No. 15-1416

IN THE
Supreme Court of the United States

JOHN T. CHISHOLM, ET AL., *Petitioners*,

v.

TWO UNNAMED PETITIONERS, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin

REPLY BRIEF FOR PETITIONERS

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I. This Court Must Address Whether the First Amendment Permits Regulation of "Disguised Contributions," Regardless of Splits Among Lower Courts.

This Petition presents a fundamentally important constitutional question in campaign finance regulation involving the lawful regulation of "disguised contributions." This has evaded review for forty-plus years. Against a background of Court decisions over the past ten years upholding independent third party issue speech, this Petition allows consideration of mandated public disclosure of funding for advertisements directed by (*i.e.*, coordinated with) a candidate but paid for by a third party issue organization. Having ramifications for the conduct of candidates and regulators alike, this issue is important and timely, regardless of splits among lower courts.

II. This Petition Presents an Article III Case and Controversy.

Respondents wrongly contend that Wisconsin Act 117 (published in December 2015) moots this Petition. [2:11.][1]

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[1] References to Respondents' briefs will refer, in brackets, to the Respondent number followed by a colon and the page, *e.g.*, [2:11.]

A case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 133 S.Ct. 721, 726 (2013). That occurs only when it is impossible for a court to grant any effectual relief whatsoever to the prevailing party. *Knox v. Service Employees*, 132 S.Ct. 2277, 2287 (2012). "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Ellis v. Railway Clerks*, 466 U.S. 435, 442 (1984).

Multiple "live" issues exist.

First, several Respondents still face criminal liability because Wisconsin Act 117 did not "'specially and expressly' abrogate the offense under the prior statute." *Truesdale v. State*, 60 Wis.2d 481, 489, 210 N.W.2d 726, 730 (1973). There is no implicit abrogation as Respondents contend. Explicit abrogation is required:

> The repeal of a statute hereafter shall not remit, defeat or impair any… criminal liability for offenses committed …under such statute before the repeal thereof, whether or not in course of prosecution…at the time of such repeal; but all such offenses, …liability wherefore shall have been incurred before the time of such repeal thereof, *shall be preserved and remain in force notwithstanding such repeal, unless*

> *specially and expressly remitted, abrogated or done away with by the repealing statute.*

Wis. Stat. § 990.04 (emphasis added).

Respondent 2 misrepresents *Truesdale*, claiming it shows "Wisconsin follows 'the old common law rule that…an amendment worked a repeal of the prior offense or penalty and precluded conviction under the old statute.'" [2:11-12.] While *Truesdale* references common law, the decision makes it plain that section 990.04 and its interpretive history modify common law.

Truesdale discusses at length the historic interpretations of section 990.04, unchanged since 1878. The rule emerging is this:

> [F]or an amendment to constitute a retroactive repeal of a prior statute, the repealing statute must "specially and expressly" abrogate the offense under the prior statute.

Id. at 489, 210 N.W.2d at 730 (1973).

Truesdale itself was based on *Halbach v. State*, 200 Wis. 145, 227 N.W. 306 (1929). In *Halbach*, the defendant was convicted of possessing "moonshine." Afterward, the provisions for which the defendant was convicted were repealed. *Id.* at 149, 227 N.W. at 307. Relying on section 990.04, Halbach's conviction was affirmed with this language:

> It would be difficult to use language which would more clearly express the legislative intent that causes of action, whether civil or criminal, should not be affected by the subsequent repeal of the statute creating the cause of action as distinguished from the right of action, unless rights accrued under the repeal statute are expressly abrogated by the repealing statute.

Id. at 150, 227 N.W. at 308.

Act 117 contains no language specially or expressly abrogating the prior statute. Accordingly, Respondents who are subjects of the investigation may yet be prosecuted.

Second, there is a "live" interest in determining whether Petitioners will be able to resume examination of seized evidence. Examination was halted on the premise that the seizure violated Respondents' First Amendment rights, requiring prosecutors to divest themselves of all evidence. *Two Petitioners*, 2015 WI 85, ¶¶28-38. If the decision below is overturned, examination will resume. Changes to the John Doe statute (even if applicable to a proceeding commenced before revision) do not prohibit the examination of evidence lawfully obtained.

As to all Respondents, ending the John Doe proceedings does not end the investigation. Prosecutors may independently commence a criminal prosecution outside the John Doe

proceeding. *See State v. Cummings*, 199 Wis.2d 721, 744-45, 546 N.W.2d 406, 415 (1996) ("[W]e see no reason why a district attorney could not independently [i.e., without participation of the John Doe Judge] file a complaint based solely upon evidence obtained through a John Doe proceeding, even if it was the district attorney who initiated the John Doe.) Additionally, short of commencing a prosecution, a District Attorney has other tools besides the John Doe to continue the investigation.[2]

Moreover, new evidence discovered upon resumption of the investigation may lawfully be delivered to the District Attorneys of counties where any Respondent resides and may lawfully be used in a prosecution. *See State v. O'Connor*, 77 Wis.2d 261, 274, 252 N.W.2d 671, 676 (1977) ("If evidence adduced in the [Dane County] John Doe investigation together with information obtained by the authorities from other sources amounts to probable cause, we see no reason why a criminal action may not be initiated by means of a complaint filed with…any judge…having jurisdiction to act in [Milwaukee County].") Respondents 3 and 6 ignore this case law, refusing to recognize that their District Attorney may yet commence a future prosecution after examination of evidence gathered and to be gathered.

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[2] These include standard interviews, subpoenas issued under Wisconsin Statutes § 968.135, search warrants under § 968.12, and if needed, a Grand Jury under § 968.40.

III. Petitioners Have Standing.

Respondents do not claim Petitioners lack Article III standing. Rather they claim they lack standing under Wisconsin law. [2:19-21.] Of course, where the threat of prosecution after a resumed investigation looms, Respondents cannot credibly argue an absence of either (1) injury in fact, (2) causation, or (3) redressability. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103–04 (1998).

Respondents have already waived any claims that Petitioners lack standing under state law. After terminating the special prosecutor on reconsideration, the court below invited Petitioners to intervene so as "not...to interfere with the ability of the prosecution team to seek Supreme Court review." 2015 WI 103 at ¶16; App.341a. Petitioners' motion below to intervene was granted *without objection from any party*. Any Respondent could have objected; none did.

While Wisconsin Statutes section 165.25(1) empowers the attorney general to represent the State, it does not proscribe other prosecutors from defending the constitutionality of state statutes. Even in an Article III context, standing has been recognized for surrogates of a statutorily authorized prosecutor. *See United States* v. *Windsor,* 133 S. Ct. 2675 (2013) (after Department of Justice declined to defend Defense of Marriage Act, intervenor allowed to defend the Act in its place). In a state law

context, as Respondent 2 acknowledges, prosecutors may handle appellate matters with the consent of the Attorney General. Wis. Stat. § 978.05(5). The Attorney General's failure to object below is *de facto* consent to proceed before the state court and here.

Finally, Petitioner Chisholm has state law standing. First, Respondent 1's candidate (and subject of the investigation) resided in Milwaukee County at all relevant times. Second, after resumed evidence examination and further investigation, a subject may thereafter become a defendant.

IV. The Petition Presents a Federal Question.

Predicated on *Buckley v. Valeo*, 424 U.S. 1 (1976), for over fifteen years Wisconsin case law required a candidate's committee to report, as contributions, money spent by third parties for the candidate's benefit at the candidate's direction, "whether or not [for] express advocacy." *WCVP v. SEB*, 231 Wis.2d 670, 679, 605 N.W.2d 654, 659 (1999) *overruled by Two Petitioners*, 2015 WI 85, ¶68 n. 23. Candidates were obligated to report, as "in-kind" contributions, expenditures by others – including expenditures for issue advocacy – made in cooperation with that third party. *WCVP, id.* at 680-81, 605 N.W.2d at 659. Such expenditures were made for "political purposes," undertaken to influence a candidate's election. *Id.* *WCVP* remained undisturbed during the recall elections and when the John Doe search warrants and subpoenas were issued.

In 2015, given their view of First Amendment law ("co-extensive" with the requirements of the Wisconsin Constitution[3]), the Wisconsin Supreme Court determined "political purposes" in section 11.01(16) was unconstitutionally "overbroad and vague." This required the court to limit the statute to "express advocacy." *Two Petitioners,* 2015 WI 85 at ¶¶10, 67, and 75. The analysis and conclusion relied heavily on First Amendment jurisprudence, including misplaced[4] reliance on *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014). *See Two Petitioners,* 2015 WI 85 at ¶¶10, 50-51, 54, 58, 63, 65 and 67.

Respondents unreasonably rely on *Michigan v. Long*, 463 U.S. 1032 (1983) – a case supporting federal jurisdiction here. In *Long*, "[t]he [Michigan] court…referred twice to the state constitution in its opinion, but otherwise relied exclusively on federal law." *Id.* at 1037. Finding jurisdiction, the Court wrote, "Apart from its two citations to the state constitution, the court below relied *exclusively* on its understanding of *Terry* and other federal cases." *Id.* at 1043 (emphasis in original). Similarly, the Wisconsin Supreme Court relied upon federal law. To the extent Wisconsin cases were cited, those cases in turn relied on U.S. Supreme Court precedent.

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[3] *Two Petitioners,* 2015 WI 85 at ¶10, n. 8.

[4] *Barland* involved truly independent expenditures and expressly extended only to "political speakers other than candidates." 751 F.3d 804, 834. See also App.568a-569a.

The decision below "rest[s] primarily on federal law, or...[is] interwoven with federal law [without any]…'plain statement' that [it] rests upon adequate and independent state ground." *See Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990) (citations omitted).

Claiming it is solely a matter of state law, Respondents isolate the *Schmitz v. Peterson* case and contend no federal question is presented. They further suggest Petitioners do not contest the mandate in that action. [1:19.] They are incorrect.

There can be no effective parsing of the original action and *Schmitz v. Peterson.* "For all practical purposes, the [state] court has merged the…writ case[] into the original action…." *Two Petitioners,* 2015 WI 85 at ¶141 (Prosser J., concurring).

The mandate, applicable as much to *Schmitz v. Peterson* as to any other part of the decision, goes further than merely affirming Judge Peterson's decision to quash subpoenas and return physical evidence. Predicated on the state court's distortion of First Amendment law, the mandate denies access to evidence that (Petitioners contend) was lawfully obtained pursuant to search warrants and subpoenas. *See Id.* at ¶76. Petitioners retain copies of all such evidence. Whether Petitioners will be able to again examine that evidence is dependent on the outcome of this Petition. Noted above, the end of the John Doe does not equal the end of the investigation.

V. Prosecutors Preserved Arguments Under Section 11.06(4) in the Original Action.

Respondent 1 posits that Petitioners waived arguments under section 11.06(4) because they were not presented to the John Doe judge. [1:21.] This overlooks the fact that the arguments were made in the supreme court *original* action, having been presented in the initial submission to that court in consolidated proceedings. Further, it ignores the "merger" of all proceedings. *Id.* at ¶141.

VI. The Facts Essential to Litigating this Case Have Been Fully Disclosed to Respondents.

Respondent 1 claims Petitioner's "factual background" is a "misstatement" under Supreme Court Rule 15.2, a consequence of lacking access to the record. [1:2]. It is true Respondents have not seen everything filed under seal. However, the state court held that "the special prosecutor's legal theory is unsupported in either reason or law." *Id.* at ¶11, 76 and 135. This reflected the Respondents challenge as, in effect, a motion to dismiss for failure to state a claim (*i.e.,* a valid legal theory). Viewed in this manner, the "record" of consequence is to be found in the prosecutors' factual allegations contained in the Statement of Facts in the original action before the state supreme court.[5]

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[5] *See* App.683a-744a.

Respondents have always contended – as a matter of law – Wisconsin cannot regulate issue advocacy expenditures made by third parties under a candidate's direction. They have largely ignored the facts, effectively claiming – even if all facts alleged in the prosecutors' briefs are true – no crime was possible under First Amendment jurisprudence. In this sense, they have "demurred" to the allegations against them.

Not unlike a motion to dismiss for failure to state a claim under Rule 12(b)(6), the Respondents have litigated (and the state court decided the case) on the basis of facts alleged in supreme court briefing, assuming them to be true (or ignoring them) for purposes of argument.[6] Obviously then, there are no allegations upon which the Petitioners rely that were not disclosed below. Just as a civil defendant may not complain that, on a motion to dismiss, he or she has not seen the actual documents forming the basis for the plaintiff's complaint, this litigation can and should proceed based on allegations within the four corners of the Petitioners' Statement of Facts made before the state supreme court. That Respondents have not seen everything in the sealed John Doe record is irrelevant.

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[6] Respondent 1 claims no opportunity to submit facts to lower courts. That is simply untrue; such opportunity existed below. See Wis. Stat. § 809.19(3)(a)2. No factual dispute was lodged.

VII. The Questions Presented Pose No Undue Procedural Complexity.

Respondents characterize Chapter 11 as "labyrinthian," yet the application of section 11.06(4) in this context is straight-forward. A candidate committee must report in-kind contributions (defined at GAB § 1.20(1)(e))[7] controlled by the candidate.

The facts on which the Petitioners rely are no secret to the Respondents. These operative facts have been cited and discussed in the supreme court briefing below. In many instances, actual documents were reprinted. App.683a-744a.

That this case may be publicly and effectively argued is demonstrated by the fact that the Respondents were able to file their responses here in public. Moreover, Petitioners struggle to identify any operative fact not already reported as a result of authorized and unauthorized disclosures. Milwaukee Journal Sentinel articles publish such previously secret facts. *See* App.689a.[8] These

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[7] Renumbered EL § 1.20(1)(e) effective June 2016.

[8] Milwaukee Journal-Sentinel, *Prosecutors' View of Recall Fundraising Roles*, [chart], http://media.jrn.com/images/WALKER20G1.jpg (last viewed August 22, 2016).

publicly available facts alone allow the parties to litigate this case effectively.

VIII. Respondents Cannot Taint the Objectivity of the State Court and Then Claim Petitioners Have No Right to a Fair Hearing There.

Respondents do not deny responsibility for unfair misinformation finding its way – without a hearing – into the state court opinion. Respondent 2 attempts to obfuscate the *Caperton* issue by sullying the Petitioners' conduct, relying heavily on information selectively leaked to the media.[9] Petitioners offer these observations.

First, that recusal was discussed in work-product e-mails should surprise no one. These work-product e-mails were surrendered by the GAB in a separate lawsuit brought by Respondent 2 – a lawsuit designed to stop the investigation. The release of such information would usually be a crime in Wisconsin,[10] but for a stipulated court order (entered without prosecutor participation) insulating the GAB from liability.

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[9] For example, the Wall Street Journal opinion piece cited repeatedly by Respondent 2 [2:31-33] reads, "Our liberal friends in Wisconsin…think someone is leaking e-mails…. We'll plead guilty to having sources…." *See More Wisconsin Emails*, Wall Street Journal, (September 16, 2015, 7:08 P.M.), http://www.wsj.com/articles/more-wisconsin-emails-1442444934.

[10] Wis. Stat. §§ 12.13(5) and 12.60(1)(bm).

Second, similarly situated judges were treated similarly below. The special prosecutor had no way of knowing if Judge Kloppenburg[11] (against whom some Respondents spent much money) would be assigned to hear his case. Nevertheless, in his February 2014 Supervisory Writ Petition (in the *exact* same manner Respondents 2, 6 and 7 chose to raise the ethics issue in their November 2013 Supervisory Writ Petition) the special prosecutor identified parties "to permit the court and its judicial officers to meet their obligations under SCR 60.04(4), Wis. Stat. § 757.19, and the Due Process Clause…." Before the supreme court, the special prosecutor – without moving for their recusal – alerted Justices Roggensack and Ziegler to funds spent by Respondents for their benefit. This is not materially different than identifying a party and expressly flagging the recusal issue for consideration by a court of appeals judge (who may or may not be assigned to hear a case). In comparison, only where more than money was involved did the special prosecutor move for recusal.[12]

Third, if the Court examines the e-mail about facts "instigating" recusal [2:30 at bottom], it will note that the named judges *included* Judge

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[11] Judge Kloppenburg participated in the court of appeals decision in the matter (not before this Court) challenging the appointment of the special prosecutor.

[12] The recusal motion relied on email already in the record. See App. 676a-682a.

Kloppenburg. This is the jurist who – Respondents would have the Court believe – Petitioners plotted to keep on the case. Moreover, Respondent 2's supporting quotation contradicts the suggestion of a clandestine meeting with Judge Kloppenburg. *Id.* at 33.

Fourth, while untimeliness under state law was urged below, neither justice found the motion to be untimely. The recusal motion was filed on February 17, 2015, sixty-three days after the supreme court's acceptance of the original action and related petitions on December 16, 2014. Briefing had not yet been completed. Wisconsin law requires a party to promptly bring a matter relating to recusal "before a decision has been rendered." *Storms v. Action Wisconsin Inc.*, 2008 WI 110, ¶30, 314 Wis.2d 510, 529, 754 N.W.2d 480, 490. Curiously, Respondents would have the prosecutors file motion papers *before* the state supreme court decided to accept the case. Nevertheless, at sixty-three days after acceptance and during briefing, the motion was prompt.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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