

No. 18-1558

In the
Supreme Court of the United States

MARSHALL SPIEGEL,
Petitioner,
v.

CORRINE McCLINTIC, *et al.,*
Respondents.

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

BRIEF IN OPPOSITION

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**PARTIES TO THE PROCEEDINGS
AND RULE 29.6 STATEMENT**

All parties to the proceedings are listed in the caption. None of the parties have a parent corporation.

**STATEMENT OF
RELATED PROCEEDINGS**

The proceedings in federal trial and appellate courts identified below are directly related to the above captioned case in this Court.

Marshall Spiegel v. Corrine McClintic and Village of Willmette, no. 16 C 9357 (N.D. Ill). The northern district of Illinois entered judgment regarding plaintiff's claims on November 7, 2017.

Marshall Spiegel v. Corrine McClintic and Village of Willmette, no. 18-1070 (7th Cir.) The Seventh Circuit entered judgment on February 14, 2019. Petitioner applied for rehearing and rehearing *en banc*, which was denied on March 19, 2019. A final judgment was issued on March 27, 2019.

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Introduction

Certiorari should not be granted in this case. This Petition is the illogical result of a long running legal campaign against Respondent Corinne McClintic (“Respondent”). Though the Petition seems to focus solely on the claims against Respondent’s co-defendant the Village of Wilmette (“the Village”), Respondent provides this response to make clear that this frivolous Petition should not be granted. Simply because there is an available avenue does not make taking that avenue a wise or reasoned choice.

Legal Standard

This Court, as authorized by Congress, has set forth its own guidelines for appeals. *See Clements v. Gonzales*, 496 F. Supp. 2d 70 (D.D.C. 2007). There is no appeal as a matter of right to the United States Supreme Court. *Durham v. United States*, 401 U.S. 481, 483 n.*, 91 S. Ct. 858, 28 L. Ed. 2d 200 (1971). Rather, decisions on petitions for writ of certiorari are entirely discretionary. *Id.* The Supreme Court rules provide the considerations taken in account by this Court on certiorari decisions:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court’s discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the

decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Sup. Ct. R. 10. Certiorari is granted only "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (citing *Layne & Bowler*

Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923)).

Argument

Certiorari should not be granted in this case. First, the decision that Petitioner seeks to have this Court review is not in conflict with any other decision of any of the other courts of appeals for the United States. Second, the federal appellate decision that Petitioner seeks review of did not involve any decision of a state court of last resort on any important federal question, and thus there is no conflicting decision. Finally, this matter does not implicate, in any way, an important question of federal law. Instead, the district court and the Seventh Circuit applied existing and consistent precedent to the facts of the case. This Petition, then, amounts to the Petitioner's assertion that the lower courts erred in their factual findings and application of properly stated rules of law. As Rule 10 indicates this type of petition is rarely granted, this Court should deny the Petition. Sup. Ct. R. 10.

I. This Case Does Not Involve a Circuit Split

The Petition fails to identify any split of authority among any of the federal appellate circuits that require this Court's intervention. The Petition appears to focus solely and exclusively on Respondent's co-defendant, the Village. For Respondent, the issues below were whether Petitioner had plead sufficient facts in his complaint to establish that Respondent, a private citizen, could be liable as a state actor under Section 1983 or for state common law intrusion upon seclusion. App. 6a–9a, 12a–13a. There can be no possibility of a

circuit split with respect to the state common law claim, as it is purely a matter of Illinois common law.

As for the law regarding conspiracy liability for private citizens under Section 1983, that body of case law is well-established and consistent. *See, e.g., Spear v. Town of West Hartford*, 954 F.2d 63, 68 (2d Cir. 1992) (“To state a claim against a private entity on a section 1983 conspiracy theory, the complaint must allege facts demonstrating that the private entity acted in concert with the state actor to commit an unconstitutional act.”); *Gregg v. Ham*, 678 F.3d 333, 339–40 (4th Cir. 2012) (noting that a private party is considered a state actor for purposes of Section 1983 if the deprivation is caused by the exercise of some right or privilege created by the State and the party charged with the deprivation is a person who may fairly be said to be a state actor, and if the defendant has acted together with or has obtained significant aid from state officials); *Brokaw v. Mercer County*, 235 F.3d 1000, 1016 (7th Cir. 2000) (“While a private citizen cannot ordinarily be held liable under Section 1983 because that statute requires action under color of state law, if a private citizen conspires with a state actor, then the private citizen is subject to Section 1983 liability.”); *Dixon v. City of Lawton, Okl.*, 898 F.2d 1443, 1448 (10th Cir. 1990) (noting that a Section 1983 conspiracy claim may arise when a private actor conspires with a state actor to deprive a person of a constitutional right under color of state law).

The Petition makes no mention whatsoever of his intrusion upon seclusion claim. Nor does the Petition devote any substantial argument to the conspiracy

liability claim under Section 1983 with respect to Respondent. Issues not raised in the petition for certiorari are considered only in the most exceptional circumstances. “One having obtained a writ of certiorari to review specified questions is not entitled here to obtain decision on any other issue.” *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 179, 58 S. Ct. 849, 851, 82 L. Ed. 1273 (1938). The petition for certiorari fixes the issues before the Court. *Irvine v. California*, 347 U.S. 128, 129–30, 74 S. Ct. 381, 381, 98 L. Ed. 561 (1954). The Petition does not seek this Court’s review of the dismissal of the claims against Respondent in any meaningful way.

II. This Case Does Not Involve A Decision of a State Court of Last Resort

While obvious, the point should be made that the procedural history of this case does not involve a decision by the Supreme Court of Illinois. Thus, the second factor considered by this Court in granting certiorari is absent.

III. No Important Issues of Federal Law are Implicated in this Case

The final enumerated Rule 10 factor, an important issue of federal law that is in need of settlement by this Court, is also not present. The Petition strains to make this anodyne case into more than it really is. While the Petition recites concerns about the First Amendment and governmental policing, these are contrived concerns. Federal law has a large body of well-developed case law regarding Section 1983, governmental action, and the First Amendment, as

discussed above. There is no need for this Court's guidance in a well-established area of law.

IV. The Petition for Certiorari is a Simple Assertion of Error in Application

The Petition is nothing more than an assertion that the Seventh Circuit and district court misapplied existing law to the allegations of the complaint. As Rule 10 indicates, this type of petition is rarely granted. Sup. Ct. R. 10. The Petition goes to great lengths to dress up this fundamental assertion with the trappings of First Amendment concerns and dozens of case cites. But these are nothing more than distractions. Seventh Circuit case law is crystal clear that video recording in public is protected by the First Amendment. The case law is also abundantly clear that First Amendment rights can be constrained under appropriate circumstances. Importantly for this case, disorderly conduct statutes in Illinois have been found constitutional time and again.

Thus, what this case amounts to is that Petitioner failed to sufficiently allege a constitutional violation or conspiracy related to his activities in the proceedings below. This was the finding of the district court, App. 30a, as affirmed by the Seventh Circuit. App. 14a. None of these legal issues are unique. While the First Amendment is extremely important, none of the facts of this case, nor any of the legal decisions, present any compelling issue for this Court to resolve. The case law involved here is settled and consistent.

V. The Petition Contains Misstatements of the Law and Facts

The Petition is replete with misstatements of law and fact. For example, Petitioner cites *Reher v. Vivo* for the proposition that videotaping other people in public, while potentially intrusive, is not illegal in Illinois. *Reher v. Vivo*, 656 F.3d 772, 776 (7th Cir. 2011). While *Reher* supports this proposition, Petitioner strategically leaves out a crucial modifier to this statement: “[b]ut videotaping other people, when accompanied by other suspicious circumstances, may constitute disorderly conduct.” *Reher*, 656 F.3d at 776. *Reher* then goes on to state that “[a]n arrest for disorderly conduct is justified when the defendant directly harasses or threatens other people.” *Id.* at 777. Videotaping other people in public is not illegal in Illinois. But, as already acknowledged by the lower courts in this matter along with the case law, videotaping accompanied by other suspicious circumstances can constitute disorderly conduct.

Petitioner also relies on inapposite cases. For example, he cites *Edmonson v. Leesville Concrete Co.* for the proposition that state action can arise from private use of state laws or procedures with the encouragement, approval, or assistance of state officials. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621–23 (1991). While *Edmonson* does stand for this proposition, it relies on *Lugar v. Edmonson Oil Co.* – a Supreme Court decision which “is limited to the particular context of prejudgment attachment.” *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 n.21 (1982) (“[W]e do not hold today that ‘a private party’s mere

invocation of state legal procedures constitutes joint participation or conspiracy with state law officials satisfying the § 1983 requirement of action under color of law. The holding today . . . is limited to the particular context of prejudgment attachment.”). *Edmonson* and *Lugar* involved prejudgment attachments; Petitioner’s case does not. As already noted by the Seventh Circuit in the lower opinion, it has not adopted Petitioner’s interpretation of the *Lugar* decision and continues to require an agreement or understanding among the state actor and the private actor in order to impose § 1983 municipal liability. *Brokaw*, 235 F.3d at 1016; *Tarkowski v. Robert Bartlett Realty Co.*, 644 F.2d 1204, 1206 (7th Cir. 1980).

The Petition also mischaracterizes the holdings of the district court and Seventh Circuit. For example, Petitioner asserts that the District Court imposed a higher pleading standard for this case. *See* Pet. Writ Cert. 3. The Petition conflates the pleading requirements for conspiracy with the requirements for alleging conspiracy liability for Section 1983 claims. The Seventh Circuit decision explained that a private citizen can be held liable under Section 1983 where there is evidence of a concerted effort between the private citizen and a state actor, the so-called “conspiracy theory” of Section 1983 liability. *See* App. 6a. The Seventh Circuit went on to recite the requirements for this conspiracy liability under their decision in *Fries v. Helsper*, 146 F.3d 452, 457 (7th Cir. 1998). This same analysis was conducted by the district court. *See* App. 27a–30a. Both lower courts here found the allegations insufficient.

The Petition, in an attempt to create a conflict where there is none, then seems to deliberately misconstrue these well-established requirements as a “heightened pleading standard.” It is nothing of the sort. These incidents of the Petitioner mischaracterizing case law are not limited to this Petition. As the Seventh Circuit observed below, “[Petitioner] also argues that an ‘agreement among all the conspirators is not a necessary element of a civil conspiracy.’” App. 7a (quoting *Lenard v. Argento*, 699 F.2d 874, 882 (7th Cir. 1983)). But he misquotes *Lenard*: the court actually stated that “[a]n *express* agreement” is not required. *Id.* (emphasis added).” App. 7a. The Petition’s contrived arguments rely on mischaracterizations of both the case law and the holdings of the lower courts. These arguments fail.

Conclusion

The Petition should be denied. First, the Petition bears none of the hallmarks that merit review by this Court. It almost completely ignores the claims plead against Respondent, mentions Respondent by name only in the background statement, and does not mention Respondent at all in the reasons for granting the Petition. Moreover, the Petition does not meet any of the three established factors that this Court typically looks to in deciding whether to grant a petition for writ of certiorari. The law applied by the lower courts in this case is well-established and consistent throughout the federal courts. There is no split of authority for any of the issues in this case. Second, this case does not involve a decision by the Illinois Supreme Court. Thus, the second Rule 10 factor is not implicated here.

Finally, there is no important issue of federal law present that requires this Court's guidance. Instead, this Petition is the type that is rarely granted: a simple assertion by the Petitioner that the lower courts erred in their application of the law and facts. This is not a case that merits intervention. It is a case where the lower courts properly applied long-standing precedent using the appropriate standards to the allegations raised by Petitioner. The lower courts found Petitioner's allegations insufficient to state a claim and dismissed and affirmed accordingly. The Petition should be denied.

Respectfully submitted

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