No 23 - ____

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL S. BARTH,

PETITIONER,

v.

In re: SEALED SEARCH WARRANT
UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT
COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioner is entitled to intervene as of right and permissively in this litigation; and denial of the general public's right of access to judicial proceedings is improper under the Common Law, the Constitution, this Court's precedent, federal statutes and rules.

II. When is inadequate representation found, or whether for example this Court should also reconsider the *New York Times v. Sullivan* "actual malice standard" as sufficient to show media bias is inadequate representation; or whether foreign headquartered media intervenors have greater Constitutional rights than American Citizens; or whether the Court taking judicial notice that the Government or Court colluded to leak sealed and classified information to certain Media or the media publishing false information is a sufficient showing of inadequacy.

III. Whether a Court of Appeals can dismiss an amended-second-notice of appeal *sua sponte* when the Court admits it has jurisdiction over the underlying docketed matter; or whether a second (amended) notice of appeal perfected Petitioner's appeal as of right and permissively as to all claims disposed of or ignored by a district court, or magistrate judge's paperless orders.

IV. Whether an appeal can be immediately taken "directly" to a United States Court of Appeals from a magistrate "decision" denying motion to intervene and motion to intervene to appeal; when for example: Special Counsel

unconstitutionally fails to follow DOJ guidelines and seeks and other intervenors consent to a non-Article III magistrate instead of an Article III district court judge; other parties consented to the magistrate conducting the court proceedings; no district court judge being assigned to supervise the magistrate; and the magistrate acted upon a Rule 72 Objection Motion instead of a district court judge that the motion was addressed to.

V. What is the scope of authority of a magistrate judge, and whether magistrate recusal is required when a magistrate exceeds his authority to "intercept" a Rule 72 motion to an Article III judge; and a motion for judge recusal was properly before a magistrate, or whether in the alternative a Court of Appeals is required to review a refusal to recuse for plain error.

VI. Whether a motion to intervene to unseal court records is a criminal or civil matter.

VII. Whether Special Counsel has legal standing to oppose an appeal of a denial of a motion to intervene when it did not oppose the motion in the district court.

VIII. Whether Court of Appeals applied the proper standard of review.

IX. Whether Petitioner is entitled to a refund of a second docket fee required to be paid by the District court in the same case on appeal.

X. Under the circumstances, should all court records be unsealed and unredacted in the underlying litigation.

INTERESTED PARTIES

All parties to the Eleventh Circuit proceedings appear in the caption of the case. A list of other interested parties that only participated in the district court are reproduced at Pet. App. A 24-25.

RELATED PROCEEDINGS

In re Sealed Search Warrant, 622 F. Supp. 3d 1257 (S.D. Fla. 2022)

In re Sealed Search Warrant, No. 22-mj-8332-BER, 2022 WL 3656888 (S.D. Fla. Aug. 25, 2022).

In re Sealed Search Warrant, 9:22-mj-08332, 22-12932 (11th. Cir. Dec. 27, 2022)

In re Sealed Search Warrant, 9:22-mj-08332, 22-13061 (11th. Cir. Dec. 27, 2022)

In re Sealed Search Warrant, 9:22-mj-08332, 22-12932 (11th. Cir. Nov. 9, 2022)

In re Sealed Search Warrant, 9:22-mj-08332, 22-13061 (11th. Cir. Nov. 1, 2022)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays this Court grant a writ of certiorari to review the decisions of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion in No. 22-12791 is found at Petitioner's Appendix (A) 1-7, 2023 WL 4995735. The Court of Appeals Orders denying reconsideration in No. 22-12932 and No. 22-13061 are found at A8 and A10. The Court of Appeals opinion in No. 22-12932 is found at A11. The Court of Appeals opinion in No. 22-13061 is found at A13. The United States District Court's Order for the Southern District of Florida (J. Rosenberg) overruling an objection to the magistrate's denial of a motion to intervene, which is not officially reported, is reprinted at A16. *In re Sealed Search Warrant*, 9:22-mj-08332 (S.D. Fla. Aug 19, 2022).

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals in Case 22-12791 was entered on August 4, 2023. This Court has jurisdiction to review the judgments of the Court of Appeals pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent constitution and statutory provisions and rules are reproduced at Petitioners Appendix A 26.

STATEMENT OF THE CASE

Petitioner should be permitted to intervene in the district court below. This Petition for Writ of Certiorari relates to the denial of the general public's common law and constitutional right to intervene in a search warrant proceeding to access court and judicial records, documents, and notes of a non-Article III magistrate who was sought by Special Counsel in contravention of U.S. Department of Justice (DOJ) Rules, on an issue of first impression in American history, an unprecedented raid by the sitting President's Attorney General on the residence of a former President and then leading 2024 presidential election opponent.

The Court's below misconstrued the Constitution, Court precedent, federal statutes and rules, to deny Petitioner's Motions to Intervene, Appeal, Amend a Notice of Appeal, for magistrate recusal, and refund a second filing fee improperly levied by the court.

Other "media" intervenors adverse interests failed to adequately represent Petitioner's interest as media; consented to a magistrate who just recused himself from a case involving the former president; failed to challenge Special Counsel who sought a non-Article III judge; failed to raise the magistrate's admitted bias but instead praised that bias; their counsel

conceding the magistrate's self-proclaimed finding of probable cause; and the magistrate (took judicial notice) that Media intervenors, Government and the Court colluded to illegally leak sealed information, and the magistrate admitted the media does not represent the public's interest when he wrote they published false information.

The Eleventh Circuit distorted the basic tenants of *Marbury v. Madison* to conclude a magistrate has the final word on what is unsealed and unredacted. The Eleventh Circuit failed to apply the appropriate standard of review to avoid the Court's mandatory jurisdiction of Petitioner's appeal.

REASONS FOR GRANTING THE WRIT

On August 5, 2022, in violation of DOJ mandatory rules, Special Counsel sought and obtained a rubber-stamped general warrant from a self-proclaimed biased non-Article III magistrate, to conduct an admitted unprecedented extraordinary raid on the residence of the democratic president's widely accepted then leading opposing 2024 Presidential candidate, former President Donald J. Trump. Not being exigent circumstances, the warrant was executed days later. The Court admitted a warrant, sought by a political presidential opponent was a matter of extraordinary first impression, similar historical events in the 1600s, a reason the Founders adopted the Fourth Amendment. *U.S. v. Parcel of Rumson, N.J., Land,* 507 U.S. 111 (1993).

In August 2022, various "parties" consented to the jurisdiction of a non-Article III magistrate to proceed

over motions to intervene to partially unseal and partially unredact records related to the warrant. The District Court Clerk's Office confirmed no Article III Judge was assigned to the matter.

Petitioner objecting to the magistrate's jurisdiction, timely moved to intervene so that all (and not just partial) court and judicial records and documents be unsealed and completely unredacted, not limited to the magistrate's notes related to the issuance of the warrant. Media intervenors consented to the magistrate's statement he found probable cause, and did not appeal the rulings. Petitioner appealed the magistrate's view of probable cause and the magistrate's incorrect rulings.

The magistrate's paperless orders approved the media's motions to intervene but denied petitioner's motion. Without providing an adequate basis, the magistrate wrongly claimed: "the interests asserted by the movant was adequately represented by the media intervenors," (DE 64, A19).

The magistrate did not provide a 10-day notice to "appeal" to an Article III judge, such notices required if the magistrate's denial of a motion to intervene is not immediately appealable to a Court of Appeals. *Thomas v. Arn,* 474 U.S. 140 (1985).

An Article III judge overruled Petitioner's objection to the magistrate's denying intervention, the judge claiming the magistrate's one sentence decision was correct under a *de novo* and the abuse of discretion standard; and that media's [counsel] "thoughtfully and professionally litigated their positions"; and

inapposite to its own judicial notice, wrote there was 1. no evidence of collusion between the Government and media; 2. no adverse interest between the media and movant; and 3. the media fulfilled their duty. (A16.)

At August 18, 2022 oral arguments, the magistrate took judicial notice the government illegally leaked sealed information to the media intervenors; the media consented to the magistrate's claim he found probable cause; and the media committed to not appealing any decisions on the scope of what the Government asked to remain sealed and redacted.

On August 22, 2022, Petitioner appealed the district judge's August 19th denial of the "objection" to the magistrate denying Petitioner's motion to intervene. (DE 84, A19, Number: 22-12791.)

On August 31, 2022, Petitioner filed a Motion to Intervene for purpose of appealing an August 22nd magistrate's order that limited what "records" would be unsealed. (DE 106, A20). *In re Sealed Search Warrant*, 622 F.Supp.3d 1257 (S.D. Fla. 2022). The Clerk's office filed the "Notice of Appeal" that was appended to the Motion to appeal, and required an additional fee to be paid for the filing of that Appeal; Case 22-12932. (DE 111, A21.)

On September 1, 2022, the magistrate wrote (DE 110, A20):

> Docket Text: PAPERLESS ORDER denying [107] Motion by Non-Party Michael S. Barth to Intervene for Purposes of Appeal. See

> *Davis v. Butts*, 290 F.3d 1297, 1299 (11th Cir. 2002) ("Standing alone, an order denying permissive intervention is neither a final decision nor an appealable interlocutory order because such an order does not substantially affect the movant's rights."). Signed by Magistrate Judge Bruce E. Reinhart on 9/1/2022.

On September 7, 2022, Petitioner filed a Rule 72 Motion objecting to the September 1, 2022 denial of the motion to intervene to appeal: (DE 118, A21.)

On September 8, 2022, the magistrate denied the Rule 72 Motion:

> Order on Motion for Miscellaneous Relief Docket Text: PAPERLESS ORDER construing the filing at [118] as a Motion for Reconsideration of this Court's Order entered at DE 110. To the extent DE 118 seeks reconsideration of this Court's prior order, that portion of the motion is DENIED. The remainder of the relief sought in DE 118 is DENIED AS MOOT because the motion at DE 70 (which sought review by the District Court) has already been denied at DE 78... Signed by Magistrate Judge Bruce E. Reinhart on 9/8/2022.

On September 9, 2022, Petitioner filed an Amended Notice of Appeal, DE 121 reading in part:

> Docket Text: Amended NOTICE OF APPEAL by Michael S. Barth as to Sealed Search

> Warrant Re: [64] Order, [110] Order on Motion for Miscellaneous Relief, [120] Order on Motion for Miscellaneous Relief, Order on Motion to Unseal Document, [78] Order on Motion for Miscellaneous Relief.

The Court of Appeals assigned this a third case number; 22-13061. (DE 132, A22.)

The Eleventh Circuit lacked an understanding of its appellate role and the constitutionally constrained role of a magistrate when it dismissed *sua sponte* case 22-12932 on November 1, 2022 and case 22-13061 on November 9, 2022 for lack of jurisdiction. On December 27, 2022, the Eleventh Circuit denied motions for reconsideration in both cases. (A8-10.)

Point I: Petitioner's standing admitted.

The Court of Appeals August 4, 2023 Order conceded petitioner's "appeal is not moot because portions of the search warrant affidavit remain under seal." (A3.) Moreover, denial of a motion to intervene to unseal are capable of repetition yet evading review. *Press Enterprise Co. v. Super. Ct.,* 478 U.S. 1, 6 (1986); *Globe Newspaper Co. v. Super Ct.,* 457 U.S. 596, 603 (1982); *Richmond Newspapers Inc. v. Virginia,* 448 U.S. 555, 563 (1980). Furthermore, Petitioner is entitled to reimbursement of the $505 Court of Appeals filing fee that was required to be paid in Case 22-12932. (DE 132, A22.)

Point II: Courts below failed to recognize Court precedent establishing the public's paramount interest over media interests.

This Court held that all District and Court of Appeals must recognize the public's common law and constitutional right to intervene to unseal court and judicial records and documents. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). The public interest is greatly favored as paramount over institutional media so that the "truth may be known." *Red Lion Broadcasting Co. v F.C.C.*, 395 U.S. 367, 390 (1969. "Media" has no constitutional right of access when the general public is excluded. *Houchins v. KQED*, 438 U.S. 1, 10-11 (1978) *citing Branzburg v. Hayes*, 408 U.S. 665, 684-685 (1972). The purpose of the public's right is firmly established to allow the citizenry to keep a watchful eye on, *inter alia,* the Judiciary, Government - and the media. *Nixon* 435 U.S. at 598.

The courts below erred by putting the magistrate, District Court, Government, U.S. and foreign media interests over this Court's recognized public's paramount constitutional and common law interests. *Agency for Int'l Dev. v. All. For Open Soc'y Int'l. Inc.*, 140 S. Ct. 2082, 2086-2088 (2020) ("foreign... do not have First Amendment Rights") (DE 173, A23, a Canadian headquartered multinational media conglomerate, was later added as an intervenor. https://en.wikipedia.org/wiki/Thomson_Reuters.)

The magistrate contradicted himself by omitting the public interest when in one sentence he wrote: "The public and the media have a qualified right of access to judicial proceeding..."; then in the next sentence he wrote: "Media intervenors focus on two categories of information." (DE 174, A22.)

Point III: Courts below ignored Special Counsel's failure to follow DOJ guidelines.

Appointment of a Special Counsel is prima facie proof that "extraordinary circumstances exist." *Office of Special Counsel*, 64 Fed. Reg. 37038-01, 1999 WL 462200 (F.R.). Special Counsel is required to "comply with the rules, regulations, procedures, practices and policies of the Department of Justice." *In re Grand Jury Investigation*, 916 F.3d. 1047, 1050 (D.C. Cir. 2019). Pursuant to DOJ, in such extraordinary circumstances as the Court below admitted, the Government was required to seek an Article III Judge in the district court, rather than a disqualifying biased non-Article III Magistrate. *Gomez v. U.S.*, 490 U.S. 858 (1989) n. 20.

The Attorney General, as a principal officer appointed by a democratic party President, was responsible to direct and supervise the Special Counsel work. *In re Grand Jury Investigation*, 916 F.3d. at 1052, citing *Edmond v. United States*, 520 U.S. 651, 663 (1997). The Attorney General is responsible for actions Special Counsel undertook. *United States v. Manafort,* 312 F.Supp.3d 60 (D.D.C. 2018). Moreover, the Attorney General serves at the pleasure of the President who in this case failed to see that the "laws are faithfully executed." *Ponzi v. Fessenden,* 258 U.S. 254 (1922) (noting that the Attorney General serves at the pleasure of the President); *United States v. Texas*, 143 S. Ct. 1964 (2023) ("The Executive Branch possesses authority to decide how to prioritize and how aggressively to pursue legal actions against defendants.")

The Government and Courts below conceded the extraordinary first impression nature of unsealing records related to the indictment of a former president. Special Counsel failed to comply with the DOJ's own rules that an Article III district judge must conduct the district court proceedings, rather than a self-proclaimed bias magistrate. The Attorney General failed to supervise Special Counsel's failure to follow DOJ rules and failure to seek an Article III judge to conduct the proceedings in the District Court. The Attorney General not only neglected his responsibility but also attempted to mislead the American public about his statutory role of supervising the Special Counsel. The media intervenors failed to "call out" President Biden's failure to ensure the "laws are faithfully executed", and that the Attorney General failed to supervise and direct the Special Counsel.

Point IV: A Magistrate who rubber stamps a warrant is recusable for bias.

A hallmark of the Fourth Amendment is an unbiased neutral and detached judge who does not act like a rubber stamp. *See e.g., United States v. Leon*, 468 U.S. 897 (1984). "The courts must...insist that the magistrate purport to perform his neutral and detached function and not serve merely as a rubber stamp." *Id.* at 914. A number of other Court of Appeals have properly reviewed and concluded that a magistrate who rubber stamps a warrant is likely biased as just one of the ways in which a magistrate judge can fail to act in a neutral and detached manner during the warrant process. *United States v.*

Barnes, 895 F.3d 1194, 1202 (9th Cir. 2018) citing *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979). (Supreme Court did not intend to limit judicial abandonment to conduct such as that in *Lo-Ji Sales* and other instances of judicial bias.)

The Magistrate admitted in his own words that he rubber-stamped the warrant when, for example, the Magistrate stated on the record that his practice is for the Government to amend an affidavit yet the record did not reflect any amendments to the warrant application. Transcript References omitted, *In re Sealed Search Warrant,* 9:22-mj-08332-BER (Transcript P. 39,); All necessary transcript(s) are on file. [Entered: 09/07/2022 11:50 AM] *In Re Warrant*, 22-12932 (11th Cir.).

The Government's admissions of the extraordinary nature of the warrant were sufficient reasons for a neutral and detached judicial officer to seek amendments to the affidavit, whether exculpatory or of dissolving probable cause.

Point V: A non-Article III magistrate is not presumed impartial under Court precedent.

Under this Court's precedent and court rules a non-Article III magistrate is subject to veto by the parties and therefore not presumed impartial. *Wellness Intern. Network, Ltd. v. Sharif*, 575 U.S. 665, 677 (2015) ("ultimate decision whether to invoke the magistrate's assistance is made by the district court subject to veto by the parties"); Recusal is required when the "probability of actual bias on the part of the judge or decision maker is too high to be

constitutionally tolerable." *Rippo v. Baker*, 580 U.S. 285, 287 (2017). Even a case cited by the Government below holds that if the question of whether 28 U.S.C. § 455 (a) requires disqualification is a close one, the balance tips in favor of recusal – as a number of circuits have correctly noted. *In re Boston's Children First*, 244 F.3d 164, 167 (1st Cir. 2001) *quoting Nichols v. Alley,* 71 F.3d 347, 352 (10th Cir. 1995); *Ligon v. City of New* York, 736 F.3d 118, 124 (2d Cir. 2013); *United States v. Dandy*, 998 F.2d 1344, 1349 (6th Cir. 1993). Appearance and not actual bias or prejudice is all that is required to show the bias would create an inability to render a proper judgement. *Liteky v. U.S.*, 510 U.S. 540, 548 (1994). Moreover, "allowing a decision maker to review and evaluate his own prior decisions raises problems." *Withrow v. Larkin*, 421 U.S. 35, 58 (1975), n. 25; because a judge might be "so psychologically wedded to his or her previous position that he or she will consciously or unconsciously avoid the appearance of having erred or change position." *Williams v. Pennsylvania*, 579 U.S. 1, 9 (2016); Code of Conduct for United States Judges, Canon 2(A) ("An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired").

A court rule to prevent a party's "veto power" against an Article III judge do not apply to a non-Article III magistrate who can easily be removed from a case by a lack of consent of the parties, and whose selection by Special Counsel violated DOJ mandatory rules.

Moreover, the magistrate was "so wedded" to his decision he wrongfully and desperately reviewed a Rule 72 motion made to an Article III district court judge, his actions brought before himself a motion for his own recusal.

The Court of Appeals ignored this Court's oft-repeated admonitions to not ignore Petitioner's constitutional rights. *Emspak v. United States*, 349 U.S. 190, 197-98 (1955) (Courts must indulge every reasonable presumption against waiver of fundamental constitutional rights.); *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 159 (1907) (Constitution would not be the supreme law of the land if it could be overridden by a judicial decision.)

Point VI: The record reflects the Magistrate's disqualifying bias.

"A warrant authorized by a neutral and detached judicial officer is a more reliable safeguard." *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 (1979); *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972) ("Issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search.") "Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. 455(a).

The record reflected the opposite of a manifest neutrality and detachment demanded of a judicial officer when presented with a warrant application for search and seizure of a political opponent of a

sitting president; but showed that magistrate recusal was required, and that Special Counsel and Media Intervenors embrace of the magistrate's bias failed to adequately argue representation of the issue.

Petitioner provided three of Magistrate Reinhart's disqualifying bias and prejudicial factors: 1. Magistrate Reinhart had already recused himself in a case two months earlier involving the former president in *Trump v. Clinton,* 2:22-cv-14102-DMM (S.D.F.L. June 22, 2022) Filing 186 ORDER OF RECUSAL; 2. Magistrate Reinhart's made at least one derogatory inflammatory and social media post about the former President (Appellant's Court of Appeals Brief A23 in Case Number 22-12932); and 3. Magistrate Reinhart's political contributions to an opposing candidate to the former President. Zach Montague, Bruce Reinhart, the Magistrate Judge Who Approved the Mar-a-Lago Search, August 18, 2022, www.nytimes.com/2022/08/18/us/politics/judge-bruce-reinhart-trump-mar-a-lago.html.

Point VII: Recusal required when a Magistrate lacks authority but "intercepts" and "overturns" an Article III Judge's Rule 72 motion authority.

This Court already held that a magistrate may not be assigned duties inconsistent with the Constitution and laws of the United States. *Gonzalez v. U.S.,* 553 U.S. 242, 245 (2008). The Court of Appeals was required but failed to review *de novo* the lack of a magistrate's authority, a question of law. *Monasky v. Taglieri,* 140 S. Ct. 719, 730 (2020) ("Generally questions of law are reviewed de novo, and questions

of fact for clear error, while the appropriate standard of appellate review for a mixed question depends on whether answering it entails primarily a legal or factual work.") When a magistrate lacks authority or has a disqualifying bias, a remand with instructions is required. *Tabler v. Stephens,* 588 Fed. Appx. 297, 315 (5th Cir. 2014) *citing Mixon v. United States,* 620 F.2d 486, 487 (5th Cir. 1980) ("Treat the proceeding and the disposition below as a nullity.") In *Mixon,* the disqualifying bias was even overlooked in the District Court, yet the Court of Appeals still reversed the decision below it.

This Court's precedent rejects the basis for the decision below and holds that non-Article III judges may not revise or overturn Article III judgements. *Brown v. U.S.*, 748 F.3d 1045, 1071 (11th Cir. 2014) ("it is axiomatic that non-Article III judges may not revise or overturn Article III judgments") *citing Chicago & S. Air Lines, Inc. v. Waterman, S. S. Corp.*, 333 U.S. 103, 113 (1948). Moreover, a non-Article III Magistrate ruling is not the final word nor the supreme law of the land. *Marbury v. Madison,* 5 U.S. 137 (1803); *Reich v. Cont'l Cas. Co.*, 33 F.3d 754, 757 (7th Cir. 1994) (Supreme Court dictum generally binds upon lower courts.)

The Court of Appeals knew that the District Court Clerk's office confirmed that no District Court Judge was appointed to the case to supervise the magistrate. *Illumination Dynamics Co. v. Pac. Lighting Sols. LLC,* 2014 WL 4090562, at 3 (N.D. Cal. 2014) ("there was no district court judge assigned to the case and ergo, no district court judge to whom objections could be presented.") It appears

obvious the Chief Judge of the District Court failed to supervise the magistrate and that the Article III court no longer retained supervisory authority over the process. *Gomez v. U.S.* 490 U.S. 858 (1989) n.13. Moreover, the Court of Appeals failed to address that a non-Article III magistrate cannot "revise" an Article III Judge's previous categorical determination of Petitioner's intervention of right when the magistrate subsequently denied the motion to intervene to take an appeal merely on a permissive intervention basis only, and not an "as of right" basis as the district court judge also previously categorized Petitioner's interest.

The Court of Appeals committed reversible error when it applied bad or no law at all to conclude that Circuit Courts cannot hear a motion for magistrate recusal. No. 22-13061. The Eleventh Circuit also erred by not finding that a recusal motion was properly before the Magistrate when at a minimum, the magistrate himself "intercepted" a "Rule 72" motion to an Article III judge, thereby bringing the recusal motion before himself; and as the District Court recognized even "implicitly" its decision was the equivalent of an Order denying the Motion for magistrate recusal.

The Court of Appeals also failed to address that an objection filed required a Rule 72 District Court Judge to act, but that the magistrate without authorization acted upon the Rule 72 motion as if the magistrate was an Article III district court judge. The magistrates "retaliation" by intercepting a Rule 72 motion out of the magistrate's frustration required that he recuse himself. *Hartman v. Moore,*

547 U.S. 250, 256 (2006) ("official reprisal for protected speech offends the constitution.")

Point VIII: Magistrate Orders are directly appealable to Court of Appeals.

This Court held that appeals can be taken directly to the Court of Appeals from Magistrate Orders in the same manner as an appeal from any other judgment of a district court. *Roell v. Withrow*, 538 U.S. 580, 589 (2003) (consent to proceedings before a magistrate judge can be inferred from a party's conduct during litigation.) 28 U.S.C. § 636 (c)(1). This Court held that consent to a magistrate is applicable in both Civil or Criminal proceedings, and consent could be express or implied. *Roell* at 586. (As noted, the District Court considered the matter to unseal as "criminal", while the Court of Appeals considered an appeal of the same as a "civil" case.) Moreover, this Court held that unless a magistrate informs a party that objections must be filed within ten days, an appeal can be taken directly to a Circuit Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985) (affirming constitutionality of the ruling in *U.S. v. Walters*, 638 F.2d 947, 950 (6th Cir. 1981)). Ten-day notices are the practice of basically every circuit. (Numerous references omitted.)

Here the Government did not choose an Article III Judge as required by DOJ rules; the Government and media consented to the Magistrate conducting the proceedings; and no "party" questioned the magistrate's authority or independence (rather media intervenors praised the magistrate's bias in their publications). This Court can take judicial

notice there were no magistrate "recommended findings"; the magistrate provided no 10-day notice to object to any magistrate decision; the Magistrate acted on the Motion to a Rule 72 District Court judge, the Chief Judge of the District Court failed to supervise the case; thereby wrongfully conceding Article III power to a non-Article III magistrate, sufficiently providing that an appeal was allowable directly to a Circuit Court.

Point IX: The Court of Appeals distorts this Court's view of the "law of the Circuit" concept as the law is "well settled" that the court below applied bad law in its *sua sponte* dismissal of an appeal directly from a magistrate who acted as an Article III judge.

The Court of Appeals *sua sponte* decision to dismiss Case 22-12932 was based on flawed logic and bad law and conflicts with this Court's precedent. (A11.) *Gamble v. United States,* 139 S. Ct. 1960, 1983 (2019) (Thomas, J., concurring) ("it is not simply bad law, but not law at all.")

The opinion in No. 22-12932 reiterated the Eleventh Circuit's misconstrued bondage to bad law in citing "*Shultz*" to follow "*Renfro*" until overruled by the Supreme Court. *In re Sealed Search Warrant*, 22-12932, (11th Cir. November 11, 2022) *citing U.S. v. Schultz*, 565 F.3d 1353, 1359 (11th Cir. 2009) *citing U.S. v. Brown*, 342 F.3d 1245, 1246 (11th Cir. 2003). (A12.)

The Circuit Panel's reliance on "*Shultz*" is bad law as "*Renfro*" is "bad law" and easily distinguishable and

the Eleventh Circuit panel in its ruling effectively certifies a question or proposition to this Court to grant *certiorari* in this case to overrule the erroneous applied panel decision holding in *Renfro* that the Eleventh Circuit erroneously extended and relied upon in dismissing the appeal in No. 22-12932. *See* Supreme Court Rule 19.

U.S. v. Schultz relied on *U.S. v. Renfro*, 620 F.2d 497 (5th Cir. 1980); and *U.S. v. Renfro* relied on *U.S. v. Haley*, 541 F.2d 678 (8th Cir. 1974); and *U.S. v. Haley* is short-sighted bad law to the extent its decision was based "[t]here being no decision by a federal District Court here nor jurisdiction pursuant to any other statute." *Id.*

Schultz reads: "as we have held, we are bound to follow *Renfro* under our prior panel precedent rule until this Court sitting in banc or the Supreme Court overrules it" quoting *United States v. Brown*, 342 F.3d at 1246.

However, as *Schultz* conflicts with this Court's precedent, court rules, and other circuit decisions, certiorari should be granted to overrule the bad eleventh circuit precedent that the panel below distorted in its application.

The Court of Appeals failed to comply with this Court's rule that Federal courts of appeals are prohibited from relying on their own precedent to conclude that a particular constitutional principle is "clearly established." *Lopez v. Smith*, 574 U.S. 1, 2 (2014).

The Eleventh Circuit cases are easily distinguishable and even distinguished themselves when the Government and all other parties "consented to" a magistrate; separate from the fact the Attorney General and Special Counsel failed to follow DOJ guidelines when they recognized the "high profile" and extraordinary nature of the matter at hand. Moreover, the standard for a Court of Appeals is not whether "another district court decides"; as while another district court decision might be "persuasive" to a district court, it is not binding on a Court of Appeals panel, particularly as this Court's rulings hold that jurisdiction would already be found based on federal statutes, that is, the federal court rules. *Banks v. McIntosh County, Georga*, 530 F.Supp.3d 1335, 1369 (S.D. Ga. 2021) ("It is black letter law that the decision of one federal district court is not binding on another federal district court, or even on the same judge in another case.")

The Court of Appeals distorts a suggestion the "law is well settled" one way, when this Court has defined "well settled law" the opposite. While it is settled that appeals can be taken directly from a magistrate to a court of appeal, the intentional distortion by the Court of Appeals only echoes that "the law of federal jurisdiction is widely regarded as a mess." *Weber v. McGrogan,* 939 F.3d 232, 237-238 (3d Cir. 2019); *Wilcox v. Georgetown University*, 987 F.3d 143, 152 (D.C. Cir. 2021) (Randolph, C.J. dissenting). The cases cited by the Court of Appeals in 22-12932 did not support the dismissal of the appeal.

Point X: The Court of Appeals four-part test failed to adequately apply this Court's three-part test for intervention as of right

F.R.C.P. Rule 24(a)(2) provides that a court "must permit" anyone to intervene who, "(1) on timely motion, (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, (3) unless existing parties adequately represent that interest." *Berger v. N. Carolina State Conf. of the NAACP*, 142 S. Ct. 2191, 2200–01 (2022). The Ninth Circuit noted the rule broadly favor intervention. *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1493 (9th Cir. 1995).

Conversely, on August 4, 2023, the Court of Appeals cited six cases in a zealous quest to dismiss petitioner's appeal to avoid judicial embarrassment; opining that an order denying a motion to intervene was not final under the anomalous rule, but jurisdiction existed to determine if the district court erred in denying intervention of right and abused its discretion in denying permissive intervention, and if neither are found, dismiss the appeal. The Circuit panel opined that Petitioner must pass four tests to intervene: 1. Timely application, 2. Interest in action, 3. Disposition impede or impair that interest, and 4. inadequate representation; but that the Circuit needed to only look at one test to dismiss the appeal, *i.e.*, inadequate representation. The Circuit mirrored the same tests the district court concluded that "media intervenors" "adequately represented"

Petitioner's interest, and did not look at three of the other four tests in denying the appeal. The Eleventh Circuit did not review the appeal *de novo*.

No one questioned the timeliness of Petitioner's motions to intervene, although the Court of Appeals appears to attempt to avoid judicial embarrassment and act as if it was just worth "skipping over." As noted above, the Supreme Court recognizes Petitioner's interest as paramount over a biased media interest. Conversely, a year after this case was initially opened, the magistrate allowed additional media intervenors, including those foreign headquartered. *Agency for Int'l Dev. V. All. For Open Soc'y Int'l. Inc.*, 140 S. Ct. 2082, 2088 (2020).

Point XI: The Court of Appeals ignored a required *de novo* standard of review of adequate representation in a desperate attempt to dismiss the appeal.

The Court of Appeals was obligated, but failed to conduct a "responsible appellate review." *Salve Regina College v. Russell,* 499 U.S. 225, 239 (1991) (discussing appellate courts' "institutional advantages" in giving "legal guidance.") The Court of Appeals failed to properly address "inadequate representation" in its deficient decision that was void and lacked a *de novo* review. The Court of Appeals decision merely mirrored the district court's so-called findings of "adequate representation" on three sub-tests: 1. collusion, 2. adverse interest, and 3. fulfillment of duty. (Failure of one of the sub-tests, is the failure of all three.) (Citation omitted.)

The Court of Appeals clearly lost sight of its responsibility when it wrote that "for the most part", the parties as adequate representatives accomplished their "ultimate objective"; as if apparently the media's objective to move the same magistrate a "year later" to unseal additional records is bizarrely adequate under *Marbury v. Madison*. The Court of Appeals "close-but-no-cigar" standard *(Guantanamera Cigars Co. v. SMCI Holding, Inc.* 2023 WL 3671527 at *1 (S.D. Fla June 2, 2023) is completely wayward under this Court precedent.

Point XII May be inadequate is inadequate representation, not "must be" inadequate.

Inadequate representation has been found in a number of other cases that also apply here. This includes among others: collusion, adverse interests, failure to fulfill duty by failing to make arguments including failing to question the role of special counsel's failure to appeal, and a default inadequate representation when the Government is the defendant, (Reference omitted.) Petitioner's motion to intervene was originally unopposed, the Government is an adverse party; reliance on the size of the law firm of other intervenors is irrelevant; and intervenors moving a "year later" is untimely, considering the circumstances.

The Court of Appeals woefully failed to understand that the "inadequate representation" requirement of Rule 24(a) is satisfied if the applicant shows that representation of an interest "may be inadequate"; and the minimal burden of making that showing should be treated as "very minimal." *Trbovich v.*

United Mine Workers of Am., 404 U.S. 528, 538 (1972) n 10. The decision below errs to suggest in effect that Petitioner must satisfy a particular burden as if Petitioner were applying for a preliminary injunction, and had to show, among other things, a "likelihood of success on the merits." *Johnson v. Vandergriff,* 143 S. Ct. 2551, 2556 (2023) (Sotomayor, J. dissenting) ("courts evaluating a stay must consider the applicant's likelihood of success on the merits and potential for irreparable injury.") Accordingly, the Court of Appeals applied an incorrect standard of review on the inadequate representation test. Conversely, if the standard the Court of Appeals applied is unclear, then the Court below failed to adequately review the appeal under the appropriate standard of review.

Ironically no party permitted to intervene asserted they adequately represent Petitioner's interest and of no surprise the Courts below make no claims the United States adequately represent Petitioner's interest. Clearly Petitioner satisfied the test to intervene as of right pursuant to Rule 24 (a) (2).

Point XIII: Government and Media are already recognized as inadequate representatives with adverse interests under "actual malice standard".

Courts have sufficiently recognized the government and media's bias proving Petitioner's interests are not adequately represented. Ironically the Government opposes the general public from intervening when "as the Government points out…[e]veryone knows and expects that media

outlets may seek to influence elections." *Citizens United v. Federal Election Com'n,* 558 U.S. 310 (2010) n. 32 (Stevens, J. concurring). Court of Appeals do not need to be judicial ostriches to be oblivious to the obvious that Media intervenors do not claim to be independent. *Tah v. Global Witness Publishing, Inc.,* 991 F.3d 231, 255 (D.C. Cir.) (Silberman, J. dissenting in part) ("press and media do not even pretend to be neutral news services").

The standard is not to prove the actual malice standard in *New York Times Co. v. Sullivan,* but if that is required to prove inadequate representation by a bias media, then this Court should grant certiorari to reconsider the broader application of the "actual malice standard" in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). *Berisha v. Lawson,* 141 S. Ct. 2424 (2021) (Gorsuch, J. dissenting from denial of *certiorari*) ("Could prevail only by showing than an injurious falsehood was published with actual malice.")

However, it is obvious the existence of media and Government bias has resulted in the erasing of the concept of "free press" as evident *inter alia,* the Government's suppression of "twitter files," and the suppression of Biden's illegal possession of classified information until after the 2022 elections. *See e.g.,* https://judiciary.house.gov/media/in-the-news/jim-jordan-requests-communications-between-biden-administration-social-media. *Missouri v. Biden,* No. 22-cv-1213, 2023 WL 4335270 (W.D. La. Jul 4, 2023), ("This targeted suppression of conservative ideas is a perfect example of viewpoint discrimination of political speech. American citizens have the right to

engage in free debate about the significant issues affecting the country.")

Point XIV: Ignoring ABA Model Rules to appease media's large law firms is not an adequate reason to deny Petitioner's intervention.

The opinion below referencing the adequacy of the "large law firms" representing the media intervenors has been held to be irrelevant and failed logic as a basis to deny a motion to intervene. *C.B.C. Distribution and Marketing, Inc. Major League Baseball Advanced Media, L.P.* 2005 WL 3299137 at n. 2 (E.D. Mo. 2005). Media intervenors calling the Petitioner's for comments on the matter is hardly "adequate representation." (Court of Appeals reference omitted.) Moreover, American Bar Association Model Rule 1.2(a) of Professional Conduct provides, "the lawyer shall abide by a client's decisions concerning the objectives of the representation." Under that rule, the Media client controls the destiny, counsel basically limited to the means; that supports Counsel's otherwise less than diligent efforts to ensure more records were unsealed and unredacted. *Doe v. Public Citizen*, 749 F.3d 246, 271 (4th Cir. 2014) ("We are not blind to the fact that a corporation's image or reputation may diminish by being embroiled in litigation against the government.") The Eleventh Circuit's claims are not persuasive considering the biased objectives of their clients, the Government, and the magistrate.

Contrary to the Court of Appeals misguided opinion, "a year later" Judicial Watch and others stopped

pursuing the matter, and the magistrate allowed additional intervenors, some foreign, who do not have sufficient constitutional or common law rights to be permitted to intervene instead of Petitioner. *Agency for International Development*, 140 S. Ct. 2082, 2088 (2020) ("Current list of intervenors", DE 173, the relevant portion duplicated at A23.)

The Court of Appeals bizarre conclusion that "[F]or the most part...almost a year later" in context constitutes adequate representation by the existing parties is clearly erroneous as non-traditional parties were not "adequate representatives." Neither the Government nor the media opposed Petitioner's intervention, the Government by not doing so, waiving the opportunity to oppose on appeal. (Citation omitted.)

Anyone but the Courts below recognize that under *Marbury v. Madison*, a biased magistrate and biased media intervenors and their expensive law firms are not acceptable "Orwellian thought police" to prevent public intervention. *Missouri v. Biden*, 2023 WL 4335270 at 73, n 721 (W.D.La July 4, 2023 ("governmental institution responsible for ...disseminating propaganda to manipulate and control public perception.").

POINT XV: Courts below took judicial notice of significant collusion for finding inadequate representation by existing parties.

The Court of Appeals distorted myopic view that government and media intervenors "had not colluded" equals the court's equally distorted claim

there was not "any" evidence of such collusion. The district court already took judicial notice at a minimum the Government and media were colluding to leak sealed and classified information, or conversely to leak false information. (Reference to district court oral argument transcripts submitted to Court of Appeals omitted.)

Bouvier's Law Dictionary defines Collusion as "an agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law, and in similar terms by other legal dictionaries. *Dickerman v. Northern Trust Co.*, 176 U.S. 181, 189 (1900). Collusion is also defined as a "secret combination, conspiracy, or concert of action between two or more persons for fraudulent or deceitful purpose." Black's Law Dictionary 240 (5th Ed 1979). While a "Mueller Report" concluded no collusion, it noted the challenge of defining the term "collusion." *See e.g.,* Special Counsel Robert S. Mueller, III, *Report on the Investigation of Russian Interference in the 2016 Presidential Election,* 2019 WL 1780145. *See also* 18 U.S.C. § 371.) *See also, Missouri v. Biden,* at 51 (FBI along with Media misled public on Russian disinformation.); Natasha Bertran, *Hunter Biden story is Russian disinfo, dozens of former intel officials say, October 19, 2020,* www.politico.com/news/2020/10/19/hunter-biden-story-russian-disinfo; *see also* Miranda Devine, *Ex-CIA chief spills on how he got spies to write false Hunter Biden laptop letter to 'help Biden'",* April 21, 2023, www.nypost.com/2023/04/20/biden-campaign-pushed-spies-to-write-fakse-hunter-laptop-letter.

To the extent the court's below already took judicial notice of the other party's "collusion" to leak sealed and classified information; in the context of an "affirmative defense," the burden is then on the Government to show there is none - that was already shown - and that they have not. *Taylor v. Sturgell*, 553 U.S. 880 (2008); *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022) (burden shifts once movant carries burden demonstrating infringement of rights under First Amendment.) Moreover, if "collusion" in the "civil-non-criminal" context between counsel is the test, then they "herded themselves together." (Reference to District Court transcripts provided to Court of Appeals omitted.)

Presumably the Government is not recommending a private cause of action against the Government's to further prove the existing collusion. While the collusion should have been investigated, this Court noted the challenges to discover a Judiciary leak. *www.supremecourt.gov/publicinfo/press/Dobbs_Public_Report_January_19_2023.*

"Relevant evidence is defined as that which has any tendency to make the existence of any fact that is of consequence to their determination of the action more probable or less probable that it would be without the evidence." *See e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc.* 590 U.S. 579 587 (1993) citing Fed. Rule Evid. 401. Prima facie evidence is defined as: "Such evidence as in the judgment of the law, is sufficient to establish a given fact.. and which if not rebutted or contradicted, will remain sufficient. *Virginia v. Black*, 538 U.S. 343 369 (2003)

Sufficient relevant evidence was shown to prove Petitioner's claim.

Point XVI: The Eleventh Circuit splits from other Circuits that failure to make arguments is neglect and inadequate representation.

Contrasted to the Eleventh Circuit, the Sixth and Ninth Circuit Court of Appeals have held that inadequate representation is sufficiently shown when an existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997) *citing Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1498-1499 (9th Cir. 1995). Here no other intervenor "purportedly" stated they sought the same outcome, shown by their failure to appeal, and shown by the failure to make all of the necessary arguments that Petitioner sought. The Eleventh Circuit is too far amiss to suggest Petitioner need somehow prove a Sixth Amendment ineffective assistance of counsel to show Fed.R.Civ.P. Rule 24 inadequate representation by media's counsel.

The Court of Appeals tried to brush up the media's counsel's "gaffe" that conceded probable cause and that the government satisfied its burden to keep whatever it wanted seal or redacted, was somehow "harmless". The fact that no existing party to the litigation questioned the magistrates bias and lack of authority but only praised the magistrate bias is also *prima face* proof of inadequate representation.

Point XVII: The Circuits are split on whether Conceding Probable Cause to a biased magistrate is inadequate representation.

The Court of Appeals decision clashes with other circuits when it tries to rehabilitate counsel's gaffe when they conceded probable cause with the Circuit's false narrative that "in context" media counsel's concession "Indeed you did, your Honor" was somehow not a concession of probable cause when in at least four Circuits, the words "You did, Your Honor" defeats the Eleventh Circuit erroneous attempt to counter the anti-probable cause waiver concession. *U.S. v. Manton*, 107 F.2d 834, 847 (2d Cir. 1939) ("not now in a position to object."); *U.S. v. Smith*, 252 Fed. Appx. 20, 32 (6th Cir. 2007) ("waived his right"); *U.S. v. Burns*, 571 Fed. Appx. 481, 482 (7th Cir. 2014) ("[h]aving passed up the chance"); *U.S. v. Waite*, 378 Fed. Appx. 818, 819 (10th Cir. 2010) ("The Government: You did, Your Honor"). *United States v. D.W.*, 108 F.Supp.3d 18, 48 (E.D.N.Y. 2016) ("You did. Your Honor. You stated it accurately. We have no contrary view.")

The Eleventh Circuit also omits the context that not only did intervenor Counsel say, Indeed you did, your Honor; "in context", they added. "Thank you..." that in context, it is more of a concession. *Prime Energy and Chemical, L.L.C. v. Tucker Arensberg, P.C.* 2023 WL 3867205 at *8 (3d Cir. 2023). ("Thank you for that clarification. I understand perfectly.")

While the Eleventh Circuit attempts to indirectly adopt the Government's failed attempt to defend media intervenor counsel's waiver by hermeneutics

and semantics by trying to reposition as "in context", in doing so the Eleventh Circuit only causes more legal principle problems because "in context", when "indeed" was used elsewhere in the oral arguments, it was used in an admitting fashion. (Reference omitted to Transcripts of oral arguments T. 42/15.)

The Court of Appeals next failed attempt to rehabilitate media's counsel "didn't know" excuse distorts the law. *In Re Warrant*, 2023 WL 4995735, at 1 (11th Cir. 2023). The Court of Appeals seems to not be able to keep track of its own opinion, as ironically the Court of Appeals claims the basis of Judicial Watch's involvement was "investigating the potential politicization of the FBI and Department of Justice and whether they are abusing their law enforcement powers to harass a likely future political opponent", and then tries to claim media counsel "didn't know" to question the magistrate's finding of probable cause.

While it appears to be Judicially irresponsible for the Court of Appeals to suggest that Petitioner criticize Judicial Watch; the irony of the Panel's opinion is that it admits what the Opinion is trying to deny; that if truly that is Judicial Watch's view, then "they knew" they should immediately question and appeal the magistrate's probable cause "finding." Moreover, the court can take judicial notice that Judicial Watch stopped pursuing additional unsealing.

Although courts have previously given great deference to a search warrant that was reviewed and signed by an "experienced judge," that deference is not boundless, must less deference to a biased,

magistrate. *U.S. v. Leon*, 468 U.S. 897, 914 (1984). Reviewing courts will not defer to a magistrate without a substantial basis for determining the existence of probable cause. *Id.* at 915 ("totality of the circumstances"); and clearly not one that just recused himself from a case involving the same underlying party.

Even though the Court of Appeals never references the Government's brief (Government waiving a right to object because if did not oppose any intervention at the district level), the Court of Appeals attempted to further repackage the Government's semantics argument as what is meant by "Indeed you did, your Honor" when the media intervenors consented to the magistrate's position he found probable cause to sign the general warrant; a mistake in any other circuit, blindly applied below.

The Court of Appeals assertion that it was "not a mistake at all" lacks substance where the Panel did not attempt to explain if it was a mistake of fact or law. Moreover, there are sufficient other examples of factors that would have given a neutral magistrate legal pause. As to the misapplication of the law, in addition to lacking unsupervised power, consider for example the protection of former President Clinton's White House audiotapes maintained in the former President's sock drawer. *Judicial Watch, Inc. v. Nat'l Archives & Records Admin.*, 845 F.Supp.2d 288 (D.D.C. 2012), appeal dismissed, 2012 WL 3244038 (D.C. Cir. 2012). Ironically in that case Judicial Watch withdrew its appeal for its own reasons, that as noted above, it appears would be judicially

irresponsible for a Court of Appeals to have a proposed intervenor to provide reasoning.

Moreover, a person named as Special Counsel must be a lawyer outside of the United States Government, with a reputation for integrity and impartial decision making" and with the appropriate experience to conduct the investigation "supported by an informed understanding of the criminal law and Department of Justice policies." 28 C.F.R. 600.3 *See e.g., United States v. Stone,* 394 F.Supp.3d 1, 20 (D.D.C. 2019) citing *United States v. Manafort,* 312 F.Supp.3d 60 (D.D.C. 2018) ("ultimate responsibility for the matter continues to rest with the Department hierarchy.') The Supreme Court has already acknowledged the government can go too far and questioned the impartiality of Special Counsel that should give an "adequate representor" reason for raising such, but that did not take place below. *See* e.g., *McDonnell v. United States,* 579 U.S. 550, 58081 (2016) ("There is no doubt that this case is distasteful; it may be worse than that. But our concern is... with the broader legal implications of the Government's boundless interpretation...")

While the Court of Appeals has made this an unnecessary dispute when the Government did not object at the district court level; it is clear there is sufficient "media" and this Court's "criticism" of Special Counsel to question whether there was sufficient cause to submit a probable cause affidavit, justifying, albeit the media intervenors failed, to object to the magistrate self-indulged findings, that basically would have forced the magistrate to justify probable cause at the time. *Shadwick v. City of*

Tampa, 407 U.S. 345, 350 (1972) ("warrant traditionally has represented an independent assurance.") Moreover, the public does not have to trust the government for good reason. *See e.g.,* Miranda Devine, "*It's been two years since 51 intelligence agents interfered with an election – they still won't apologize.*" NY Post, October 19, 2022, www.nypost.com/2022/10/19/its-been-two-years-since-51-intelligence-agents-interfered-with-an-election-they-still-wont-apologize.

Point XVIII: The Circuits are split on whether the failure to file an appeal fails to fulfill a duty and therefore is inadequate representation

Under the Due Process Clause of the Fourteenth Amendment, "no man can be a judge of his own case." *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016). The decision by the other "media parties" not to appeal the magistrate's Orders constitutes inadequate representation of another party's interest for purposes of entitling another party to intervene in multiple other circuits. *Americans United for Separation of Church and State v. City of Grand Rapids*, 922 F.2d 303 (6th Cir. 1990); *Pellegrino v. Nesbit*, 203 F.2d 463, 468 (9th Cir. 1953); *Smuck v. Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969)). Here the Eleventh Circuit did not articulate a cognizable rationale why other party failures to "appeal" or "object to" a magistrate decision on an issue they claim is one of the most extraordinary cases in US history is somehow adequate representation. The deviation from the Sixth, Ninth and D.C. Circuit is another reason to grant certiorari.

Point XIX Permissive intervention improperly denied under FRCP Rule 24(b).

In the appeal to the Court of Appeals, Petitioner also raised the issue of being improperly denied permissive intervention under subdivision (b) of Fed. Rule Civ. Proc. 24. Upon a timely application anyone may be permitted to intervene. *Martin v. Wilks*, 490 U.S. 755, 764 (1989). While resolution of a motion for permissive intervention is committed to the discretion of "a court" before which intervention is sought, the exercise of that discretion fails when its ruling is based on an erroneous view of the law. *Cameron v. EMW Woman's Surgical Ctr. P.S.C.,* 142 S. Ct. 1002, 1011-12 (2022).

That same failure happened here when Petitioner was improperly denied permissive intervention below. The Rule 72 Article III judge denied intervention on both as of right and permissive. The Magistrate denied permissive intervention. After all is said and done, Petitioner filed an amended notice of appeal that perfects the appeal both as of right and permissively under FRCP 24 (a) and (b).

Point XX: This Court should resolve the question whether a motion to intervene to unseal court records is governed by civil or criminal rules.

The District court stated that even though the caption does not designate a criminal or civil matter, the matter was a criminal matter in the District Court. "Mj" in the case caption while referencing a magistrate, does not distinguish criminal from civil.

Cf. Court of Appeal Docket Nature of Suit: 2440 Other Civil Rights; and that the time to take an appeal differs for civil and criminal matters. Fed. R. App. P. 4(a) and 4(b). The Eleventh Circuit docketed an appeal of the district court as a civil matter. While it may be intuitive that motions to intervene are "governed" by the Federal Rules of Civil Procedure; to the extent criminal proceedings borrow the Rules of Civil Procedure, the matter left open for discretion is inapposite to judicial efficiency. To the extent there are different rules applicable to civil and criminal matters and the nature of appellate review, this Court should clarify the issue.

Point XXI: Eleventh Circuit deviates from Fifth, Sixth and Ninth Circuits who require a refund of a second notice of appeal filing fee.

The Fifth, Sixth and Ninth Court of Appeals hold that no additional fee can be required for any amended notice of appeal. *Phillips v. Tangilag*, 14 F.4th 524, 542 (6th Cir. 2021) (ordering the refund of an erroneously assessed fee) *quoting Owen v. Harris County, Tex.*, 617 F.3d 361 (5th Cir. 2010) ("no fee can be required for any amended notice of appeal"); and *citing Anderson v. Equinox Holdings, Inc.*, 813 F. App'x 308, 309 (9th Cir. 2020) ("or an amended notice of appeal"). The District Court on behalf of the Court of Appeals required a second fee to file a "second" Notice of Appeal that was in effect perfected by an Amended Notice of Appeal. (DE 113, A 21.)

Point XXII: An amended notice of appeal perfects matters already on appeal.

Petitioner filed an amended notice of appeal in Case 22-13016 raising all relevant issues. (DE 121, A22.). that pursuant to the Fed. R. App. P. 4(a)(4), placed jurisdiction in the Court of Appeals upon disposition of any underlying District Court activity, including judge recusal and permissive intervention. 16A Charles A. Wright *et al.*, *Federal Practice and Procedure*, 3949, 4, at 153 n. 52.

Point XXIII: All court records in the district court should be unsealed and unredacted in the underlying litigation.

Based on the record, the Government failed to justify that any record in the district court be sealed or redacted, and under this Court's precedent, the matter should be remanded to review whether all records including the magistrate's notes should be unsealed and unredacted.

CONCLUSION

This Court should grant the petition for writ of certiorari, allow the Petitioner to intervene, and vacate the judgement below and remand for further consideration in light of this Court's precedent.

Respectfully submitted,

Michael S. Barth
Petitioner *Pro Se*
October 26, 2023

TABLE OF APPENDICES PAGE

2023 WL 4995735

United States Court of Appeals
Eleventh Circuit

IN RE: Sealed Search WARRANT
United States of America, Plaintiff-Appellee,

v.

MICHAEL S. BARTH, Interested Party-Appellant.

No. 22-12791

Non-Argument Calendar

Filed: 08/04/2023

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 9:22-mj-08332-BER-1

Attorneys and Law Firms

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Michael S. Barth, Far Hills, NJ, Pro Se.

Before WILSON, Jordan, and Grant, Circuit Judges.

Opinion

PER CURIAM:

*1 Michael S. Barth appeals from the district court's denial of his motion to intervene in a search warrant proceeding. Because we find no error in the district court's denial of the motion to intervene, we dismiss the appeal for lack of jurisdiction.

I. In August 2022, the government obtained a search warrant to search the Mar-a-Lago residence of former President Donald J. Trump. The search warrant and an affidavit demonstrating probable cause were filed under seal. Two days after the search was executed, Judicial Watch, Inc. moved to unseal these documents. Judicial Watch said that it was investigating "the potential politicization" of the FBI and Department of Justice and whether they are "abusing their law enforcement powers to harass a likely future political opponent." Various news organizations intervened shortly thereafter for the purpose of unsealing and obtaining access to all the search warrant materials. The Florida Center for Government Accountability, Inc., a nonprofit focusing on ensuring government accountability and transparency, intervened for the same purpose.

Barth is proceeding pro se as a member of the public. He sought to intervene "for the limited purpose of miscellaneous relief to unseal all the remaining documents (including the Court's notes), related to the sealed search warrant." His motion said that he intends to "adopt and incorporate the applicable legal references in the memorandums of law filed by the Media Intervenors."

A magistrate judge denied Barth's motion to intervene under Federal Rule of Civil Procedure 24 because the "interests asserted by the movant are adequately represented by the media-intervenors." Barth filed a letter seeking review by a district judge, which the district court construed as an objection to the magistrate judge's order. Barth's objection was overruled. The district court agreed with the magistrate judge that the parties who have been permitted to intervene "have thoughtfully and professionally litigated their position" and concluded "with certainty" that Barth's interests were adequately represented. Moreover, the district court found no evidence of collusion with the government, no adverse interest between the existing intervenors and Barth, and that the intervenors have not failed in the fulfillment of their duties.

Barth now appeals.[1] He argues that the district court erred by denying his request to intervene because the existing parties would not necessarily represent his interests. He says that counsel for the media intervenors made two "fatal mistakes": (1) conceding that the warrant was supported by probable cause and (2) conceding that the government has an interest in protecting its methods that may, in some cases, outweigh the public right to access. He also argues that the media may only want to "unseal this matter so far" because they do not "really. . . want to know 'both sides of the story.' "

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[1] Since the date that Barth filed this suit, criminal prosecution related to the underlying search warrant has begun and various materials and excerpts related to it have already been unsealed. This appeal is not moot because portions of the search warrant affidavit remain under seal.

And he suggests that the government and media are colluding by leaking details of the investigation.

II. *2 An order denying a motion to intervene is not a final order. *Fox v. Tyson Foods, Inc.*, 519 F.3d 1298, 1301 (11th Cir. 2008). Under the "anomalous rule," however, "we exercise 'provisional jurisdiction' to determine whether a district court erred in denying intervention as of right under Rule 24(a), or clearly abused its discretion in denying permissive intervention under Rule 24(b)." *United States v. US Stem Cell Clinic, LLC*, 987 F.3d 1021, 1024 (11th Cir. 2021) (quoting *Fox*, 519 F.3d at 1301)). If "we discover no reason to reverse the district court, then 'our jurisdiction evaporates' and we dismiss the appeal." *Id.*

III. A party seeking to intervene as of right under Rule 24(a)(2) must show that: "(1) his application to intervene is timely; (2) he has an interest relating to the property or transaction which is the subject of the action; (3) he is so situated that disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and (4) his interest is represented inadequately by the existing parties to the suit." *Fox*, 519 F.3d at 1302–03. When a party fails to establish one of these requirements, it is unnecessary to analyze any of the remaining requirements. *See, e.g., Worlds v. Dep't of Health & Rehab. Servs.*, 929 F.2d 591, 595 (11th Cir. 1991).

The district court's decision denying Barth's intervention rested on the fourth requirement. Representation is adequate if (i) no collusion is shown between the representative and an opposing