No. __-_____

In the Supreme Court of the United States

MICHAEL J. LINDELL AND MYPILLOW, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA; MERRICK B. GARLAND, in his official capacity as Attorney General of the United States; CHRISTOPHER WRAY, in his official capacity as Director of the Federal Bureau of Investigation,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The extraordinary number of conclusions in the opinion below that conflict starkly with applicable precedents smacks of a judicial process that strains to reach a result based on the identity of the parties rather than the rule of law. The maneuvers of the Eighth Circuit to evade the governing precedents that protect Lindell's First and Fourth Amendment rights have produced a decision crafted to apply only to Lindell, unanchored to the well-established legal principles that safeguard the rights of everyone else. The case presents the following questions:

1. Whether a preliminary injunction may be granted if it requests the ultimate relief sought in the litigation.

2. Whether a warrant is invalid for failure to comply with the particularity requirement of the Fourth Amendment where the warrant authorizes the seizure of all electronic data stored on a cell phone without particularly describing the data to be seized.

PARTIES TO THE PROCEEDING

Petitioners are Michael J. Lindell and MyPillow, Inc. (which were identified in the opinion below collectively as "Lindell").

Respondents are the United States of America, Merrick B. Garland, in his official capacity as Attorney General of the United States, and Christopher Wray, in his official capacity as Director of the Federal Bureau of Investigation (which will be referred to herein collectively as "the Government").

CORPORATE DISCLOSURE STATEMENT

Petitioner, My Pillow, Inc. discloses that there is no parent company, subsidiary, affiliate, or other company which owns 10% or more of the stock of My Pillow, Inc.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings that are directly or indirectly related to this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

RULES

PETITION FOR WRIT OF CERTIORARI

This case involves an effort by the Government to identify and retaliate against those who persist in questioning the integrity of computerized voting systems, particularly those used in the 2020 election. In this case, the Government has abused its powers in pursuing its objectives of identifying the individuals involved in challenging election outcomes and the strategies and tactics they employ by reviewing the electronically stored data on Lindell's seized cell phone containing privileged communications among individuals, including Lindell, who have associated for the common purpose of protecting election integrity. Even more disturbing, federal courts have disregarded numerous controlling precedents in approving the Government's actions against Lindell and his associates, which he contends have violated his First and Fourth Amendment rights.

The weaponization of the judicial process in political combat has become so commonplace that it has spawned a neologism-–lawfare. That such moves would be made by political actors is, perhaps, not surprising. But the bulwarks of the rule of law that are supposed to thwart the corrosive tide of lawfare-–law enforcement institutions and the courts – have increasingly succumbed to lawfare's corrupting influence. The resulting perceived lack of fairness and evenhandedness in the judicial system has generated a popular distrust of---even contempt for---the judicial system that poses a significant threat to respect for the rule of law, the bedrock of civil order. This Court is uniquely empowered to arrest this devolution of the rule of law by administering a course correction when

a lower court goes astray from established precedent in politically turbulent litigation.

The instant case presents a striking example of a judicial decision that strains to reach a result determined solely by the court's perception of the parties rather than the governing legal precedent. Such an adjudication is at war with our constitutional system. As this Court has underscored:

> The purpose behind the Bill of Rights, and the First Amendment in particular, [is] to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.

McIntyre v. Ohio Elections Commission, 514 U.S. 234, 357 (1995). The decision below can only be explained as a rejection of the traditional and appropriate relief for vindicating First and Fourth Amendment rights because the claimant and his political views are unpopular.

If the decision below is allowed to stand, it will serve as further confirmation in the view of many that justice in the United States is simply a function of the predilections and prejudices of the judiciary. The destructive effect of a perception by a substantial number of citizens that the judicial system is incapable of dispensing justice in a fair and dispassionate manner will inevitably worsen the already troubling polarization of American society and undermine the bedrock principle that justice should be blind. That is a concern that must not be ignored.

OPINIONS BELOW

The majority opinion and the minority opinion concurring in part and dissenting in part of the panel of the United States Court of Appeals in this litigation are available at 82 F.4th 614 (8th Cir. 2023). The denial by the Court of Appeals of the Petition for Rehearing and for En Banc Review on November 26, 2023, is unpublished and can be viewed at App. 62. The opinion of the district court is published at 639 F. Supp. 3d 853 (D. Minn. 2022).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment to the United States Constitution:

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 peacefully to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment to the United Sates Constitution:

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.

STATEMENT OF THE CASE

A. Facts and Procedural History

Lindell has become a controversial figure for vigorously raising concerns about the integrity of the computerized voting systems used in the 2020 presidential election and the handling of evidence that could expose the problems with those systems. One of the disputes over the preservation of election records arose in Mesa County, Colorado, where the County Clerk had forensic images[1] made of the election management system servers when a software upgrade instituted by the Secretary of State threatened to erase election data prematurely in violation of federal law. *See* 52 U.S.C. §20701 (election data must be preserved for 22 months after an election). The County Clerk spoke at a conference arranged by Lindell to discuss the vulnerabilities of these computerized systems. When these forensic images unexpectedly appeared on the internet, the Colorado Secretary of State launched an investigation. Without apparent jurisdiction, the Government promptly initiated its own investigation. App. 3; 82 F.4th at 617.

On September 13, 2022, Lindell was returning from Iowa when three unmarked vehicles occupied by agents of the Federal Bureau of Investigation in casual dress blocked his truck in the drive-through lane of a fast-food restaurant in Mankato, Minnesota. As part of the Mesa County investigation, one of the agents served a search and seizure warrant on Lindell

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[1] These forensic images do not contain any voter-specific information, only vote totals and other information concerning the software and databases on the voting machine.

and demanded that Lindell surrender his cell phone. The Government has not returned the cell phone.

Lindell filed this action on September 20, 2022, seeking to enjoin the criminal proceeding as a violation of his First Amendment rights and to have his cell phone and the data stored on it returned to him. He filed an application for a temporary restraining order on September 21, 2022, which was denied. The motion for a TRO was converted to a motion for preliminary injunction, which the district court denied after a hearing in an Order entered on November 4, 2022.

Lindell filed his notice of appeal to the United States Court of Appeals for the Eighth Circuit on December 2, 2022. Lindell appealed pursuant to 28 U.S.C. §1292(a)(1). The appeal was argued on June 14, 2023. On September 22, 2023, the court issued its opinion affirming the denial of a preliminary injunction, but reversing and remanding the district court's decision not to exercise its equitable jurisdiction over Lindell's motion for return of his cell phone. Lindell filed a petition for rehearing *en banc* or, in the alternative, petition for rehearing by the panel on November 6, 2023. The court denied the petition on November 26, 2023.

B. The Decision Below

Each step of the reasoning of the Eighth Circuit panel below manifests an extraordinary effort to bob and weave around controlling precedent to reach their profoundly flawed decision.

1. The majority opinion below acknowledged at its outset that the principal objective of this action was to vindicate Lindell's First Amendment rights, 82 F.4th at 617, but it never again mentioned the First Amendment, much less considered the central role the guarantees of the First Amendment had to play in any legal evaluation of Lindell's claim to injunctive relief. The extent of the panel's legal error is illustrated by its pronouncement that the requested preliminary injunction amounted to an impermissible "tactic" to obtain the ultimate relief sought by Lindell, and that "[t]his type of ultimate relief request is fatal to Lindell's preliminary injunction application." App. 6; 82 F.4th at 618. In support, the panel pointed to four plainly inapposite decisions. *Union Home Mortgage Corp. v. Cromer,* 31 F.4th 356 (6th Cir. 2022); *Williams v. Recovery Sch. Dist.,* 859 F. Supp.2d 824 (E.D.La. 2012); *McKinney ex rel. NLRB v. S. Bakeries, LLC,* 786 F.3d 1189 (8th Cir. 2015) and *Sanborn Mfg. Co., Inc. v. Campbell Hausfeld/Scott Fetzer Co.,* 997 F.2d 484 (8th Cir. 1993). Not one of these decisions included a First Amendment claim.

Astoundingly, the court below failed to address or even mention *Dombrowski v. Pfister,* 380 U.S. 479 (1965), the key precedent authorizing preliminary injunctive relief to protect First Amendment rights and approving such relief even when it effectively grants the ultimate relief in the case. The analytical blinders of the panel are further demonstrated by the fact that they cited *H & R Block, Inc. v. Block, Inc.,* 58 F.4th 939, 946 (8th Cir. 2023), authored by the same judge who wrote the majority opinion below, only as to the standard of review. But *H & R Block* and the

authorities it cited acknowledged the rule that a preliminary injunction may be granted if the movant satisfies a heavier burden where such relief would provide substantially all the relief sought in that litigation. That aspect of *H & R Block* is another precedent supporting Lindell that the panel conveniently ignored.

Similarly, the panel failed to address or even mention *Lewellen v. Raff,* 843 F.2d 1103 (8th Cir. 1988), which held that a preliminary injunction was appropriate to prohibit a criminal proceeding from continuing where the proceeding was in retaliation for the exercise of constitutional rights, even though the preliminary injunction granted substantially all the relief sought in that litigation. *Id.,* at 1109-10.

2. The failure of the court below to recognize the central role of Lindell's First Amendment rights in this case–-and this Court's precedents that protect those rights---fatally crippled its legal analysis in multiple ways. For example, it concluded that Lindell "will have an opportunity to raise his constitutional issues after he is charged with a criminal violation," 82 F.4th at 620, but it declined to address his argument that *Dombrowski* concluded that "a substantial loss or impairment of freedom of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination," 380 U.S. at 486, and that "abstention and the denial of injunctive relief may well result in the denial of any effective safeguards against the loss of protected freedoms of expression, and cannot be justified." *Id.,* at 492.

Likewise, the court below concluded that "the mere threat of potential future prosecution is insufficient to establish irreparable harm for exercising equitable jurisdiction." App. 10; 82 F.4th at 620. That conclusion is at odds with the holding in *Dombrowski* that "the threat of prosecutions of protected expression is a real and substantial one," 380 U.S. at 494, and that the chilling effect on the exercise of First Amendment rights of the fact of a prosecution, *id.,* at 487, or the threat of prosecution, *id.,* at 489-90, "will establish the threat of irreparable injury required by traditional doctrines of equity." *Id.*

3. The court below referenced the test described in *Douglas v. City of Jeannette,* 319 U.S. 157 (1943); *Trump v. United States,* 54 F.4th 689 (11th Cir. 2022); *Black Hills Inst. of Geological Research v. U.S. Dep't of Justice,* 967 F.2d 1237 (8th Cir. 1992) and *Matter of Search of 4801 Fyler Avenue,* 879 F.2d 385 (8th Cir. 1989), *cert denied,* 494 U.S. 1026 (1990) to determine whether to exercise equitable jurisdiction over the return of seized property, but it failed to acknowledge that *Dombrowski* had expressly rejected the application of the *Douglas* decision to cases involving a claim of violation of First Amendment rights. 380 U.S. at 489-90. None of the other decisions above involved a First Amendment claim.

4. The court below concluded that Lindell was required to prove that the Government acted with callous disregard of his constitutional rights, drawing on precedents not involving First Amendment rights. 82 F.4th at 619. It simply ignored Lindell's argument that the investigation was unlawful because it was launched under three statutes that were clearly not

applicable to Lindell's circumstances, and with the unlawful purpose of punishing him for exercising his First Amendment rights and to deter him from continuing to exercise those rights.

5. The panel relied on language in Fed.R.Crim.P. 41(e)(2)(B) that purports to allow the Government to seize the entire storage of data on an electronic device for later review, 82 F.4th at 621-22, without addressing Lindell's argument that such language is in conflict with the language of the Fourth Amendment, which requires that a warrant "particularly describ[e]…the things to be seized."

6. The court below acknowledged that the seizure of Lindell's cell phone included "a plethora of information unrelated to the government's investigation…." 82 F.4th at 620. Yet, it failed to address Lindell's argument that such overseizure violated the Fourth Amendment, as well as the freedom of association protected by the First Amendment by providing the Government with the ability to review privileged communications between Lindell and those associated with him in questioning the legitimacy of the 2020 election.

REASONS FOR GRANTING THE PETITION

I. The decision below that denied the motion for preliminary injunction on the grounds that it would award the ultimate relief sought is in direct conflict with *Dombrowski v. Pfister*.

The decision below affirmed the district court's denial of a preliminary injunction to restrain a criminal proceeding against Lindell which he asserted was initiated in bad faith to retaliate for his exercise of his First Amendment rights. That decision is in conflict with the holding in *Dombrowski v. Pfister,* 380 U.S. 479 (1965) that "on the allegations of the complaint, if true, abstention and the denial of injunctive relief may well result in the denial of any effective safeguards against the loss of protected freedoms of expression, and cannot be justified." *Id.,* at 492.

The opinion below utterly ignores *Dombrowski.* The preliminary relief granted in *Dombrowski* awarded the plaintiffs there the ultimate relief they could have obtained if the litigation had proceeded to final judgment. The relief sought by Lindell also would have granted the ultimate relief he could be awarded.

Despite the unequivocal approval in *Dombrowski* of a preliminary injunction to restrain criminal proceedings brought to retaliate for the exercise of First Amendment rights, the court below brushed aside Lindell's motion for preliminary injunction as "a tactic to, at a minimum, interfere with, and, at most, enjoin a criminal investigation and ultimately hamper any potential federal prosecution

related to his, or others, involvement in the public disclosure of forensic images of Mesa County's election management servers." App. 6; 82 F.4th at 618.

II. The decision below creates a conflict with decisions of other federal circuit courts regarding motions for preliminary injunction that would grant substantially all the relief that could be obtained if the litigation had proceeded to a final judgment.

The decision below is in conflict with *JTH Tax, LLC v. Agnant,* 62 F.4th 658 (2d Cir. 2023); *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land,* 915 F.3d 197 (4th Cir. 2019); and *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcraft,* 389 F.3d 973 (10th Cir. 2006)(*en banc*)(*per curiam*), *aff'd on other grounds,* 546 U.S. 418 (2006) regarding motions for preliminary injunction that seek substantially all the relief that is ultimately sought in the litigation. Each of those three decisions approved a preliminary injunction that awarded substantially all the relief sought in the action; consequently, the decision below produced a conflict between the Eighth Circuit and Second, Fourth, and Tenth Circuits over the issue of the appropriateness of a preliminary injunction that grants substantially all the relief that the movant could obtain if the matter had been left for final resolution after a trial and the disposition of any appeal.

III. The decision below creates a conflict with *Groh v. Ramirez.*

Groh v. Ramirez, 540 U.S. 551 (2004) stated that in applying the particularity requirement of the Fourth Amendment, "[w]e are not dealing with formalities" (quoting *McDonald v. United States,* 335 U.S. 451, 455(1948)). The *Groh* Court held that a warrant that fails to satisfy the particularity requirement is unconstitutional and invalid. 540 U.S. at 559. It concluded that, as the Fourth Amendment explicitly states, the warrant must describe with particularity the things to be seized. *Id.* In this case, the Government seized a considerable amount of data, including communications among Lindell's associates in the cell phone's stored data, that were not described in the warrant. App. 9; 82 F.3d at 620.

IV. The decision below is in conflict with authoritative decisions of the Eighth Circuit in *Lewellen v. Raff, H & R Block, Inc. v. Block, Inc., and In re Grand Jury Proceedings.*

According to the law of the circuit doctrine, *Mader v. United States,* 654 F.3d 794, 800 (8th Cir. 2011) (*en banc*), the court below was bound by previous Eighth Circuit decisions: *Lewellen v. Raff,* 843 F.2d 1103 (8th Cir. 1988) (preliminary injunction appropriate to restrain prosecution in bad faith for plaintiff's exercise of constitutional rights); *H & R Block, Inc. v. Block, Inc.,* 58 F.4th 939 (8th Cir. 2023) (preliminary injunction may be granted despite providing substantially all the relief sought in the action if movant carries the heavier burden imposed);

and *In re Grand Jury Proceedings,* 716 F.2d 493 (8th Cir. 1983) (search warrant invalidated for lack of particularity). Yet, the court declined to follow any of those decisions. This provides the Court with an opportunity to address whether it will adopt the law of the circuit doctrine.

The panel concluded erroneously that granting a preliminary injunction in this case would be "contrary to the purpose of a preliminary injunction" based on its view that a preliminary injunction may never be granted if it gives the movant the ultimate relief he seeks. 82 F.4th at 618. That conflicts with the holding in *Lewellen*, which upheld such a preliminary injunction. 843 F.2d at 1109-10.

Contrary to the decision below, the preliminary injunctive relief that Lindell requested is not categorically prohibited. It is one of three kinds of preliminary injunction that must satisfy a "heavier burden" than required to obtain other preliminary injunctions. The opinion in *H & R Block, Inc.* was authored by the same circuit judge who wrote the *Lindell* opinion and had been published just months before the *Lindell* opinion was published. This abrupt reversal by the court regarding the permissible function of a preliminary injunction is a telling example of the lack of evenhandedness of the court below.

In re Grand Jury Proceedings invalidated a search warrant as overly broad because it authorized the seizure of all records of the defendant's business "without any enumeration or specificity." 716 F.2d at 498, 502. The fact that the warrant in that case

contained a "laundry list of various types of records" sought did not save the warrant because "the FBI was not restricted to the items on the list." *Id.* In Lindell's case, the FBI was also not limited in its seizure of his cell phone storage by the warrant's reference to three criminal statutes or the 24 categories of information listed in the warrant. The warrant authorized the seizure of the entire cell phone storage.

The panel recognized that most of the stored information was very likely unrelated to the Department's investigation. 82 F.3d at 620. Yet, that unrelated information was seized without being particularly described in the warrant, which is a basis for invalidating the warrant as a violation of the particularity requirement of the Fourth Amendment. *See Groh v. Ramirez,* 540 U.S. at 557. The particularity requirement relates to the seizure of things, not to any subsequent search of those things.

V. The decision below is in conflict with decisions of other circuits regarding preliminary injunctive relief in cases involving claims of retaliation for the exercise of constitutional rights.

Courts in other circuits have embraced the reasoning of *Dombrowski* that a preliminary injunction is appropriate to prevent a criminal proceeding from continuing where it has been brought in bad faith to retaliate for the exercise of constitutional rights. *E.g., Wilson v. Thompson,* 593 F.2d 1375, 1380-81 (5th Cir. 1979); *Olagues v. Russoniello*, 797 F.2d 1511, 1519 (9th Cir. 1986) (*en banc*), *dism'd as moot,* 484 U.S. 806 (1987); *Free the*

Nipple-Fort Collins v. City of Fort Collins, 916 F.3d 792, 807 (10th Cir. 2019); *Privitera v. Calif. Bd. of Med. Qual. Assurance,* 926 F.2d 890, 898 (9th Cir. 1991); *Timmerman v. Brown,* 528 F.2d 811, 814-15 (4th Cir. 1975). The decision below has produced a conflict between the Eighth Circuit and the Fourth, Fifth, Ninth and Tenth Circuits over the issue of the appropriateness of a preliminary injunction in cases involving retaliation for the exercise of constitutional rights.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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