, on its own, prove or disprove probable cause, *see Gardunio v. Town of Cicero*, 674 F. Supp. 2d 976, 985 (N.D. Ill. 2009) (finding that police records were not "concededly authentic" where complaint alleged that they reflected false and "manufactured" information), and Ms. Archer alleged that Appellees manipulated and omitted information in several documents. A16, 35–36, 43–48, ¶¶ 3, 103–05, 141–60. *Cf. Saunders v. Duke*, 766 F.3d 1262, 1270 (11th Cir. 2014) ("Where a civil rights plaintiff attaches a police report to his complaint and alleges that it is false, . . . the contents of the report cannot be considered as true for purposes of ruling on a motion to dismiss.").

Completeness. The extra-complaint materials were cherry-picked by the Appellees from a trove of millions of documents obtained in the course of the John Doe proceeding. Many of the materials that Defendants selected purport to incorporate hundreds of thousands (or possibly millions) of pages that were not offered to the Court and that Ms. Archer has never had the opportunity to review. Even at trial, Ms. Archer would have the right to compel submission of the omitted materials. *See* Fed. R. Evid. 106. Ms. Archer's rights cannot be lesser on the pleadings than they would be at trial.

Centrality. With the exception of the warrant for the search of Ms. Archer's home, the extra-complaint documents are not central to Ms. Archer's complaint. *See Wright v. Associated Ins. Cos. Inc.*, 29 F.3d 1244, 1248 (7th Cir. 1994) (document must be "referred to in the plaintiff's complaint" to be considered in motion to dismiss). Ms. Archer had never seen the other documents before this litigation, and the only reference to them in her amended complaint was that they were false. In the case of the affidavit in support of the warrant for Ms. Archer's phone or email, the affidavit was not even referenced in the complaint, was filed with the district court only after Ms. Archer amended her complaint, and was one of four affidavits explicitly incorporated by reference along with "Applications, Affidavits, and other papers" filed at any time in the John Doe proceeding. And these materials can hardly be central if, as Ms. Archer now alleges, the John Doe judge did not even review them in connection with the warrant executed on her.

Improper Judicial Notice. The district court's alternative finding that it could take judicial notice of the extra-complaint materials because they are "court records" is likewise incorrect. SPA12 n.10. Judicial notice is appropriate only for documents that are "part of the public record." *Scherr v. Marriott Int'l, Inc.*, 703 F.3d 1069, 1073 (7th Cir. 2013); *see also United States v. Neal*, 611 F.3d 399, 402 (7th Cir. 2010) ("This is not a subject on which a judge may take

judicial notice. The facts are adjudicatory, not legislative, and *don't appear to be general public knowledge*.") (emphasis added). Here, the documents Appellees appended to their motions are not part of the public record because they were and remain under seal. *See Two Unnamed Petitioners v. Peterson*, 866 N.W.2d at 180–83. Moreover, the court below erred by taking notice of these materials for the truth of the matters asserted. *Gen. Elec. Capital Corp.*, 128 F.3d at 1082 n.6; *Design Basics LLC v. Campbellsport Bldg. Supply Inc.*, 99 F. Supp. 3d 899, 918 (E.D. Wis. 2015).

Even if the district court were entitled to take some or all of these extra-complaint materials into account, the district court should have accepted Ms. Archer's "point of view" as to all allegations that challenge the factual content, statements, and allegations in these documents. *Hecker v. Deere & Co.*, 556 F.3d 575, 582 (7th Cir. 2009). Applying this standard, Ms. Archer's amended complaint easily alleges a lack of probable cause for investigating Ms. Archer for the two alleged crimes for which the Appellees putatively investigated her, the 2009 RFP and the 2010 RFP.

2009 RFP. For the 2009 housekeeping RFP, Appellees purportedly investigated Ms. Archer for violating the Wisconsin law that prohibits state employees from exercising "a discretionary power in a manner inconsistent with the duties of" his or her office "and with intent to obtain a dishonest

advantage for the officer or employee or another." Wis. Stat. § 946.12(3). But Appellees had no reason to believe that Ms. Archer took any action "inconsistent with the duties" of her office, much less that she intended any "dishonest advantage." The materials on which Appellees base their defense only indicate that Ms. Archer sent emails to other County officials, and they also fabricate Ms. Archer's involvement by falsely stating that Ms. Archer was aware of the alleged involvement of non-County employees in publicly disclosing information about an RFP bidder through a "forwarded" email. A429, ¶ 30(b). At the very least, this raises factual disputes on which discovery is appropriate.

2010 RFP. As to the 2010 RFP, the Appellees actively hid from the John Doe judge the that fact that Ms. Archer actively opposed awarding the contract to the bidder supposedly favored by the Walker administration by omitting this information and the underlying documentation from the affidavit offered in support of the warrant for the search of her home. Ms. Archer's active opposition to the supposedly favored bidder defeats any claim to probable cause that Ms. Archer intended any dishonest advantage: she could not have intended to obtain a dishonest advantage for the supposedly favored bidder by actively attempting to thwart any advantage flowing to that bidder. Failure of probable cause as to *mens rea* defeats probable cause altogether. *See, e.g.*, *Juriss*

v. McGowan, 957 F.2d 345, 349–51 (7th Cir. 1992); *Rogers v. Stem*, 590 F. App'x 201, 206, 207–08 (4th Cir. 2014).

Aiding and Abetting. The district court also improperly determined that there was probable cause to suspect Ms. Archer of aiding and abetting crimes by others. This fails because "[a] person aids and abets in the commission of a crime when he or she: (1) undertakes conduct (either verbal or overt action) which as a matter of objective fact aids another person in the execution of a crime; and (2) consciously desires or intends that the conduct will yield such assistance." *State v. Simplot*, 509 N.W.2d 338, 345 (Wis. Ct. App. 1993). As to the 2009 RFP, Defendants have no reasonable basis to believe that Ms. Archer was aware of the acts that they claim were improper, and as to the 2010 RFP, Defendants knew (and hid from the John Doe judge) that she took efforts diametrically opposed to the supposedly improper actions and intended the very opposite of "assistance."

Unrelated Crimes. The district court also incorrectly found that there was probable cause to investigate Ms. Archer because the Appellees had probable cause to investigate the missing charitable funds. *See* SPA33. But Ms. Archer had nothing to do with the missing charitable funds, and Appellees do not so much as suggest otherwise. *See* A115–16, ¶ 108. Likewise, the district court's belief that Appellees received "information" "about preferential

treatment in the county bidding process" by individuals other than Ms. Archer is not license to investigate Ms. Archer without probable cause. SPA33; A45, ¶¶ 146–47.

B. Ms. Archer's Retaliatory Arrest Claim Was Also Dismissed Incorrectly

Count IV, for retaliatory arrest, turns on many of the same First Amendment retaliation factors that govern Count I. *See Morfin v. City of E. Chicago*, 349 F.3d 989, 1005 (7th. 2003). It was established by, at latest, 2003 that retaliatory arrest without probable cause violates the First Amendment, *id.* at 1006 (sending claim to jury), and this right is particularized under *Reichle v. Howards*, 132 S. Ct. 2088, 2094 (2012). It should therefore proceed for the reasons stated above.

C. Ms. Archer's Conspiracy Claim Should Be Reinstated

The district court dismissed Ms. Archer's conspiracy claims because it dismissed all the substantive constitutional violations. SPA35. But as discussed above, Ms. Archer has adequately alleged multiple substantive constitutional violations. Therefore, her conspiracy claim is well-pleaded.

II. Ms. Archer Adequately Pleaded That Appellees Violated Her Clearly Established Fourth Amendment Rights

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

seizures"; it prohibits warrants issued without probable cause; and it requires that warrants "particularly describe[e] the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. In Count II of her amended complaint, Ms. Archer pleaded sufficiently that Defendants violated her Fourth Amendment rights in five ways: (1) by searching her home and seizing her person based on a warrant they knew was not issued by a neutral and detached magistrate; (2) by searching Ms. Archer's home and seizing her person based on a warrant they procured through deceit; (3) by searching her home and seizing her person based on a warrant that any reasonable law-enforcement officer would know was not particularized; and (4) by ordering execution of the warrant in an overbroad and unreasonable manner. A56, ¶¶ 199–205. Because motions to resolve a case on the pleadings do not "permit piecemeal dismissals of *parts* of claims," *BBL, Inc.*, 809 F.3d at 325, a finding in Ms. Archer's favor on any of these theories requires reversal of the district court's decision dismissing Count II.

A. The John Doe Judge Was Not a Neutral and Detached Magistrate

Appellees violated Ms. Archer's rights by searching her home and seizing her person based on a warrant they knew was not issued by a neutral and detached magistrate, but instead was either rubber-stamped by the John Doe judge or never signed by him at all. *United States v. Leon*, 468 U.S. 897, 914

(1984). The district court's conclusion that "at worst, [Ms. Archer's] allegations . . . support the inference that [the John Doe judge's] review of the warrants was not thorough" is judicial wagon-circling at its worst. SPA23. The John Doe judge swore under penalty of perjury that (1) he was working on another assignment that day, (2) he did not work free of charge, and (3) he did not work on the John Doe investigation. The affidavits are lengthy and incorporate hundreds of thousands of pages by reference, so reviewing them would have taken days. For this reason alone, the district court's judgment as to Counts II and IV, alleging Fourth Amendment violations, should be reversed.

B. The Appellees Lacked Probable Cause To Search Ms. Archer's Home

Setting aside the fact that the John Doe judge never reviewed the home-search warrant, Appellees violated Ms. Archer's rights by searching her home and seizing her person based on a warrant that they procured through deceit. A45–48, ¶¶ 146–60. It has been "firmly established in the criminal context since the Supreme Court decided *Franks v. Delaware*, 438 U.S. 154 (1978)," that an official cannot rely on a warrant if his own misleading statements were the basis for procuring it. *Betker v. Gomez*, 692 F.3d 854, 864 (7th Cir. 2012) (denying qualified immunity); *see also Juriss*, 957 F.2d at 350–52 (same). It was

therefore improper to dismiss Ms. Archer's complaint on the ground that Appellees had probable cause to search her house.

C. The Warrant for the Search of Ms. Archer's Home Was Not Particularized

Appellees also violated Ms. Archer's Fourth Amendment rights by searching her home and seizing her person based on a warrant that any reasonable officer would know was not particularized. The Fourth Amendment requires that a warrant "particularly describ[e] the . . . things to be seized." In the case of crimes of "exceptional scope," *see United States v. Spilotro*, 800 F.2d 959, 965 (9th Cir. 1986) (Kennedy, J.), simply referring to the criminal statute on which the warrant putatively rests is insufficient to establish particularity, *see, e.g.*, *United States v. Leary*, 846 F.2d 592, 601 (10th Cir. 1988); *United States v. Roche*, 614 F.2d 6, 7 (1st Cir. 1980); *United States v. Cardwell*, 680 F.2d 75, 77 (9th Cir. 1982); *Rickert v. Sweeney*, 813 F.2d 907, 909 (8th Cir. 1987); *In re Application of Lafayette Academy*, 610 F.2d 1, 3 (1st Cir. 1979). Because courts have excluded evidence on that basis, *see, e.g.*, *Spilotro*, 800 F.2d at 968, qualified immunity is not available, *Malley v. Briggs*, 475 U.S. 335, 344 (1986); *Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004). This Court recognized the principle, at latest, in *Platteville Area Apartment Ass'n v. City of Platteville*, 179 F.3d 574, 580 (7th Cir. 1999).

There is no question that the breadth of the Wisconsin Misconduct in Public Office statute is "exceptional." It criminalizes violations of public duties, Wis. Stat. § 946.12, derived from "an assortment of sources," such as statutes, rules, guidelines, handbooks, custom, usage, and "perhaps other sources." *State v. Jensen*, 681 N.W.2d 230, 238 (Wis. Ct. App. 2004) (quotation marks omitted). In fact, the statute is sufficiently broad that the Wisconsin Supreme Court split evenly as to whether it is unconstitutional as void for vagueness. *See State v. Chvala*, 693 N.W.2d 747, 748 (Wis. 2005). The other statutes cited are equally broad. *See* Wis. Stat. §§ 19.58, 19.59, 939.05, 939.30.

The warrant for the search of Ms. Archer's home is not limited by the two topics described (the 2009 and 2010 RFPs) because these descriptions appear subsequent to the language "*including* the following" and are thus illustrative, not exhaustive. A402 (emphasis added). In considering whether a warrant with a laundry list of exemplars is particularized, courts consider whether the search conducted pursuant to the warrant was "restricted to the items on the list." *In re Grand Jury Proceedings*, 716 F.2d 493, 498 (8th Cir. 1983); *United States v. Bridges*, 344 F.3d 1010, 1017–18 (9th Cir. 2003); *United States v. George*, 975 F.2d 72, 75–76, 78 (2d Cir. 1992); *United States v. Washington*, 797 F.2d 1461, 1473 (9th Cir. 1986); *VonderAhe v. Howland*, 508

F.2d 364, 369 (9th Cir. 1974).[7] In the case of the raid of Ms. Archer's home, the executing law enforcement officers did not limit their search to items related to the 2009 and 2010 RFPs, instead ransacking her home and seizing *all* Ms. Archer's emails going back to 2006, *when she was still working in Green Bay*. A44, ¶ 143; *see also United States v. Reed*, 726 F.2d 339, 342 (7th Cir. 1984) ("warrants specifying seizure of business records evidencing a crime have been held overbroad when the particular records were not readily identifiable and police in fact seized all records"); *compare United States v. Abrams*, 615 F.2d 541, 543 (1st Cir. 1980) ("It seems clear that the executing officers could not or made no attempt to distinguish bona fide records from fraudulent ones so they seized all of them in order that a detailed examination could be made later. This is exactly the kind of investigatory dragnet that the fourth amendment was designed to prevent.").

In fact, the Appellees cannot agree to this day about what topics were subject to search: the Investigator-Appellees claim that the 2009 RFP was not part of the search, A140, ¶ 156, while the Prosecutor-Appellees argue that the 2009 RFP was part of the search, Record, Dkt. No. 21 at 18–19. There is no

[7] Warrants drafted as the one here are fundamentally different from the warrant in *Andresen v. Maryland*, 427 U.S. 463, 480 (1976), which was limited in scope to the particularized named crimes despite a catch-all phrase. *United States v. Brown*, 832 F.2d 991, 996 (7th Cir. 1987).

way that a warrant is valid or particularized where the law-enforcement officers involved in its procurement and execution cannot agree on its subject or scope.

The district court tacitly conceded that the warrant did not limit the search by focusing on the affidavit that Appellees claim they offered in support of the warrant. *See* SPA19. But the warrant affidavit could not limit the search in this case. The affidavit was not incorporated by reference into the warrant, and an affidavit that is part of a warrant application does not limit the scope of the warrant unless the warrant explicitly "incorporated the affidavit by reference."[8] *United States v. Stefonek*, 179 F.3d 1030, 1033 (7th Cir. 1999); *see also Groh*, 540 U.S. at 557–58 ("The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents.") (denying qualified immunity). Even if an attached affidavit could suffice in some cases, *see United States v. Jones*, 54 F.3d 1285, 1291 (7th Cir. 1995) (suggesting that an affidavit may be "attached to the warrant or incorporated into it"), *but see Groh*, 540 U.S. at 558 (suggesting that an affidavit must use "appropriate words of incorporation, *and* . . . accompan[y] the warrant") (emphasis added), *see also United States v. Pratt*, 438 F.3d 1264, 1269 n.8 (11th Cir. 2006) ("Search

[8] The district court believed that the affidavit was incorporated into the warrant, but the warrant represented only that the affidavits was "attached," which does not amount to "appropriate words of incorporation." *Groh*, 540 U.S. at 558.

warrants can incorporate by reference the words of supporting documents if the documents are attached to the warrant."), the statement on the warrant that the affidavit was attached is false. The affidavit was not attached. Instead, Appellees hid the affidavit from Ms. Archer due to the ostensibly secret nature of the investigation, and carried out their search free from any purported limitation that the affidavit might have provided.

D. The Scope of the Search of Ms. Archer's Home Was Unlimited

The scope of the search was unreasonable. The investigative team, led by Mr. Weiss, A37–39, ¶¶ 112, 120, (1) intentionally searched areas where they knew they would not find responsive evidence, A39–40, ¶¶ 120, 125, and (2) obtained documents from well outside the time period of alleged wronging, A44, ¶ 143. Even if the Court finds that there were sufficient limitations on the face of the warrant, Appellees' "flagrant disregard" for such limitations rendered it a general warrant. *Hessel v. O'Hearn*, 977 F.2d 299, 302 (7th Cir. 1992); *United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978); *United States v. Medlin*, 798 F.2d 407, 411 (10th Cir. 1986); *see also United States v. Matias*, 836 F.2d 744, 747–48 (2d Cir. 1988) (collecting cases). In addition, the investigative team retained possession of non-responsive documents, did not return them, and, instead, caused them to be released them to the public. A44, ¶ 143. Law-enforcement officials are not permitted to retain indefinitely

materials that are not responsive to a warrant. *See Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976); *United States v. Tamura*, 694 F.2d 591, 595–97 (9th Cir. 1982); *United States v. Metter*, 860 F. Supp. 2d 205, 215–16 (E.D.N.Y. 2012); *United States v. Debbi*, 244 F. Supp. 2d 235, 237–38 (S.D.N.Y. 2003).

E. The District Court's Decision Dismissing the False Arrest Claim Should Be Reversed

Fourth Amendment protections apply when a person is "seized," which occurs when a state actor uses physical force or a show of authority and a private citizen submits to the show of authority. *Acevedo v. Canterbury*, 457 F.3d 721, 724 (7th Cir. 2006). While *Michigan v. Summers*, 452 U.S. 692, 703 (1981), validates only a detention during a search "authorized by a *valid* warrant" (emphasis added), it is "clearly established that temporarily seizing a person while a search is conducted is justified only when the search itself is constitutional." *Poolaw v. Marcantel*, 565 F.3d 721, 735 n.14 (10th Cir. 2009). The *Summers* exception does not apply where the warrant is invalid, which is the case here. *See Summers*, 452 U.S. at 703 & n.18; *Poolaw*, 565 F.3d at 735 n.14; *Florida v. Royer*, 460 U.S. 491, 499 (1983); *see also Malley*, 475 U.S. at 344–46; *Harman v. Pollock*, 446 F.3d 1069, 1086 (10th Cir. 2006).

III. Prosecutorial Immunity Does Not Apply

A "prosecutor is not absolutely immune for acts that 'go beyond the strictly prosecutorial to include investigation.'" *Bianchi v. McQueen*, 818 F.3d 309, 318 (7th Cir. 2016) (quoting *Fields v. Wharrie*, 740 F.3d 1107, 1111 (7th Cir. 2014)). The district court ignored this rule, dismissing Ms. Archer's First and Fourth Amendment claims against the Prosecutor-Appellees on prosecutorial-immunity grounds for three reasons. First, it held that "any actions associated with John Doe I" were prosecutorial rather than investigative. SPA28. Second, it held that any actions related to obtaining the warrant to search Ms. Archer's home were prosecutorial rather than investigative. Third, the district court absolved the Prosecutor-Appellees of any remaining investigative acts, including the search of Ms. Archer's home, because they were not physically present. Each of these holdings was erroneous.

A. The Prosecutors' Acts in John Doe I Were Investigative

To determine whether prosecutorial immunity applies, courts use a "functional approach," which considers what activities a prosecutor is performing, not her title. *Buckley*, 509 U.S. at 269. As this Court has explained, a "prosecutor only enjoys absolute immunity insofar as he is 'act[ing] within the scope of his prosecutorial duties.'" *Bianchi*, 818 F.3d at 318 (alteration in

original) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976)). And a prosecutor only performs his professional duties, such as "the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury[,] *after a decision to seek indictment has been made.*" *Buckley*, 509 U.S. at 273 (emphasis added).

Applying this functional test, *Buckley* held that defendant prosecutors were not entitled absolute immunity because, at the time they carried out the investigation at issue, they lacked "probable cause to arrest petitioner or to initiate judicial proceedings" and so were not carrying out "the prosecutor's function as an advocate." *Id.* at 273–74 (quotation marks omitted). Instead, "[t]heir mission at that time was entirely investigative in character," and "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.* at 274; *see also Bianchi*, 818 F.3d at 318; *Hartman*, 547 U.S. at 262 n.8; *Fields*, 740 F.3d at 1113–14.

Ms. Archer's complaint alleges that the Appellees were engaged in investigative activities, and thus never assumed the prosecutorial function. Appellees never determined that probable cause existed to commence prosecution against Ms. Archer.[9] A28–33, ¶¶ 69–94. Indeed, Appellees chose

[9] The district court erroneously suggested that probable cause to search or investigate is sufficient to trigger absolute immunity. SPA10. In fact, only probable cause "to have [some]one arrested" is sufficient, *Buckley* at 274, given

the John Doe proceeding as their primary vehicle of harassment *because they did not need probable cause to open or expand it*. They only needed "reason to believe that a crime has been committed" within the jurisdiction. Wis. Stat. § 968.26(2)(am).

The Appellees never decided to indict Ms. Archer, A16, 48, 51–52, ¶¶ 3, 158, 159, 176, nor could they have: the John Doe proceeding culminates, at most, in a "complaint" that "has no more standing than a complaint issued by a magistrate on the verified oath of any informant, and . . . is subsequently subject to be tested on the question of probable cause at a preliminary examination prior to the filing of an information." *State v. Doe*, 254 N.W.2d 210, 212 (Wis. 1977). The Prosecutor-Appellees could thus only perform an investigatory function when participating in the John Doe.

The district court skirted these problems by redefining the entire John Doe procedure as a "judicial proceeding" in which prosecutors have absolute immunity for "any conduct." SPA28. This holding ignores not only the functional approach of *Buckley* and its progeny but also Wisconsin law interpreting the state's John Doe statute. *See Heidelberg v. Ill. Prisoner Review Bd.*, 163 F.3d 1025, 1027 (7th Cir. 1998) (a federal court is "bound to follow a

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that the "issuance of an arrest warrant is an act of legal process that signals the beginning of a prosecution." *Snodderly v. R.U.F.F. Drug Enforcement Task Force*, 239 F.3d 892, 899 (7th Cir. 2001). The prosecutors never sought to have Ms. Archer arrested for the purpose of bringing charges.

state's highest court's interpretation of its own state law"). Under Wisconsin law, "a John Doe proceeding is intended as *an investigatory tool* used to ascertain whether a crime has been committed and if so, by whom."[10] *State ex rel. Reimann*, 571 N.W.2d at 390 (emphasis added); *see also In re Doe*, 766 N.W.2d 542, 546 (Wis. 2009) ("John Doe proceedings . . . . *are an investigative tool*.") (emphasis added); *State v. Libecki*, 830 N.W.2d 271, 272 n.1 (Wis. Ct. App. 2013) ("A John Doe proceeding is *an investigatory procedure* . . . .") (emphasis added).

Even if the John Doe proceeding were akin to a grand jury (which leads to an actual indictment, not the complaint to be tested at a preliminary hearing that results from a John Doe proceeding), *Buckley* denied prosecutorial immunity to prosecutors for their actions taken before a grand jury because "its immediate purpose was to conduct a more thorough investigation of the crime—not to return an indictment against a suspect whom there was already probable cause to arrest." 509 U.S. at 275; *see also KRL v. Moore*, 384 F.3d 1105, 1113–14 (9th Cir. 2004); *Hill v. City of New York*, 45 F.3d 653, 662–63 (2d

[10] Elsewhere in the decision, the court below repeatedly and correctly described the John Doe proceeding as an "investigation." *E.g.*, SPA1 ("The investigations in question were John Doe investigations."); SPA2 ("[A] John Doe's principal advantage is as an investigative tool."); *id.* at 5 ("GAB voted to join the investigation."); SPA9 ("[T]he Wisconsin supreme court shut the investigation down.").

Cir. 1995) (fact-specific nature of inquiry precluded dismissal on pleadings). *Buckley* thus squarely refutes the district court's holding that all actions taken in connection with a John Doe proceeding are immune, regardless of whether they are investigative or prosecutorial.

B. The Prosecutors Are Not Immune for Their Role in Obtaining Warrants

The district court held in the alternative that the Prosecutor-Appellees have absolute immunity "to the extent that the plaintiff's allegations involve prosecutors' representations to the John Doe judge to obtain search warrants." SPA13. This holding rests on a misreading of the amended complaint, which results in a misapplication of the law. Ms. Archer did not allege that the Prosecutor-Appellees made any representations to the John Doe judge to obtain search warrants for her office or house. To the contrary, she alleged that the Investigator-Appellees were the ones who prepared and submitted the affidavits for the warrants, and the Prosecutor-Appellees sanctioned and advised the process. A35, 38, ¶¶ 103–04, 113–15.

That distinction is crucial because, under *Burns v. Reed*, 500 U.S. 478 (1991), absolute immunity does not apply "to the prosecutorial function of giving legal advice to the police." *Id.* at 496. A prosecutor only receives "absolute immunity for [his] actions in a probable-cause hearing," not actions

taken outside of the hearing. *Id.* at 490, 496. Because giving legal advice to the investigators is precisely what Ms. Archer alleges the Prosecutor-Appellees did, the Prosecutor-Appellees are not entitled to absolute immunity under *Burns*.

C. Prosecutors Can Be Liable Under Section 1983 for the Actions of Their Subordinates

The district court also found that the Prosecutor-Appellees cannot be liable for "the execution of the warrant" because prosecutors "may be held liable only for personal conduct." SPA13–14. That is not the law. State actors can be held liable under Section 1983 if they "caused or participated in an alleged constitutional deprivation." *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983). This occurs where "the conduct causing the constitutional deprivation occurs at [the defendant's] direction or with [his] knowledge and consent." *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995) (second alteration in original) (quotation marks omitted). "That is, he must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye." *Id.* (quotation marks omitted); *see also Pembaur v. City of Cincinnati*, 475 U.S. 469, 479–80 (1986); *T.E. v. Grindle*, 599 F.3d 583, 588–89 (7th Cir. 2010).

Here, Ms. Archer alleged that Mr. Chisholm not only knew of but spearheaded the conspiracy to target Walker and his associates, including Ms. Archer. A15–16, ¶ 2. Mr. Chisholm informed members of the District

Attorney's office that it was his "duty" to "stop Walker," A26, ¶¶ 57–60, and encouraged his subordinates to target Walker and his associates, A26, ¶ 61. Mr. Chisholm further promoted the other two Prosecutor-Appellees, Mr. Landgraf and Mr. Robles, for that purpose, A22, ¶ 37. The Prosecutor-Appellees also helped develop the pretextual legal theories to target Ms. Archer and helped orchestrate the raid. A38, ¶ 115. Under controlling law, a prosecutor can be held liable for all these actions. Otherwise, a high-ranking law-enforcement officer could direct a subordinate to engage in blatantly unconstitutional conduct, such as physically attacking a political opponent under color of law, but escape liability because her hand was not on the baton.

IV. The Anti-Injunction Act Bars the District Court's Injunction of the *Three Unnamed Petitioners* Decision

The district court's order authorizing the Appellees to file copies of documents and electronic data seized in the John Doe II investigation with the clerk of the district court enjoins the Wisconsin Supreme Court's mandate that Appellees turn over "all originals and *all copies* of documents and electronic data" obtained during the investigation "within 30 days following the completion of proceedings in the U.S. Supreme Court on any petition for certiorari review." *Three Unnamed Petitioners*, 875 N.W.2d at 58, 60 (emphasis added). This injunction was unnecessary—the Wisconsin Supreme Court has

yet to deny a particularized request for use of the documents in this litigation—and violates the Anti-Injunction Act.

The Anti-Injunction Act embodies the principle that "lower federal courts possess no power whatever to sit in direct review of state court decisions." *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 296 (1970). It provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. As the Supreme Court has observed, those exceptions are "narrow," and "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." *Smith v. Bayer Corp.*, 564 U.S. 299, 306 (2011) (quotation marks and alterations omitted).

The district court's finding that its order does not implicate the Anti-Injunction Act because it authorizes the Appellees to violate the Wisconsin Supreme Court's mandate, rather than enjoining the mandate itself, is contrary to nearly a century of Supreme Court precedent. *See* SPA41 ("My resolution does not impair state court proceedings in any way. To the contrary, it leaves the state court order intact."). The Anti-Injunction Act applies not only to ongoing state proceedings, but also to "all steps taken or which may be taken

in the state court or by its officers from the institution to the close of the final process." *Hill v. Martin*, 296 U.S. 393, 403 (1935). "[I]t governs a privy to the state court proceeding…as well as the parties of record." *Id.* As such, a federal court cannot evade the Anti-Injunction Act "by addressing the order to the parties or prohibiting utilization of the results of a completed state proceeding." *Atl. Coast Line*, 398 U.S. at 287; *Okla. Packing Co. v. Okla. Gas & Elec. Co.*, 309 U.S. 4, 9 (1940) ("That the injunction was a restraint of the parties and was not formally directed against the state court itself is immaterial.").

Likewise, the district court's finding that the injunction was necessary to prevent "the state court [from] divest[ing] the defendants of evidence that may well be relevant to this litigation" is meritless for three reasons. SPA41. First, the injunction was unnecessary because the documents do not need to be submitted to the Wisconsin Supreme Court until the completion of proceedings in the United States Supreme Court on any petition for certiorari review, which will not occur until this fall at the earliest. At that point, if the district court still believes an injunction is necessary, the district court will have thirty days to issue it before Appellees must relinquish the documents. Until then, Appellees retain possession of the documents, making any injunction of the Wisconsin Supreme Court's mandate premature.

Second, there is no evidence that the Wisconsin Supreme Court will permanently divest the district court of evidence. To the contrary, the Wisconsin Supreme Court has stated that the documents "will not be destroyed, but will be stored by the clerk of this court in a sealed and secure manner." *Three Unnamed Petitioners*, 875 N.W.2d at 61. The stored documents will then "be available for use in related civil proceedings," including this one, "if there is a request and a determination that such use is proper under the circumstances." *Id*. The district court's presumption that the Wisconsin Supreme Court would deny a proper request violates the bedrock principle that federal courts must presume that state courts will perform their duties properly. *See, e.g.*, *Allen v. McCurry*, 449 U.S. 90, 95–96 (1980).

Third, the injunction is unnecessary because Appellees will still need permission from the Wisconsin Supreme Court to access the documents, as even the district court admits. SPA40 n.18 ("[T]he plaintiff may well be correct that defendants will have to seek permission to use the materials from the state court."). Physical custody is not the touchstone for whether secret state court materials can be used in federal litigation. Instead, this Court has held that the "state supervisory court" in charge of a grand jury proceeding must have the opportunity to pass on discovery requests for grand jury materials before a federal court is permitted to order their production in discovery in civil

litigation. *See, e.g.*, *Lucas v. Turner*, 725 F.2d 1095, 1099 (7th Cir. 1984) ("[W]hen state grand jury proceedings are subject to disclosure, comity dictates that the federal courts defer action on any disclosure requests until the party seeking disclosure shows that the state supervisory court has considered his request and has ruled on the continuing need for secrecy.") (quotation marks omitted); *Socialist Workers Party v. Grubisic*, 619 F.2d 641, 644 (7th Cir. 1980) (same). Only after "the party seeking disclosure shows that the state supervisory court has considered his request and has ruled on the continuing need for secrecy" will a federal court consider ordering production, *Lucas*, 725 F.2d at 1009 (quotation marks omitted), and, even then, a showing of "particularized need" is required, *Hernly v. United States*, 832 F.2d 980, 985 (7th Cir. 1987).

Appellees have not attempted to make a request showing particularized need, nor has the Wisconsin Supreme Court adjudicated such a request.[11]

[11] While it is true that Appellees made motions to intervene in the Wisconsin Supreme Court proceedings in the hope that they could retain possession of the millions of documents they seized in the John Doe II proceeding, the Appellees in these motions made no attempt to show particularized need. *See* Record, Dkt. No. 53-5 (December 2, 2015 order denying the Investigator-Appellees' motion to intervene); Record, Dkt. No. 59-1 (January 12, 2016 order denying the Prosecutor-Appellees' motion to intervene). Rather, they simply sought to retain all of the documents, regardless of whether those documents had any relevance to this matter. In fact, so weak was the showing of need in these motions that the district court stated "[i]n my view, the materials at issue are unlikely to be relevant to the present case." SPA37 n.17.

Until those two events occur, Appellees have not made a showing that an injunction is necessary. Enjoining the Wisconsin Supreme Court before then only creates in needless friction between federal and state courts—the very outcome that the Anti-Injunction Act and the principles of comity aim to prevent.

Conclusion

For the foregoing reasons, the decision below should be reversed.

August 2, 2016

Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,831 words, excluding parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) and Circuit Rule 32(b) because it has been prepared in a 14-point proportionally spaced font.

Pursuant to Circuit Rule 30(d), the undersigned counsel for Appellant certifies that the Required Appendix of Appellant contains all of the materials required by Circuit Rule 30(a) and (b).

Dated: August 2, 2016

/s/ David B. Rivkin, Jr.
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served on August 2, 2016, upon the following counsel of record in this appeal by the U.S. Appeals Court's ECF system.

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