No. 20-_____

In The

Supreme Court of the United States

JACK JORDAN,

Petitioner

v.

UNITED STATES DEPARTMENT OF LABOR,

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the Freedom of Information Act ("FOIA"), lower courts may disregard, violate or change the plain language of the judicial review provisions of the Administrative Procedure Act, Federal Rules of Civil Procedure or Federal Rules of Evidence or Supreme Court precedent thereunder.
2. Whether, under FOIA, claims may be dismissed without any court expressly addressing the plain language of FOIA, the Constitution and Supreme Court precedent that was presented.
3. Whether, under FOIA, claims may be dismissed on the grounds that one record at issue also was at issue in earlier-instituted litigation in a different circuit.
4. Whether a judge's clear violation of the Constitution, federal law or Supreme Court precedent must be corrected upon consideration of a timely motion requesting such correction.

DIRECTLY RELATED PROCEEDINGS

U.S. District Court (Western District of Missouri):

Jack Jordan v. U.S. Dept. of Labor, 5:18-cv-06129-ODS, partial dismissal (Dec. 14, 2018); summary Judgment (Apr. 9, 2019); relief requested upon reconsideration denied (Mar. 19, 2019, Apr. 29, 2019 June 27, 2019)

U.S. Court of Appeals (8th Cir.):

Jack Jordan v. U.S. Dept. of Labor, No. 19-1743 (Feb. 21, 2020), petition for reh'g denied, Apr. 28, 2020

INDIRECTLY RELATED PROCEEDINGS

U.S. District Court (District of Columbia):

Jack Jordan v. U.S. Dept. of Labor, No. 1:16-cv-01868-RC, Summary Judgment (Mar. 30, 2018).

U.S. Court of Appeals (District of Columbia Circuit):

Jack Jordan v. U.S. Dept. of Labor, No. 18-5128 (Oct. 19, 2018), petition for reh'g en banc denied, Jan. 24, 2019

U.S. District Court (District of Columbia):

Jack Jordan v. U.S. Dept. of Labor, No. 1:16-cv-01868-RC, post-hearing relief denied (July 1, 2019)

U.S. Court of Appeals (District of Columbia Circuit):

Jack Jordan v. U.S. Dept. of Labor, No. 19-5201 (Jan. 16, 2020), petition for reh'g en banc denied, Mar. 18, 2020

U.S. Supreme Court:

Jack Jordan v. U.S. Dept. of Labor, No. 20-241, Pet. for Writ of Certiorari filed Aug. 28, 2020

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jack Jordan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

DECISIONS BELOW

The per curiam order of the U.S. Court of Appeals for the Eighth Circuit summarily affirming the district court (App. 1-2) is reported at 794 Fed.Appx. 557 (2020). The per curiam order of the Eighth Circuit denying rehearing (App. 42) is unreported. The orders of the U.S. District Court for the Western District of Missouri dated December 14, 2018, April 9, 2019, April 29, 2019 and June 27, 2019 (App. 3-41) are unreported, but the December 14 order is available at 2018 WL 6591807, the April 9 order is available at 2019 WL 1549722 and the June 27 order is available at 2019 WL 2665052.

JURISDICTION

The judgment of the appeals court was entered on February 21, 2020. *See* App. 1-2. A timely-filed petition for panel rehearing was denied on April 28, 2020. *See* App. 42. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Reprinted in the appendix are provisions of the U.S. Constitution, the Freedom of Information Act, 5 U.S.C. 552, and the Administrative Procedure Act, 5 U.S.C. 702, 703, 704, 706. In addition, 5 U.S.C. 3331 (Oath of office), provides:

> An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: "I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the

> same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God." This section does not affect other oaths required by law.

28 U.S.C. 453 (Oaths of justices and judges) provides:

> Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, ___ ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. So help me God."

STATEMENT OF THE CASE

Petitioner's claims were instituted under the Freedom of Information Act ("**FOIA**"), 5 U.S.C. 552, and the judicial review provisions of the Administrative Procedure Act ("**APA**"), 5 U.S.C. 701-706, to obtain records or information maintained by the U.S. Department of Labor ("**DOL**").

In and since 2016, numerous DOL employees have sought to conceal evidence that proves that—for the purpose of dispositively influencing the outcome of DOL adjudications by concealing relevant evidence and asserting knowing falsehoods—DOL employees (including at least one Administrative Law Judge) knowingly misrepresented that an email (Powers' email) **(1)** was marked with a privilege notation (which they purported to quote) and **(2)** expressly requested "legal advice" or explicitly requested "input and review."

Copious federal law clearly and compellingly precluded government efforts to conceal such evidence. But Judge Smith (U.S. District Court for the Western District of Missouri) has knowingly and willfully joined Judge Contreras (D.C.

District Court) and D.C. Circuit judges in helping the DOL and its counsel, the U.S. Department of Justice ("**DOJ**") conceal such evidence. *See also* Pet. No. 20-141 at 8-17 (pertaining to the D.C. court proceedings).

I. Legal Background.

Only eight months before the Eighth Circuit issued its decision below, this Court emphatically reminded the Eighth Circuit (and all courts) of particular relevant duties under FOIA (and all federal law). In a case directly under FOIA, this Court emphasized that each court must start with "a careful examination of the ordinary meaning and structure of the law itself" and when "that examination yields a clear answer" all "judges must stop." *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). In a companion case also under the APA, this Court emphasized that each "court must apply all traditional methods of interpretation" to all relevant federal law, and then it "must enforce the plain meaning" that "those methods uncover." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2419 (2019). This Court emphatically reiterated that each court "must exhaust all the 'traditional tools' of construction." *Id.* at 2415 quoting *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, n.9 (1984). And when "the law gives an answer—if there is only one reasonable construction of" the law "then a court has no business" choosing "any other reading, no matter how much" anyone "insists it would make more sense." *Id.*

The Eighth Circuit panel flouted the foregoing and many other the Supreme Court decisions presented to it. In a single sentence devoid of any statement or

application of any relevant legal authority, the circuit panel affirmed Judge Smith, merely stating that he "did not err in dismissing some claims as duplicative of another pending litigation" and "in granting summary judgment as to the remaining claims." App. 2. Petitioner moved the panel to reconsider and apply and comply with Supreme Court precedent, but the panel merely refused (in a single sentence devoid of any statement or application of any relevant legal authority). *See* App. 42.

With their decisions, Judge Smith and Eighth Circuit judges purported to have the power to thwart, flout, violate and undermine Congress, the Supreme Court, Supreme Court precedent, federal law (including FOIA and federal rules of procedure and evidence) and the Constitution.

A. Dismissing Claims Regarding All Requested Records Merely Because One Record Also Was Sought in Earlier-Instituted Litigation.

This Court previously emphasized that any "dismissal" is "a refusal to exercise federal jurisdiction." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 28 (1983). To cause "the *surrender* of that jurisdiction," the DOL was required to prove "exceptional" circumstances with the "clearest of justifications." *Id.* at 25-26. The DOL and the courts below were required to address "priority" between this case and the earlier-instituted litigation which must "be measured" in "terms of how much progress has been made in the two actions." *Id.* at 21. Plaintiff's claims could not have been dismissed unless the courts below concluded that the DOL proved that in the earlier-instituted litigation the most

"steps" had been taken "necessary to a resolution of" each relevant legal issue. *Id.* at 22.

The DOL never even argued, much less proved, and no court ever found, that any step had been taken in any case to establish any fact that was material to the resolution of any relevant legal issue. *Cf.* page 12, below. Thus, the courts below were bound by the following: "If there is" even "any substantial doubt as to" whether the earlier-instituted litigation "will be an adequate vehicle for the complete and prompt resolution of the issues between the parties" in this case, then "it would be a serious abuse of discretion to grant" any "dismissal." *Moses* at 28.

FOIA also contained provisions that directly established and indirectly indicated that a suit under FOIA could not be dismissed merely because one or more records were at issue in another case. Congress emphasized that FOIA "does not authorize withholding of" any "information or limit the availability of records" or information "except as specifically stated in [FOIA]." 5 U.S.C. 552(d). Nothing in FOIA established or even indicated that Plaintiff could not request records more than once or sue to obtain such records in more than one circuit.

"Congress undoubtedly was aware of the redundancies" that would occur in requests, and it "chose to deal with" them "by crafting only narrow categories of materials which need not be, in effect, disclosed twice *by the agency*. If Congress had wished to codify" some larger "exemption," Congress "knew perfectly well how to do so. It is not for [courts] to add or detract from Congress' comprehensive scheme." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 152-53 (1989).

Congress "carefully" addressed "situations in which the requested materials have been previously published or made available by the *agency itself*." *Id.* at 152 citing 5 U.S.C. 552(a)(1), (2). Congress also specifically imposed additional disclosure requirements on agencies regarding records "that have been requested 3 or more times." 5 U.S.C. 552(a)(2)(D)(ii)(II). Congress even clearly contemplated that multiple requests would be submitted "by the same requestor, or by a group of requestors acting in concert," and agencies have specific limited powers with respect thereto. *Id.* at 552(a)(6)(B)(iv). Congress further clearly established the due process of law, including the following, to which every requester is entitled.

FOIA requires "each agency, upon any request for records" to "make the records promptly available to any person." *Id.* at 552(a)(3)(A). If any records or information are withheld, any requester may sue in federal court in the district where he "resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia," and in each such case "the court shall determine the matter de novo." *Id.* at 552(a)(4)(B).

Under FOIA, each agency must bear the "burden" of proof to "sustain its action." *Id.* at 552(a)(4)(B). "Placing the burden of proof upon the agency puts the task of justifying the withholding on the only party able to explain it." *Tax Analysts*, 492 U.S. at 142, n.3. Crucially, the agency could "withhold information under [FOIA] only if," *i.e.*, only to the extent and for so long as, an agency employee "reasonably [and actually] foresees that disclosure would harm an interest protected by [a FOIA] exemption." *Id.* 552(a)(8)(A).

Clearly, FOIA "may be invoked by any member" of "the public" to "compel disclosure of confidential Government documents." *EPA v. Mink*, 410 U.S. 73, 92 (1973). A requester "need show [only] that" he "sought and" was "denied specific agency records." *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 449 (1989). The "identity of the requesting party has no bearing on the merits of" his "FOIA request" and resolution "cannot turn on the purposes for which" his "request" was "made." *U.S. Dept. of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 771 (1989).

B. Summary Judgment Regarding Agency Refusal to Release Records Requested in Particular Electronic Format.

The courts below clearly violated (knowingly, in at least some respects) Petitioner's rights under Federal Rules of Civil Procedure ("**FRCP**") Rules 7, 43 and 56, FOIA and the APA.

When reviewing agency action, courts "may not accept" even agency "counsel's *post hoc* rationalizations for agency action." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 50 (1983). A "reviewing court" clearly "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* at 43. The agency (not the district court) was required to "state with particularity" the "grounds" for seeking any "order." FED.R.CIV.P. 7(b)(1)(B). Each ground was required to be supported in a lawful manner.

An agency witness could "testify to a matter only if evidence" was "introduced sufficient to support a finding that" he had "personal knowledge of the matter." FED.R.EVID. 602. A presiding judge cannot be a witness. *See* FED.R.EVID. 605. He also cannot judicially notice any fact that is even "subject to reasonable dispute." FED.R.EVID. 201(b). The hearsay offered by the DOL and Judge Contreras (below) about the content of Powers' email to support summary judgment regarding Powers' email also was clearly inadmissible. *See* FED.R.EVID. 802, 806.

Testimony must be presented by competent witnesses in "open court unless a federal statute [or federal or Supreme Court rules] provide otherwise." FED.R.CIV.P. 43(a). Summary judgment testimony must be in "depositions" or "affidavits or declarations." FED.R.CIV.P. 56(c)(1)(A). Any such declaration must **(1)** "be made on personal knowledge" and **(2)** "set out facts that would be admissible in evidence," including **(3)** facts that "show that" the declarant was "competent to testify on the matters stated." *Id.* 56(c)(4).

The DOL "must support" each "assertion" of fact by "citing to particular parts of materials in the record," *id.* 56(c)(1)(A), and regarding each "material fact" the DOL must show the "absence" of a "genuine dispute," *id.* 56(a). The "party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of" the record that "demonstrate the absence of a genuine [dispute regarding every] material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Summary judgment could not have been granted for the DOL unless its "submissions" had "foreclosed the possibility of the existence of certain facts from which" it "would be open to a jury" to "infer" that the agency failed to fully comply with any material FOIA provision. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). This Court has emphasized that Rule 56 "by no means authorizes trial on affidavits" that, on an agency's motion for summary judgment, require a determination of an agency employee's credibility or weighing evidence in the agency's favor. *Id.* at 255. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences" favoring the agency are not the "functions" of "a judge [ ] ruling on" an agency "motion for summary judgment." *Id.*

The FOIA requester's "evidence" must "be believed, and all justifiable inferences are to be drawn in his favor." *Id.* Especially relevant to the DOL's motion to dismiss based on Judge Contreras' summary judgment with respect to Powers' email (below), unexplained failures to produce "strong" evidence that "is available can lead only to the conclusion that [such evidence] would have been adverse." *Interstate Circuit v. United States*, 306 U.S. 208, 226 (1939). "Conduct which forms a basis for inference is evidence. Silence is often most persuasive" "evidence" (as it was in the case below and in every case pertaining to Powers' email) that the law was violated. *U.S. ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-54 (1923).

FOIA includes many provisions that require agencies to create records, to release portions of records, and to release records in the format requested. Such

provisions clearly require agencies to create records in connection with responding to FOIA requests. Agencies must create and "make available for public inspection in an electronic format" copies of "all records" that "have been released to any person" under FOIA. 5 U.S.C. 552(a)(2)(D).

Agencies must "provide" records/information "in any form or format requested" unless the records/information are not "readily reproducible by the agency in" the requested "form or format." *Id.* 552(a)(3)(B). This requirement was imposed in the Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996), which emphasized usefulness, not merely disclosure, of information. Such amendments were based on findings that "agencies increasingly use computers to conduct agency business and to store publicly valuable agency records and information," and agencies "should use new technology to enhance public access to agency records and information." *Id.* § 2(a).

The purposes of such amendments included "maximiz[ing] the usefulness of agency records" and improving "access to agency records and information." *Id.* § 2(b). Congress intended that "information technology" would be "used by [federal] agencies" to promote "greater efficiency in responding to FOIA requests" and "to let requestors obtain information in the form most useful to them." H.R. Rep. No. 795, 104th Cong., 2nd Sess. 11, 1996 U.S.C.C.A.N. 3448, 3454 (1996).

"Any reasonably segregable portion of a record shall be provided" after "deletion" or omission "of the portions which are exempt." 5 U.S.C. 552(b) (final paragraph). Agencies must "take reasonable steps" to "segregate and release" any

"nonexempt information." *Id.* 552(a)(8)(A)(ii)(II). To facilitate the foregoing, agencies also must "make reasonable efforts to maintain" their "records in forms or formats that are reproducible," *e.g.*, in electronic forms or formats. *Id.* 552(a)(3)(B).

The ordinary meaning of "readily reproducible" refers primarily "to an agency's technical capability to create the records in a particular format." *Sample v. Bureau of Prisons*, 466 F.3d 1086, 1088 (D.C. Cir. 2006). The word "readily" also implies consideration of "the burden on the" agency imposed by reproduction in the format requested. *Scudder v. CIA*, 25 F.Supp.3d 19, 38 (D.D.C. 2014). Regarding the "reasonableness" of "reproducibility, the agency should employ a standard" based on its "normal business as usual approach" regarding "reproducing data in the ordinary course of the agency's business." *TPS, Inc. v. U.S. Dep't of Def.*, 330 F.3d 1191, 1197 (9th Cir. 2003) (quoting 32 C.F.R. 286.4(g)(2) "business as usual"). "When an agency already creates or converts documents in a certain format—be it for FOIA requestors, under a contract, or in the ordinary course of business—requiring that it provide documents in that format to others does not impose an unnecessarily harsh burden, absent specific, compelling evidence as to significant interference or burden." *Id.* at 1195.

II. Factual Background.

The DOL withheld records that Plaintiff requested in two requests under FOIA. *See* App. 3-4, 24-25. Judge Smith authorized the DOL to withhold all records subject to one request by granting the DOL's partial motion to dismiss.

Judge Smith authorized the DOL to withhold all records subject to the other request by granting the DOL's motion for summary judgment.

A. Granting the Agency's Motion to Dismiss.

To justify dismissing Petitioners claims regarding all records subject to one FOIA request, Judge Smith noted that only one record at issue (Powers' email) also was at issue in earlier-instituted litigation in D.C. courts. *See* App. 7. Judge Smith initially acknowledged the fact that Plaintiff sought "all responsive records," including not only those "containing Powers' emails," but also "other records responsive to his FOIA request." App. 4. Judge Smith acknowledged that "Plaintiff seeks release" not only of Powers' email, but also "any documentation establishing the date of transmission to and receipt by the BRB." *Id.* But in considering the agency's motion to dismiss, Judge Smith failed to address any record other than Powers' email, itself. *Cf.* App. 6-7.

Next, Judge Smith failed to apply or comply with the clear commands in *Moses*, above, or apply or comply with FOIA's plain language. Instead, Judge Smith asserted the sweeping contention that "[d]istrict courts have ample discretion to stay or dismiss a matter based upon" the mere existence of "a duplicative federal proceeding." App. 7. For support, Judge Smith relied on a decision that clearly did not apply or even consider FOIA or the APA. It applied only the Declaratory Judgments Act ("**DJA**"). *See id.* citing *Kerotest Mfg. Co. v. CO-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952).

Judge Smith failed to address Plaintiff's analysis of crucial differences between the law governing *Kerotest* and the law governing this case. The plain language of the DJA made the exercise of jurisdiction merely permissive: courts "may declare the rights and other legal relations of any interested party." 28 U.S.C. 2201. But the plain language of FOIA stated Judge Smith "has jurisdiction" and "shall determine the matter de novo." 5 U.S.C. 552(a)(4)(B). The plain language of the APA established that Plaintiff had the right to judicial review of agency action under FOIA. *See id.* 702, 704. It established that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." *Id.* 706.

Significantly, Judge Smith acknowledged *Moses* for a crucial proposition: he was required to consider "whether the forum in which the first case was filed adequately protects the rights of the litigants in the second case." App. 7 citing *Moses*, 460 U.S. at 21-22. *See also Moses* at 26 ("an important reason against" refusing to exercise jurisdiction "is the probable inadequacy of the [earlier-instituted] proceeding to protect [a litigant's] rights"). Judge Smith then clearly and knowingly misrepresented that "[a]s best [he] can discern . . . there is no indication Plaintiff's rights were not adequately protected" by the D.C. courts. App. 8.

Judge Smith directly acknowledged that Judge Contreras granted the DOL summary judgment based on Judge Contreras' personal representation (and purported personal knowledge) that Powers' email "contained" "an express request

for legal advice." App. 7 quoting Judge Contreras. Summary judgment on such grounds clearly violated Plaintiff's right to due process of law in virtually every conceivable respect, including under copious well-known federal law and Supreme Court precedent. *Cf.* pages 7-9, above.

Judge Contreras' contention also was mere hearsay about a crucial ground which, moreover, was not ever even asserted by the DOL either in the case below or in the D.C. case. Such hearsay was not even offered in lawful testimony or a declaration. It also was an inference illegally favoring the DOL. It was asserted *sua sponte* by a judge, specifically, to help the DOL violate specific FOIA provisions by concealing all evidence of any actual non-commercial words used to request any such advice, *e.g.*, "please advise regarding." *Cf.* pages 10-11, above, requiring release of records and segregable non-exempt information.

Judge Contreras asserted his representation while he and the DOL remained silent regarding any actual words that Powers used and while they all concealed the profoundly-relevant evidence in their possession. Such conduct required the inference that the assertion was false. *See Interstate Circuit* and *Bilokumsky*, above. Moreover, Judge Smith knew and directly acknowledged that the D.C. Circuit already had revealed that Judge Contreras' representation was false: any "parts of the Powers email" purportedly stating "an explicit request for legal advice" consisted only of "disjointed words that have 'minimal or no information content.' " App. 5 quoting the D.C. Circuit.

Judge Contreras' summary judgment was a complete sham, and Judge Smith knew it. Judge Smith knew that a party's own "failure to cite anything" in the record "in support" of a material fact "violates the Federal Rules of Civil Procedure." App. 23 citing FED.R.CIV.P. 56(c). Judge Smith knew, *a fortiori*, that a judge *sua sponte* purporting to assert facts or inferences that were not supported by any evidence in the record even more clearly violated the FRCP.

Plaintiff moved Judge Smith to reconsider and apply controlling legal authorities to dispositive facts, but Judge Smith refused. *See* App. 16-18. Judge Smith openly revealed that—rather than comply with Supreme Court precedent, federal law and the Constitution—he was determined to preserve "comity" with Judge Contreras and the appearance of the "sanctity" of Judge Contreras' sham summary judgment. App. 15. Judge Smith openly and expressly chose to follow and support Judge Contreras instead of the Supreme Court, federal law or the Constitution. The Eighth Circuit expressly chose to support Judge Smith instead of the Supreme Court, federal law or the Constitution.

B. Granting the Agency's Motion for Summary Judgment.

Regarding copies of letters that the DOL had addressed to Plaintiff in 2016-2018 (mostly pertaining to Plaintiff's FOIA requests), Plaintiff sought to obtain copies of such letters in essentially the same PDF format in which every filing by the DOL was made in every federal court proceeding. *See* App. 3-4, 24-25 (regarding Request F2018-850930). The DOL never even argued that it could not

release all such records in such format with reasonable effort, *e.g.*, within about 30 minutes.

To justify summary judgment for the DOL, Judge Smith (alone) contended that "[n]othing in" FOIA "requires" an agency to "create a new record in order to respond to a request for records." App. 28. Such contention was clearly erroneous. Multiple FOIA provisions clearly required the DOL to create records or release records in any format requested by Plaintiff if the DOL could do so with reasonable effort. *See* pages 9-11, above.

Judge Smith also clearly and knowingly failed to comply with FRCP Rule 56 and Supreme Court precedent thereunder. He purported to *sua sponte* state inferences favoring the DOL, material facts and grounds for summary judgment that the DOL, itself, failed to even assert. No evidence showed that any DOL employee believed, or even asserted, the inferences or contentions that Judge Smith asserted.

Judge Smith knew that "Plaintiff asked the DOL to produce" certain "records in 'either MS Word or an unlocked PDF copy.'" App. 24. *Accord* App. 28 ("requested the responsive records be provided 'in either MS Word or an unlocked PDF copy.'"). Even so, Judge Smith (alone) inferred (and clearly misrepresented) that "Plaintiff's request did not ask for anything other than '[a]ll letters from the OALJ' to Plaintiff regarding any of his FOIA requests," App. 30, and Plaintiff "did not request this more particular unlocked PDF format in his initial FOIA request," App. 29. Judge Smith (alone) further inferred (and clearly misrepresented) "it is

difficult to determine if Plaintiff is requesting the responsive documents be produced in Word or unlocked PDF." App. 29. Judge Smith (alone) further inferred (clearly erroneously) that "the DOL could not have known Plaintiff sought the type of PDF format he later detailed." *Id.*

Judge Smith (alone) inferred (and clearly misrepresented) "that Plaintiff was given access to [all the] documents he sought in one of the formats he sought." App. 31. Judge Smith knew his inference was likely false: some "letters may have been produced in paper copy only." App. 27, n.8 (citing the DOL's declaration which clearly declared that the DOL was "unable to confirm" the format in which 12 letters were sent to Plaintiff). To support the foregoing inference, Judge Smith (alone) further inferred that the scanned "PDF format" in "which" the DOL "sent Plaintiff" some other letters "was one of the (two) formats requested by" Plaintiff. App. 30. Judge Smith (alone) inferred (and clearly misrepresented) that "the DOL provided [all] the documents in unlocked PDF format." App. 29.

Under FRCP Rules 54, 59 and 60, Plaintiff repeatedly sought Judge Smith's compliance with controlling legal authorities, but Judge Smith repeatedly refused. Judge Smith repeatedly summarily contended that Plaintiff failed to establish "exceptional circumstances" that required Judge Smith to comply with controlling legal authorities, and Judge Smith characterized such compliance as "extraordinary relief." App. 18, 22, 33. Eventually, Judge Smith refused to apply and comply with controlling legal authorities merely "because, first and foremost," Plaintiff "previously raised" such issues. App. 36.

REASONS FOR GRANTING THE PETITION

For many compelling reasons, this petition should be granted, including "because of the public importance of the issues presented and the need for their prompt resolution." *United States v. Nixon*, 418 U.S. 683, 687 (1974).

The legal authorities and issues are clear and compelling. The panel affirmed conduct by Judge Smith that each panel member knew was clearly unlawful, including because it was unconstitutional. The panel acquiesced in Judge Smith's clear and knowing violations of federal law, the Constitution and Supreme Court precedent. The panel so far departed from the accepted and usual course of judicial proceedings—and sanctioning such a departure by Judge Smith—as to call for an exercise of this Court's supervisory power.

The facts also are clean and straightforward. The Eighth Circuit panel repeatedly completely failed or expressly refused to address any of the plain language of any federal law or the Constitution or Supreme Court precedent presented by Plaintiff. It completely failed to apply any legal authority to any evidence. It allowed Judge Smith to do the same in many respects.

I. Agencies and Lower Courts Now Routinely Use Summary Judgment in a Manner Clearly Contrary to Rule 56 and Supreme Court Precedent, and Sometimes to Thwart FOIA and the Constitution.

This Petition is a timely and appropriate vehicle for this Court to address profoundly important recurring issues of lower courts' common use of summary judgment to dispose of cases under FOIA in a manner that contravenes the APA, federal rules of procedure and evidence and Supreme Court precedent thereunder.

Many courts barely even acknowledge—and they often fail to apply—the clear restrictions of Rule 56 or Supreme Court precedent. The lower court decisions in the Petition No. 19-547 provide examples in a matter currently pending before this Court.

Here, neither Judge Smith nor the Eighth Circuit even purported to find that the DOL established the absence of any genuine dispute regarding any, much less every, material fact. Instead, Judge Smith purported to find material facts (which actually were inferences) that he, alone, asserted—many of which were clearly contrary to the evidence in the record and which even were contradicted by other nearby portions of Judge Smith's own opinion. *See* pages 16-17, above.

In FOIA cases, lower courts now routinely clearly exceed their powers and clearly fail to fulfill their duties to apply and comply with some of the provisions of federal law, the Constitution and Supreme Court precedent that are most fundamental to our systems of jurisprudence and government. The DOJ (as the legal representative of agencies in FOIA litigation) and many courts have egregiously undermined Congress, FOIA, the APA, the Supreme Court and the Constitution by failing to apply and comply with the dictates of the foregoing in cases under FOIA.

The DOJ and many courts routinely act, assert or imply that the mere existence of FOIA somehow justifies disregarding well-settled plain language in federal statutes and rules, the Constitution and Supreme Court precedent. FOIA is being eviscerated as its predecessor was. FOIA is one section of the core APA. *See*

5 U.S.C. 551-559. FOIA was enacted in 1966 as "a revision" of section 3 of the APA because "Section 3 was generally recognized as falling far short of its disclosure goals" as it came to be used more to justify "withholding" than to compel "disclosure" of government records. *Mink*, 410 U.S. at 79.

Congress clearly intended that FOIA would not suffer the fate of the original APA Section 3, and to ensure that it did not, Congress has significantly amended FOIA many times, including recently. But the DOJ, other agencies and too many courts are draining the vitality from FOIA, rules of procedure and evidence, and Supreme Court precedent. Such efforts are perhaps most obvious and common at the confluence of FOIA and FRCP Rule 56.

To dispose of FOIA suits, it has become far too common for agencies and courts to invoke summary judgment while the agencies and courts openly violate or disregard the requirements of Rule 56 and the Supreme Court precedent thereunder. The actions of the courts below are illustrative. Judge Contreras and the D.C. Circuit provided even more egregious examples. *See, e.g.*, Pet. No. 20-241 at 8-17. The actions at issue in this Petition and Petition No. 20-241 clearly directly undermine some of the Supreme Court's most well-established and well-known precedent. They clearly undermine and violate FRCP Rules 7, 43 and 56, as well as FOIA and the Constitution.

"The basic purpose of" FOIA is "to ensure an informed citizenry" because informed citizens are "vital to the functioning of a democratic society." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Informed citizens are vital to

the functioning of the Constitution. They are "needed to check against corruption and to hold the governor accountable to the governed." *Id.*

Numerous DOL and DOJ employees and Judge Contreras, Judge Smith and circuit court judges are attempting to conceal or help agencies conceal evidence of corruption, *i.e.*, Powers' email. Copious evidence establishes that Judge Smith's actions regarding Powers' email were intended to thwart the core purpose of FOIA, *i.e.*, to help DOL and DOJ employees and Judge Contreras conceal evidence that they knowingly misrepresented the content of Powers' email to justify concealing it (for the further purpose of dispositively influencing the outcome of DOL adjudications by concealing relevant evidence and asserting knowing falsehoods). *See, e.g.*, pages 12-15, above; Pet. No. 20-241 at 8-17.

If they told the truth, they would not hide the proof. They would not take up the time and efforts of many DOL and DOJ employees and many judges and justices merely to conceal evidence of two short phrases: non-commercial, non-confidential words used in any privilege notation (*e.g.*, "Subject to Attorney Client Privilege" or "subject to attorney-client privilege") and any express request for legal advice (*e.g.*, "please advise regarding").

II. District Court and Circuit Court Judges Openly Violated the Constitution and Federal Law, and they Sought to Undermine this Court by Flouting Supreme Court Precedent.

Eighth Circuit judges usurped—and they knowingly allowed Judge Smith to usurp—powers such judges did not have, and they violated—and knowingly allowed Judge Smith to violate—duties that were clearly established in the Constitution

and the APA, and which this Court emphatically and repeatedly confirmed. As a matter of course, the panel repeatedly willfully abdicated—and knowingly allowed Judge Smith to abdicate—their vital roles under the Constitution. Thus, the panel highlighted the need for this Court to address courts' duties to ensure the constitutionality of agency action under FOIA and court review of such actions.

The issues have been carefully considered by this Court regarding the Constitution for 230 years. Many times this Court has emphasized that judges cannot knowingly violate or disregard any statement in the Constitution, federal law or Supreme Court precedent. But if this Court fails to enforce its rulings, then its "judgments and decrees would be only advisory." *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 450 (1911). That is how even Judge Smith, but also Eighth Circuit judges, repeatedly treated this Court's precedent. If each lower court judge can "make himself a judge of the validity of orders which have been issued" by this Court "and by his own act of disobedience set them aside, then" this Court is "impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery." *Id.* quoting U.S. Const. Art. III, §2. That is especially true of the "one supreme court" specifically required by the Constitution. U.S. Const. Art. III, §1.

Every federal judge has sworn at least two oaths to apply and comply with the Constitution and federal law. *See* pages 1-2, above. They swore to support and defend the Constitution. *See id.* Yet, Judge Smith and Eighth Circuit judges chose, instead, to support and defend agency employees or judges that they knew were

knowingly undermining and violating federal law and the Constitution. To do so, they knowingly undermined and violated federal law, the Constitution and Supreme Court precedent.

It is profoundly significant that Judge Smith expressly quoted, relied on, supported and defended Judge Contreras instead of the Constitution, FOIA and Supreme Court precedent. In granting the DOL's motion to dismiss, Judge Smith never addressed the Constitution or Supreme Court precedent requiring his compliance with federal law. Throughout the proceedings below, Judge Smith virtually entirely failed to address any relevant provision of federal law or any Supreme Court precedent, and he openly violated those presented to him by Plaintiff. Eighth Circuit judges clearly engaged in similar conduct. Twice, they limited their decisions to a single sentence, not even addressing any Supreme Court precedent, federal law or constitutional provision that Plaintiff presented. *See* App. 2, 42.

III. Lower Court Judges Are Openly Violating the Constitution, Federal Law and Supreme Court Precedent to Undermine Our Constitutional System.

Judge Smith expressly—and Eighth Circuit judges implicitly—joined and followed Judge Contreras and D.C. Circuit judges in seeking to throw very significant portions of the population and very significant areas of law (now addressed by FOIA and the APA) into their deplorable states before the Constitution. The Declaration of Independence of 1776 specifically addressed that particular problem. It addressed the right to petition and the Founders'

determination to end courts' violations of such right. "In every stage of these Oppressions We have Petitioned for Redress" but "Our repeated Petitions have been answered only by repeated injury." *Ibid.*, para. 30. That was one of the egregious "injuries and usurpations" that evidenced "absolute Tyranny," *id.*, para. 2, to "prove" that it was our "right" and our "duty" to "throw off such Government," declare the perpetrator "unfit to be the ruler of a free People," and treat our "brethren" as "Enemies in War," *id.*, paras. 2, 31.

The Founders who dared to place their names on the Declaration of Independence "pledge[d]" literally their "Lives," their "Fortunes" and their "sacred Honor" to "secure" our "rights" by ensuring government authorities "deriving their just powers" exclusively "from the consent of the" people being "governed." *Id.*, paras. 32, 2. To such end, they pledged everything they and their families had or ever would or could have.

In a manner unique in this country's history, many Founders and their families personally took up arms, and every Founder risked everything he and his family had or could have to establish particular protections for the "people." As profoundly and as viscerally as any legislature possibly could, the Founders meant every word in the Constitution at issue herein.

The Constitution was carefully and conscientiously crafted to "establish Justice" and "secure the Blessings of Liberty" to "THE PEOPLE." U.S. Const. Preamble. The Founders clearly did not intend to allow any court to engage in the same abuses that impelled them to risk as much as they did. They clearly did not

intend that federal courts would allow or facilitate executive or judicial abuses of power.

Two of the most important and overarching principles in the Constitution are its separation of powers and its limits on all forms of federal power. "The Framers concluded that allocation of powers" in the Constitution and federal law "enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived." *Bond v. United States*, 564 U.S. 211, 221 (2011). "The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government." *Freytag v. C.I.R.*, 501 U.S. 868, 870 (1991). The structure of power under the Constitution, generally, and "especially the structure of limited federal powers—is designed to protect individual liberty." *Bond v. United States*, 134 S. Ct. 2077, 2101 (2014).

To cause Americans to ratify the Constitution, the Framers represented to the American people that "judges" would be the "faithful guardians of the Constitution." The Federalist No. 78 (A. Hamilton) (1788) (The Federalist Papers, Bantam ed. 2003) at 477. They represented that courts would be "bulwarks" against "encroachments" on the Constitution. *Id.* at 476. They represented that "courts of justice" would be bound by their sacred "duty" to "declare all acts contrary to the manifest tenor of the Constitution void." *Id.* at 473.

The Framers knew and acknowledged that without a judiciary that enforced the Constitution, everything they and many others had fought, bled, died, suffered

and struggled mightily for years to accomplish "would amount to nothing." *Id.* They knew and profoundly feared a system in which judges operated without strong constraints. In crafting the Constitution, they were guided by the certainty that "there is no liberty" when "the power of judging" is "not separated from the legislative and executive powers" and "liberty" has "every thing to fear" when judicial power joins or subordinates itself to executive or legislative powers. *Id.*

All "powers" at issue here that were "not delegated" to federal courts "by the Constitution" are "reserved" to "the people." U.S. Const. Amend. X. Not even "Congress," and therefore no other governmental authority, may "make" any "law" that abridges "the right of the people" to "petition the Government for a redress of grievances." Amend. I. "The judicial Power of the United States" is "vested in one supreme Court," which necessarily has the power and duty to supervise all "inferior Courts," which also are bound by the law by which Congress established them. Art. III, §1. Such "judicial Power shall extend to all Cases, in Law and Equity, arising under [the] Constitution" and federal "Laws," and particularly "to Controversies to which the United States shall be a Party." *Id.* §2.

It is vital to our constitutional form of government that "all executive and judicial Officers" are "bound" to "support this Constitution." Art. VI. cl. 3. The President and all executive branch employees "shall take Care that the Laws be faithfully executed." Art. II, §3. And federal courts must ensure they do. "No person" may "be deprived of life, liberty, or property, without due process of law." Amend. V. In every adjudication under FOIA, the "Constitution, and" federal

"Laws" which shall be made in Pursuance" of the Constitution "shall be the supreme Law of the Land" and all "Judges" shall be "bound thereby." Art. VI, cl. 2.

IV. The Supreme Court Repeatedly Emphasized that Courts Must Exercise Jurisdiction and Exercising Jurisdiction Means Declaring the Law.

Judge Smith and the Eighth Circuit panel denied Plaintiff his right to petition regarding the DOL's withholding of records covered by Judge Smith's dismissal. Judge Smith dismissed Plaintiff's claims regarding Powers' email merely because Powers' email was at issue in an earlier-filed case. Judge Smith did not even assert any reason for dismissing Plaintiff's claims regarding any records other than Powers' email. *See* page 12, above.

The right to petition is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). As in this case, "litigation may well be the sole practicable avenue open" to "petition for redress of grievances," *i.e.*, as "a means for achieving the lawful objectives of equality of treatment by [the] government." *NAACP v. Button*, 371 U.S. 415, 430 (1963). Courts "cannot foreclose the exercise of constitutional rights by mere labels." *Id.* at 429. Courts must "allow the widest room for discussion" and only "the narrowest range for its restriction." *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 1 Cranch 137, 163 (1803). With the Constitution this country

"emphatically" established "a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.*

When required by federal law, Courts have an "absolute duty" to "hear and decide cases within their jurisdiction." *United States v. Will*, 449 U.S. 200, 215 (1980). Courts "*have no more [power] to decline the exercise of jurisdiction which is [required], than to usurp that which is not given*. The one or the other would be treason to the constitution." *Id.* at 216, n.19 quoting *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821) (Marshall, C.J.).

The foregoing is especially true of violations of law by government employees. The "judicial Power" of the United States "shall extend" to all "Controversies to which the United States shall be a Party." U.S. Const. Art. III, §2. Thus, "where a specific duty is assigned by law, and individual rights depend upon the performance of that duty," it is "clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Marbury,* 1 Cranch at 166. When Congress or the Constitution creates particular "duties," and when any government employee (or court) "is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts," such employee or court "cannot at [its] discretion sport away [such] vested rights." *Id.*

"It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd v. United States*,

116 U.S. 616, 635 (1886). That applies even when "the obnoxious thing" (a constitutional violation) appears in its "mildest and least repulsive form" because "illegitimate and unconstitutional practices get their first footing in that way," by "silent approaches and slight deviations from legal modes of procedure." *Id.* *Accord Miranda v. Arizona*, 384 U.S. 436, 459 (1966).

The duty to exercise jurisdiction clearly means much more than merely disposing of a case or controversy. Each court "must continuously bear in mind that to perform its high function in the best way justice must satisfy the appearance of justice." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988) quoting *In re Murchison*, 349 U.S. 133, 136 (1955) (internal quotation marks omitted). There can be no appearance of justice if the law appears nowhere in a court's decision.

Under the Constitution, "fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property." *W. & A.R.R. v. Henderson*, 279 U.S. 639, 642 (1929). Judge Smith's and the Eighth Circuit's "outright refusal to" allow Plaintiff to proceed under FOIA (at the very least with respect to all records other than Powers' email that were covered by Judge Smith's dismissal) "without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules" (and the plain language of FOIA, the APA and the Constitution). *Foman v. Davis*, 371 U.S. 178, 182 (1962).

"The courts must declare the sense of the law." The Federalist No. 78 at 476. That is what "jurisdiction" means: the court "pronounces the law." The Federalist No. 81 (A. Hamilton) (1788) at 498. *See also id.*, n.3 ("jurisdiction" is a "compound" of *jus* and *dictio* meaning "a speaking or pronouncing of the law"). "Jurisdiction is power to declare the law." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). But it is as much a duty as a power. Failing to exercise jurisdiction when the Constitution and federal law required it carried the Eighth Circuit "beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Id.*

"It is emphatically" the "duty" of courts "to say what the law is. Those who apply [a] rule to particular cases, must of necessity expound and interpret that rule." *Marbury*, 1 Cranch at 177. "Article III of the Constitution establishes an independent Judiciary" with the "duty" to "say what the law is" in "particular cases and controversies." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322-23 (2016).

Each "Judge" is "required to declare the law." *Etting v. U.S. Bank*, 11 Wheat 59, 75 (1826) (Marshall, C.J.). If a court "refuse[s] to give an opinion on" a particular "point," parties "may except to the refusal, which exception will avail" them if they show "that the question was warranted" by the evidence and "that the opinion" they requested "ought to have been given." *Id.* One reason for this rule is vital: "if the Judge proceeds to state the law, and states it erroneously, his opinion ought to be revised; and if it can have had any influence on the" judgment, it "ought to be set aside." *Id.*

A court "would necessarily abuse its discretion if it based its ruling on" either "an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). But without an adequate statement of either the law or the facts, abuses of discretion can occur with impunity, just as they did occur repeatedly to date in this matter.

The APA also clearly required the Eighth Circuit to declare the law. The APA required the court to "decide all relevant questions of law" and "interpret constitutional and statutory provisions" to the "extent necessary to" its "decision." 5 U.S.C. 706. "The essence of judicial decisionmaking" is "applying general rules to particular situations." *Rivers v. Roadway Exp.*, *Inc.*, 511 U.S. 298, 312 (1994). "A judicial construction of a statute is an authoritative statement of what the statute meant," but the Eighth Circuit failed to fulfill its "responsibility to say what [the] statute means." *Id.* at 312-13.

"When a party properly brings a case or controversy to an Article III court, that court is called upon to exercise the 'judicial Power of the United States.' " *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring) quoting U.S. Const. Art. III, §1. Such "judicial power [ ] requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Id.* "Independent judgment required judges to decide cases in accordance with the law of the land." *Id.* at 1218. Courts have a constitutional "obligation to provide a judicial check on the other branches." *Id.* at 1213. "When courts refuse even to decide what the best interpretation is under the law, they abandon the judicial

check. That abandonment permits precisely the accumulation of governmental powers that the Framers warned against." *Id.* at 1221.

The duty to decide controversies and declare the law clearly applies under the APA. Any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action" under any "statute" is "entitled to judicial review thereof." 5 U.S.C. 702. "The form of proceeding for judicial review is" as provided in FOIA "in a court specified" thereby. 5 U.S.C. 703. FOIA "specifies the form of proceeding for judicial review of" DOL withholdings, but the APA "codifies the nature and attributes of judicial review." *ICC v. Bhd. of Locomotive Engineers*, 482 U.S. 270, 282 (1987). The APA "sets forth the full extent of judicial authority" and duty "to review executive agency action for procedural correctness." *Perez*, 135 S. Ct. at 1207.

Under the APA, each court must "decide all relevant questions of law" and "interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action" to the full "extent necessary to decision and when presented." 5 U.S.C. 706. The APA even specifically identified a number of relevant questions of law that must be decided. *See id.* The APA clearly established "the plain duty of the courts" to "eliminate, so far as [the APA's] text permits, the practices it condemns." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 45 (1950). The "courts are charged" with "ensuring that agencies comply with the 'outline of minimum essential rights and procedures' set out in the APA." *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) (applying Section 706 under FOIA).

Congress specially designed the APA as a "bill of rights for [the multitude of] Americans whose affairs are controlled or regulated" by federal agencies. 92 Cong. Rec. 2149 (statement of Sen. McCarran). The APA "invest[s] courts with" the "duty" to "prevent avoidance of the requirements of the [APA] by any manner or form of indirection." *Am. Bus Ass'n v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980) quoting S. Doc. No. 248, 79th Cong., 2d Sess. 19, 199, 217 (1946). *Accord* S. Rep. No. 752, 79th Cong., 1st Sess. 31 (1945). For example, agencies must "show the facts and considerations warranting [each] finding." *Id.* *See also* 92 Cong. Rec. 2159 (1946) (statement of Sen. McCarran (the APA's primary sponsor)) and H. Rep. No. 1980, 79th Cong., 2d Sess. 44 (1946) (both reiterating both the foregoing propositions).

To thwart FOIA, the APA, and the Constitution, Judge Smith repeatedly arrogated to himself the power to deny Plaintiff his rights to petition and to due process of law. *See* pages 12-17, above. The Eighth Circuit allowed Judge Smith to do so. *See* App. 2, 42. The Eighth Circuit clearly essentially refused to exercise jurisdiction that it was required to exercise by stating the law.

V. The Eighth Circuit Abdicated Its Duty to Guard Against Judicial Misconduct.

Judge Smith's conduct "was a violation of the federal constitution," so it afforded "no justification for [any] judgment." *Allgeyer v. Louisiana*, 165 U.S. 578, 593 (1897). Any such "judgment must therefore be reversed." *Id.* In turn, the Eighth Circuit's decision depriving Petitioner of his "liberty without due process of law" was "a violation of" the "constitution." *Id.* at 589. Neither court's conduct

could "become due process of law, because it is inconsistent with the provisions of the constitution." *Id.* "To deprive the citizen" of a right "without due process of law is illegal." *Id.* at 591.

"Under our Constitution no court" may "serve as an accomplice in the willful transgression of" federal law, much less of the Constitution. *Lee v. Fla.*, 392 U.S. 378, 385-86 (1968). *See also Butz v. Economou*, 438 U.S. 478, 506 (1978) quoting *United States v. Lee*, 106 U.S. 196, 220 (1882):

> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:
>
> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it."

Federal courts have "only that power authorized by Constitution and [by Congress in a] statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Whenever a court exceeds its constitutionally-granted powers that "renders the act of the court a nullity." *Stoll v. Gottlieb*, 305 U.S. 165, 176 (1938). That was the primary point of, and it was repeatedly emphasized in, one of this Court's earliest and most prominent decisions.

In "declaring what shall be the *supreme* law of the land, the constitution itself is first" and "only" statements of law "made in *pursuance* of the constitution" can be the law. *Marbury*, 1 Cranch at 180 quoting U.S. Const. Art. VI, cl. 2. The "constitution is superior to any ordinary act of" any government employee. *Id.* at

178. "It is a proposition too plain to be contested, that the constitution controls any" such employee's "act repugnant to it" and no such employee "may alter the constitution by an ordinary act." *Id.* at 177. The Constitution is the "paramount law of the nation," so any "act" putatively establishing law "contrary to the constitution is not law." *Id.*

To "declare" as the Eighth Circuit essentially did regarding Judge Smith's pronouncements and actions that they are "completely obligatory" even though "according to the" Constitution they are "entirely void" is to "subvert the very foundation of" the Constitution. *Id.* at 178. If any government employee "shall do what is expressly forbidden" in the Constitution and then anyone contends that "such act" is "in reality effectual," that "would be giving to" such employee "a practical and real omnipotence." *Id.* It "thus reduces to" literally "nothing" our "greatest improvement on political institutions—a written constitution." *Id.*

The Constitution clearly is "a rule for the government of *courts*." *Id.* at 180. For that reason it "direct[s] the judges to take an oath to support it," and the "oath certainly applies, in an especial manner, to [judges' official] conduct." *Id.* All "*courts*" clearly "are bound by" the Constitution, and any putative statement of "law repugnant to the constitution is void." *Id.* When any putative statement of law relevant to a case is "in opposition to the constitution," courts must "decide" the issue "conformably to the constitution, disregarding" or expressly invalidating any contrary statement of law. *Id.* at 178. "This is of the very essence of judicial duty." *Id.*

CONCLUSION

For the foregoing reasons this petition should be granted. The Eighth Circuit's judgment should be vacated and the Eighth Circuit should be required to comply with FOIA, federal rules of procedure and evidence, Supreme Court precedent and the Constitution.

Respectfully submitted,

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