No

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID WELLINGTON,
Petitioner

vs.

FERNANDO DAZA; SPECIAL AGENT HAND; SPECIAL AGENT MARSHALL; UNKNOWN AGENT 1; UNKNOWN AGENT 2; UNKNOWN AGENT 3; UNKNOWN AGENT 4; UNKNOWN AGENT 5,
Respondents

On Petition For Writ of Certiorari

To The Tenth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

David Wellington
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Petitioner

QUESTIONS PRESENTED

In 2017 Respondents executed a search warrant (which had no affidavit) at Petitioner's home. It authorized a search for violations of 26 U.S.C. §7201 (entire federal tax code), as well as 18 U.S.C. §371 (conspiracy to commit any offense against United States). The warrant named Petitioner, three other parties, as well as unspecified/ unnamed New Mexico LLC's, other unnamed 'associated parties/companies', and unspecified publications based on their content. The appellate court affirmed the dismissal of Petitioner's *Biven's*-type suit on grounds Respondents had qualified immunity based on the conclusion the warrant was not facially overbroad. It also held the normal post-seizure hearing requirement for seizure of publications due to their content was inapplicable because obscenity was not the subject matter of the targeted publications.

1. Is a search warrant that authorizes a search for violations of the entire federal tax code (26 U.S.C. §7201), plus any other numerous codes and laws for conspiring to commit any other offense against the United States (18 U.S.C. §371); along with unspecified 'associated parties', and unspecified, unidentified publications based solely on their content, so facially overbroad under the First and Fourth Amendment that qualified immunity should be denied?

2. When publications are targeted in a search warrant and seized due to their content, is the immediate hearing requirement under the First Amendment inapplicable just because the subject matter is not obscenity?

LIST OF PROCEEDINGS

In re Search of 2124 Altura Verde Ln, Albuquerque, New Mexico, No 17MR186, U.S. District Court of New Mexico dated March 10, 2017

Wellington v Daza, et al, No 17-732, U.S. District Court of New Mexico. Judgment entered April 29, 2021.

Wellington v Daza, et al, No 21-2052, U.S. Court of Appeals for Tenth Circuit. Judgment entered August 2, 2022; Rehearing Denied October 3, 2022.

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The opinion of the appellate court is not published, and is reprinted in Appendix A. The appellate court order denying rehearing is reprinted in Appendix B.

JURISDICTIONAL GROUNDS

Petitioner, David Wellington respectfully petitions this Court for a Writ of Certiorari to review the judgement rendered in this case by the Tenth Circuit Court of Appeals. The opinion was entered on August 2, 2022. The rehearing petition was denied October 3, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

LEGAL PROVISIONS INVOLVED

The constitutional and statutory provisions involved are as follows:

U.S. Constitution, First Amendment:
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Fourth Amendment:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

26 U.S.C. §7201:
Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

18 U.S.C. §371:
If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT OF THE CASE

This matter involves the search of petitioner's home in March 2017 and seizure of numerous items, including documents, electronic equipment, personal computer records, publications solely due to their content, and other items which generally showed his 'association' with others. The search and seizure was done by federal tax agents under a search warrant dated the same month. It authorized a search for evidence of possible violations of 26 U.S.C. §7201 [the *entire* federal tax code], and for

possible violations of 18 U.S.C. §371 [conspiracy to commit *any* offense against the United States, or to defraud it in any manner]. With no explanation, the warrant also authorized a search for records dating all the way back to January 1, 2005.

The warrant authorized a search for books and records pertaining to petitioner, three other named individuals, unspecified (all) New Mexico Limited Liability Companies, as well as any unspecified "associated companies/parties". It also authorized a search for unidentified/undefined 'tax-defier paraphernalia, to include publications and how to manuals'. This term is not found in any law, and what constituted 'tax-defier paraphernalia' was left entirely to the discretion of the agents executing the warrant on snooping through home library materials (both paper and electronic).

No affidavit was incorporated into the warrant, and therefore was no part of it. Respondent Daza was the one who supplied the warrant affidavit. After the warrant was issued, at Daza's request, the application affidavit was sealed by a magistrate other than the one who signed the warrant. The warrant was then executed 'as is' by the respondents, except Daza.

Although vaguely described publications were clearly targeted by the warrant, it neither provided for nor required any First Amendment hearing on seizing any publications. Also, although the warrant authorized, and information from petitioner's personal computers and other electronics was seized, no restrictions were placed on any search of electronic records, and respondents have

retained possession of them to this day — apparently still searching for possible violations of any federal laws.

With the warrant having a virtually limitless scope of subject matter, the executing agents then just used it as a 'ticket' to enter the property and conduct a general search, taking whatever struck their fancy. This included family information, various litigation documents and legal research, correspondence relating to anyone, documents concerning Wyoming and Arizona LLC organizations (which are clearly not New Mexico), and automobile insurance documents. Respondents also took photographs of various items, including petitioner's voter registration card (apparently seeking political affiliation information), and took a video of the interior of the house; but none of the photographs or videos were recorded in the seized item 'inventory' list that was made. The 'inventory' list was then signed/verified by respondent Daza, even though he did not participate in the search, and was never even present on the property at the time.

Petitioner subsequently filed a *Bivens-type* action that named the officers who were involved in procuring the warrant and/or participated in the search: respondents Daza, Hand, Marshall, and 5 Unknown Doe's as defendants. It contained seven causes of action related to the search raid. The basis for the federal court's jurisdiction was 28 U.S.C. §1331 (general federal question).

One of the primary claims was the search warrant was simply overbroad on its face because by merely citing extremely broad statutes (even with a date limitation and

item description), its subject matter scope was virtually unlimited. The Complaint further alleged overbreadth regarding exactly who the warrant pertained to, and First Amendment violations concerning searches for petitioner's associations with others and searches for publications based solely on their content.

After numerous delays in the proceedings, and no discovery allowed (both at the repeated requests of defense counsel), petitioner eventually filed a motion for partial summary judgment on grounds the warrant was invalid since it was facially overbroad and violated the First Amendment. This was denied by the district court.

Subsequently appellees Daza, Hand, and Marshall filed a summary judgment motion arguing qualified immunity as to the validity of the search warrant. Nothing was presented in the motion that disputed the allegations in the Complaint. Also, the motion completely ignored the numerous allegations in the Complaint about the respondents' disregard of the warrant limitations (if any actually existed), seizing items not covered, and disregard of hearing protocols where First Amendment issues are involved. There was also no hearing in the trial court to determine whether items were seized outside the limitations of the warrant. Nonetheless, relying in part on the reasoning behind the ruling denying petitioner's prior motion, respondents' qualified immunity motion was granted on grounds the warrant was valid.

On appeal petitioner again argued, among other things, the warrant was facially overbroad, and items were seized outside the scope of the warrant, including photographs of

items and a video of the interior of the residence, none of which even appeared in the 'inventory' list of seized items.

The appellate panel held that because warrants in a drug investigation case [*United States v. Villanueva*, 821 F.3d 1226, 1238-39 (10th Cir. 2016)], and investigation of stolen oil case [*United States v Hargus*, 128 F.3d 1358, 1362-1363 (10th Cir 1997)] involved 'underlying criminal conduct that was extensive', the warrant in this case was also not overbroad. This was the *very first time* in the entire case that any court had even considered any 'extensive underlying criminal conduct' theory, much less made any ruling on it. No such argument had previously been made anywhere by respondents, nor had the trial court considered, much less made, any ruling on this theory.

Also, both the above cases cited by the appellate court involved (i) more narrowed subject matter (drugs and oil), and (ii) consideration of search warrant affidavits that provided further explanation of the 'extensive criminal conduct', and reasons for the breadth of the search. This case does not have either. Instead, the warrant here allowed a general search for evidence of possible violations of the entire federal tax code, plus conspiracy to commit *any* other offense against the United States or defraud it. The warrant also generally allowed for a search of petitioner's associations with others; documents relating to unnamed New Mexico LLC's, as well as undefined and unspecified 'tax defier' publications. The panel held this was a sufficiently narrow description under the Fourth Amendment for the scope of a search warrant due to unexplained 'extensive criminal conduct'.

The panel also held that when a pre-discovery qualified immunity claim is made via summary judgment, in general, an opposing party 'may not simply rest on the allegations in a complaint'. App - 6. This is apparently so even if those allegations are undisputed. In this case, the qualified immunity summary judgment motion did not dispute any of the factual allegations in the Complaint. Instead, it simply presented (i) legal arguments based on the Complaint allegations, and (ii) a copy of a seizure inventory list (which was already an exhibit to the Complaint). Also, nowhere was any argument made that all the seized items came within the warrant limitations, even though the Complaint specifically alleged items were seized outside the limitations (and provided examples).

But according to the panel decision, even undisputed allegations in a Complaint can be disregarded on a pre-discovery qualified immunity claim simply because it's a 'summary judgment' proceeding (as opposed to a dismissal motion). App - 6 (party may not simply rest on complaint allegations, and "reversal would not be warranted even if the defendants had submitted no evidence"). The panel held 'something more' must be presented. But the 'something more' is unexplained.

The panel decision also held the search for and seizure of unspecified and unidentified 'tax defier' publications was valid because "[a]lthough the term is not defined by statute, it is sufficiently particular to allow agents to identify the materials to be seized. And again, although the warrant describes materials in terms of their content, it is not directed at the content per se, but because the materials are evidence, fruits, or instrumentalities of

violations of §§ 7201 and 371." App - 18. The panel cited absolutely no authority for this conclusion.

It further held the normal hearing requirements applicable to the seizure of publications due to their content did not apply because the content did not "arise from the arena of obscenity and restraint of distribution", and petitioner had not "demonstrated the expansion of that case law to seizures, pursuant to a search warrant, of particular copies of books and other materials that may be evidence, fruits, or instrumentalities of other types of crimes." Again, the panel cited no authority for its unequal treatment between obscenity and other types of content.

REASONS FOR ALLOWING THE WRIT

The writ should be issued in this case because the appellate court decision contradicts and defies, several long-standing decisions made by this Court concerning the most sacred of rights protected under the First and Fourth Amendments: (i) the right of privacy in what someone may decide to read in their own home, especially when no legislation has made it illegal; (ii) who someone may decide to associate with; and (iii) the right against general searches and seizures.

The writ should also issue because the appeal court decision to sua sponte inject a new legal theory ('extensive criminal conduct') into its decision for the very first time is so far departed from the usual and accepted course of proceedings that this Court should exercise its supervisory power. For both the above reasons, as further detailed below, this Court should summarily reverse/ vacate the appeal court.

The issue of search warrants has been thrust into the public eye more than ever with one being issued for the very first time for the search of an ex-President's residence. That warrant authorized a search for classified documents, national defense information, and Presidential records. But the scope of that warrant pales in comparison to the one in this case.

In contrast to search warrants in most cases, the number of potential warrants in tax and federal conspiracy cases dwarfs any other category just because of the sheer magnitude of the subject matter covered. It is largely because of the hated 'general warrants' for tax-related searches that the Fourth Amendment was created. Because of the broad scope of subject matter, such a warrant can literally be issued against anyone at anytime to search for anything. This case effectively presents that situation.

In this case, the appellate court literally said a warrant is valid if it directs a search for evidence of violations of 26 U.S.C. §7201 (which covers the *entire* federal tax code), as well as 18 U.S.C. §371 (any conspiracy to violate *any other* law of the United States); plus it authorized a search for unnamed (all) New Mexico LLC's and unlimited 'associated parties', as well as unidentified publications based on their content. It's hard to imagine how a warrant could be made any broader in scope.

In addition to the above, the appellate court decision added an issue that had never even been brought up before by anyone: a finding of 'extensive criminal conduct' for the first time ever — with no basis for it. This is

clearly far departed from the usual and accepted course of proceedings. Not only was it improper for the court to sua sponte inject an argument/ issue into its decision (for which no stated grounds exist), but under this ruling, now *any* search warrant can be presumed to include 'extensive criminal conduct', and therefore can summarily be deemed 'more expansive'. This ruling conflicts with every other ruling in a similar case, including rulings from this Court.

1. The Appellate Court Decision Contradicts Those of This Court And Departs From The Usual Course of Proceedings.

Petitioner contends a major reason for allowing the writ should be self-evident from the above: the search warrant was clearly and flagrantly overbroad on its face (if not a general warrant), since it allowed for a fishing expedition to search for evidence of any potential violations of the entire federal tax code, as well as any other crimes against the United States. This alone violates the most rudimentary fundamentals behind the Fourth Amendment restriction against unreasonable searches, and sets an incredibly bad precedent to be followed in other search warrant cases. (Although the decision is 'unpublished' it nonetheless comes up high in search results on Lexis searches for 'tax search warrant' , and will doubtlessly be cited in other cases).

Given its breadth, the warrant in this case is virtually indistinguishable from the illegitimate 'general warrant or writ of assistance' discussed by this Court in such cases as *Lo-Ji Sales v New York*, 442 U.S. 319, 325 (1979), and *Stanford v Texas*, 379 U.S. 476, 481 (1965) (hated general

warrants and writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws). This situation may even be worse than what was discussed in *Stanford* since the warrant here was not even limited to imports, but rather allowed a search for possible violations of every law in the entire federal tax code, plus conspiracy violations of any other federal law.

26 U.S.C. §7201 states it applies to "any person who willfully attempts in any manner to evade or defeat *any* tax imposed by this *title*" (emphasis added). The full 'title' consists of subtitle A (income tax on individuals, corporations, partnerships, etc); subtitle B (estate and gift taxes); subtitle C (employment taxes); subtitle D (miscellaneous excise taxes); subtitle E (alcohol, tobacco, and other excise taxes); subtitle H (financing of presidential election campaigns); subtitle I (various federal trust funds); subtitle J (coal industry health benefits), and subtitle K (group health plans). By merely citing §7201, the subject matter scope of the warrant authorized a search for evidence of possible violations of any and all the above. How can a search warrant be more broad?

Well, by also merely citing 18 U.S.C. §371, the warrant added even more breadth by allowing a search for evidence of violations of unspecified 'conspiracies to defraud the United States'. The subject matter of this would span numerous Titles of the U.S. Code. How a search warrant of this magnitude could not be described as 'general warrant' is simply beyond logic.

The decision in the instant case not only conflicts with the above decisions from this Court, but also other circuits and even with decisions made within the Tenth Circuit itself. Appellate courts have long held a search warrant that merely cites broad statutes in conjunction with a laundry list of ordinary items does not satisfy the Fourth Amendment. *U.S. v Cardwell*, 680 F.2d 75, 77 (9th Cir 1982) ("[t]he only limitation on the search and seizure of appellants' business papers was the requirement that they be the instrumentality or evidence of violation of the general tax evasion statute, 26 U.S.C. Sec. 7201. That is not enough."); *Rickert v Sweeney*, 813 F.2d 907, 909 (8th Cir 1987) (warrant limited only by laundry list of items and reference to general conspiracy and tax evasion statutes did not limit search); *United State v Ford*, 184 F.3d 566, 575 (6th Cir 1999) (warrant authorizing search for numerous ordinary financial documents facially overbroad, suppression required, tax conviction reversed); *United States v Rosa*, 626 F.3d 56, 62 (2nd Cir 2010) (mere reference to 'evidence' of a violation of a broad criminal statute or general criminal activity provides no readily ascertainable guidelines for the executing officers as to what items to seize; warrant authorization to search for 'evidence of a crime,' that is to say, any crime, is so broad as to constitute an invalid general warrant); *United States v. Maxwell*, 920 F.2d 1028, 1033 (D.C. Cir. 1990) (same); *Roche v. United States*, 614 F.2d 6, 7 (1st Cir.1980) (warrant that authorized the seizure of books, records and documents 'which are evidence, fruits, and instrumentalities of the violation of Title 18, United States Code Section 1341 [mail fraud]' provided "no limitation at all").

The decision in the instant case even contradicts those of the Tenth Circuit itself. See *United States v Leary*, 846 F.2d 592 (10th Cir 1988) (search warrant for violations of import/ export laws listing all ordinary books and records of such a business was facially overbroad); *Voss v Bergsgaard*, 774 F.2d 402, 404-405 (10th Cir. 1985) (warrant for seizure of documents and records 'all of which are evidence of violations of Title 18, United States Code, Section 371' held overbroad and invalid).

The situation was made even more egregious by the lack of limitations on exactly who the warrant pertained to: anyone 'associated' with the parties named in the warrant, or associated with *any* New Mexico LLC (which would number in the 10's of thousands). The determination of who might be 'associated' with someone was left entirely to the discretion of those executing the warrant. The limitlessness of who the warrant applied to is breathtaking itself. But it also implicated associational privacy rights under the First Amendment of those named in the warrant.

This court has long held government actions that "may have the effect of curtailing the freedom to associate [have been] subject to the closest scrutiny," since at least 1958 when it decided *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958) and *NAACP v. Button*, 371 U.S. 415, 428-29 (1963). Even the Tenth Circuit itself has held when a search warrant implicates associational rights, it is facially overbroad if not narrowed with 'scrupulous exactitude'. *Voss v Bergsgaard*, 774 F.2d 402, 405 (10th Cir. 1985) ('the warrants overbreadth is made even more egregious by the fact that the search implicated free speech *and*

associational rights'; warrant subject to 'scrupulous exactitude' standard) (emphasis added). 'Associated party' warrants have also been held to be patently overbroad on their face by other appellate courts. *United States v. Washington*, 797 F.2d 1461, 1473 (9th Cir. 1986) (warrant that permits officers to seize evidence of association between a suspect and any other person is patently overbroad).

The decision in the instant case contradicts all the above. Of course, the First Amendment is of critical importance in this country, and search warrants that allow general searches of associations for potential general criminal activity should be abhorrent on their face. Yet, the appellate decision in this case allowed just that; in direct conflict with the above decisions.

Then the warrant also authorized a search for unspecified, undefined 'tax defier' publications that might exist in a home, which further implicated First Amendment privacy rights to the contents of a home library. Although the appellate court recognized there is no law even defining what 'tax defier' material might even be, much less any law prohibiting it, the court nonetheless held the term was 'sufficiently defined' enough for a search and seizure. It cited no authority for this conclusion.

This Court has already rejected the idea that a seizure of publications may be couched under some law other than the substantive law directly at issue, especially when no determination has been made of any violation of the substantive law. *Fort Wayne Books, Inc v. Indiana*, 489 U.S. 46, 66 (1989). Therefore the appellate court's

approval of a search for unknown, unspecified publications (based on general subject matter), couched as possible violations of tax or conspiracy laws, contradicts the above decision. This is especially true when no substantive law even exists that even defines 'tax defier' publications, much less outlaws them.

This Court has also rejected the idea that warrants are valid when they "gave the broadest discretion to the executing officers; ... specified no publications, and left to the individual judgment of each of the many police officers involved the selection of such magazines as in his view" were offensive. *Marcus v. Search Warrant of Property*, 367 U.S. 717, 732 (1961). Nonetheless, the appellate court adopted the opposite view in this case; and did so when no statute defining or prohibiting 'tax defier' materials even exists.

The above decision in this case is also not only a direct affront to the Fourth Amendment, but also basic, fundamental First Amendment rights of privacy in the content of a home library recognized by this Court decades ago in *Stanley v. Georgia*, 394 U.S. 557 (1969) (conviction for possession of statutorily illegal 'obscene' film seized by police from home reversed as violation of First Amendment home *privacy* right). This decision shows people have an extremely strong First Amendment right of privacy in the contents of a home library. But the appellate court in this case held the opposite because of nothing but pure conjecture about unknown, unseen, unspecified potential publications that *might* be found during a search for possible evidence of some unspecified tax and/or conspiracy crime.

This Court has also readily recognized all publications in this country are presumptively protected under the First Amendment, and it is up to the government to prove otherwise at an appropriate pre-seizure, or prompt post-seizure hearing. *New York v. Video, Inc*, 475 U.S. 868, 873 (1986). If it is going to be a post-seizure hearing, the hearing must be required in the warrant itself under *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). But the appellate court held the hearing requirement was inapplicable because the publications sought were not 'from the arena of obscenity and restraint of distribution'. The court cited no authority for its facially discriminatory treatment between obscenity (which can be declared illegal in some circumstances by a legislature) and non-obscenity (which generally cannot be declared illegal). Petitioner has found no case where any court has recognized or allowed this sort of unequal treatment which, ironically, favors potentially illicit publications, and discriminates against non-prohibited publications. This is ridiculous on its face.

The circumstance here is similar to that in *Stanford v Texas*, 379 U.S. 476 (1965), where this Court held "the indiscriminate sweep of the language" in a search warrant aimed at 'records and publications' of the Texas Communist Party was "constitutionally intolerable". There, this Court recognized "the use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new." *Id* at 484. This system for the suppression of objectionable (but not illegal), publications apparently still exists today, over 50 years later.

Petitioner submits the appellate court decision is so far departed from accepted and usual First and Fourth Amendment jurisprudence, as to be reason for a summary reversal and remand on grounds the warrant was unconstitutional due to its facial overbreadth. Petitioner has found no case where a search warrant was held to be valid where it authorized a search for violations of (i) *any* federal tax law, and (ii) conspiracy to violate any other federal law. The idea that this could ever be considered to comply with the Fourth Amendment alone is shocking. Adding in the First Amendment considerations makes it even more shocking.

Based on the above, petitioner contend this issue needs little analysis, and the appellate court's decision that the search warrant was valid should be summarily reversed/ vacated, with the case remanded for further proceedings.

2. The Appellate Decision Contradicts This Court's Decisions Regarding What Should Be Considered In Determining A Pre-Discovery Qualified Immunity Claim

The appellate decision also held that petitioner had to present something beyond the allegations of the Complaint for a pre-discovery qualified immunity determination because the immunity claim was presented by respondents in the context of a summary judgment motion. But this directly contradicts decisions from this Court in *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (the first-step standard for a qualified immunity determination has been deciding whether the *allegations in a complaint* state a claim for violation of a clearly

established right), and *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (first, a court must decide whether the facts that a plaintiff has alleged 'show the [defendant's] conduct violated a constitutional right', second, the court must decide 'whether the right was clearly established.')

Even more directly on point is this Court's decision in *Anderson v Creighton*, 483 U.S. 635, 646 (1987) (note 6) (first thing to be determined is whether the actions *the Creightons allege* Anderson to have taken are actions that a reasonable officer could have believed lawful; if they are not, and if the actions Anderson claims he took are different from those the Creightons allege, then discovery may be necessary before Anderson's motion for summary judgment on qualified immunity grounds can be resolved) (emphasis added).

The appellate court's decision on the matter is in direct contradiction to this Court's decisions on exactly what should be considered in making a pre-discovery qualified immunity determination. Its decision creates unnecessary confusion in the very broad area of qualified immunity, which is usually raised in the context of civil rights matters under 42 U.S.C. §1983 as well as other areas where qualified immunity can be raised. If allowed to stand, the appeal court decision will cause unnecessary confusion and conflict in this frequently litigated arena.

This Court should act to correct the appellate court's manifest refusal to follow what should be settled law, and avoid any further conflict on this issue.

3. The Appeal Decision Contradicts This Court's Decisions On Fundamental First Amendment Principles When Publications Are Targeted In a Search Warrant and Seized Due to Their Content.

This Court has long recognized that at the core of the First Amendment is the idea that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). Therefore, a search warrant for possible publications in a home library based on their content is seriously suspect from its inception.

For this reason, this Court has long recognized that the seizure of materials (films, books, literature, writings) on the basis of their content implicates First Amendment concerns not raised by other kinds of seizures. For that reason, certain special conditions must be met before such seizures may be carried out. *New York v. Video, Inc*, 475 U.S. 868, 873 (1986). Even where a seizure of materials "would not constitute a 'prior restraint,' but instead would merely preserve evidence for trial, the seizure must be made pursuant to a warrant and there must be an opportunity for a prompt postseizure judicial determination" of the First Amendment issue. *Id*, citing *Heller v. New York*, 413 U.S. 483 (1973).

It has also long been held that one of the conditions for allowing seizures of publications on the basis of their content is the incorporation of a requirement for an adversary hearing judicial determination of the First Amendment issue — either before, or immediately after, the seizure — to determine whether or not the items

sought/ seized are in fact protected under the First Amendment. *Freedman v. Maryland*, 380 U.S. 51, 58 ("only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression"). If the adversary hearing is not required before a search warrant is issued, whatever scheme that is used in the warrant must require a procedure ensuring a *prompt* post-seizure judicial determination. [The requirement for prompt judicial review is not satisfied by a mere 'probable cause' finding. *Blount v. Rizzi*, 400 U.S. 410, 419-420 (1971)]. If the hearing condition does not exist, a seizure (and warrant authorizing any such seizure) would not be constitutionally permissible. *Heller*, supra.

Whatever (legislative or administrative) scheme may be used to justify such a seizure, it (or some other authority) must assure a *prompt* judicial decision of the First Amendment question. *Heller*, supra, (note 9), citing *United States v. Thirty-Seven Photographs*, 402 U.S. 363, at 367 (1971); *Blount v. Rizzi*, 400 U.S. 410, 417 (1971); *Freedman v. Maryland*, 380 U.S. 51, at 58—59 (1965)). It must also provide for preserving the status quo (i.e. seizure of materials in question) 'for the shortest fixed period' of time possible. *United States v. 37 Photographs*, 402 U.S. 363, 367-368 (1971) (discussing invalidation of Chicago's motion picture censorship ordinance for failure to require prompt judicial hearing). Any seizure of these types of materials must be for the shortest time possible, after which they must presumptively be returned.

In contradiction to the above, the appellate court held the hearing requirement for the seizure of undefined and unidentified 'tax defier' materials was inapplicable because (i) it only applied to content that may be obscene, and (ii) the unidentified, unseen, unknown potential publications were (somehow just assumed to be) evidence of violations of the entire federal tax code and/or conspiracy to violate other federal laws. No authority was cited by the appeal court for either conclusion.

The appellate court decision completely contradicts the concepts of this Court's rulings, and turns them on their head by allowing someone executing a warrant to be the final arbiter of: (i) what publications should be seized based on their content, and (ii) whether they may be protected under the First Amendment. According to the appeal decision, the executing officer's unbridled discretion is the final word, and unreviewable. This is the exact opposite principle of this Court's prior rulings.

For whatever reason, the appellate court's decision is almost outright defiant of the rulings by this Court on fundamental Constitutional protections, and allows for arbitrary searches of a home library for content that agents executing a warrant may dislike. This is a virtual direct frontal assault on First and Fourth Amendment principles this Court has already settled.

CONCLUSION

The appellate court's decision contradicts numerous decisions of this Court on several fronts regarding the First and Fourth Amendments, and search warrants. Its

justification was to insert a new legal theory ('extensive criminal conduct') into its decision when that issue had never even been presented by any party. Outside of jurisdictional questions, it is clearly improper for a court to insert and rule on issues/arguments a party never even made. As the decision itself stated, an appeal court will not ordinarily consider issues and arguments that were never raised. Yet, it went even beyond this and raised an issue on its own which was then a cornerstone of its ruling. This is something so out of the realm of accepted procedure that this Court should summarily vacate/ reverse the appeal court decision.

Also, in near complete contradiction to the numerous long-standing rulings of this Court, the appellate court approved of what can only be described as a 'general warrant'. It allowed total and complete discretion to the officers executing it to determine: (i) what statutory violations were being considered, (ii) what evidence of any violations they may be searching for, (iii) what constituted 'associated parties' and (iv) what constituted 'tax defier' materials. This is virtually unprecedented in this day and age.

Given the circumstances, this Court should not idly stand by while a lower court flaunts well established principles from this Court's prior decisions. It should also not allow an appellate court to sua sponte insert and rule on a legal theory ('extensive criminal conduct') that had never been presented by anyone. Nor should it allow decisions to stand that will cause unnecessary conflict and confusion about what should be well settled principles of law regarding what should be considered in a pre-discovery

qualified immunity determination. This Court has already held the only thing to be considered should limited to the allegations in the Complaint, with the assumption of their truth.

Given all the above, this Court should therefore grant this petition, and either summarily vacate/reverse the appellate court's decision and remand the matter, or set the case for further proceedings.

Respectfully submitted,

/s/ David Wellington
Petitioner