No. 14-2585

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ERIC O'KEEFE, et al.,
Plaintiffs-Appellees,

v.

FRANCIS D. SCHMITZ, et al.,
Defendants-Appellees,

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al.,
Intervenors-Appellants,

v.

UNNAMED INTERVENOR 1, et al.,
Intervenors-Appellees.

On Appeal from the United States District Court
For the Eastern District of Wisconsin
Honorable Rudolph T. Randa
Case No. 2:14-cv-00139

BRIEF AND APPENDIX OF INTERVENORS-APPELLANTS REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF NEWS EDITORS, WISCONSIN BROADCASTERS ASSOCIATION, WISCONSIN FREEDOM OF INFORMATION COUNCIL, AND WISCONSIN NEWSPAPER ASSOCIATION

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DISCLOSURE STATEMENT

The undersigned counsel of record for Reporters Committee for Freedom of the Press, American Society of News Editors, Wisconsin Broadcasters Association, Wisconsin Freedom of Information Council, and Wisconsin Newspaper Association hereby furnishes the following information in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit:

(1) The full name of every party or amicus the attorney represents:

Reporters Committee for Freedom of the Press, American Society of News Editors, Wisconsin Broadcasters Association, Wisconsin Freedom of Information Council, and Wisconsin Newspaper Association

(2) If such party or amicus is a corporation:

(i) Its parent corporation, if any: N/A

(ii) A list of stockholders that are publicly held companies owning 10% or more of stock in the party: N/A

(3) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this Court:

Gibson, Dunn & Crutcher LLP
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Dated: August 12, 2014

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INTRODUCTION

This appeal challenges the district court's decision to keep hundreds of pages of documents under seal in a high-profile lawsuit alleging prosecutorial abuse. Plaintiffs allege that politically motivated prosecutors launched a secret "John Doe" proceeding under section 968.26 of the Wisconsin Statutes, replete with armed raids, that targeted conservative activists and political advocacy groups in an effort to stifle their constitutionally protected right to engage in political speech, and to retaliate against them for their support of Wisconsin Governor Scott Walker. The district court found the evidence sufficiently credible to take the extraordinary step of enjoining what it determined was an unlawful state court proceeding.

Yet despite the public importance of this lawsuit, the severity of the government misconduct alleged, the involvement of high-level elected officials, and the intense public interest surrounding this case, virtually every substantive filing in this matter has been concealed from public view. Indeed, even though the John Doe judge himself had no objection to unsealing—and even though no one claims that sealing is necessary to preserve the secrecy of an "unlawful" investigation that has already been the subject of extensive public discussion and debate—the district court refused to unseal the record. Remarkably, the court based its decision on legal arguments—that are themselves under seal—made by "Unnamed Intervenors." The notion that court records in a civil lawsuit may be hidden from the public based on secret legal arguments made by anonymous individuals violates the constitutional and common law rights of the public and the press to observe the courts, and it is incompatible with the principle that judges "issue public decisions after public arguments based on public records." *In re Krynicki v. Falk*, 983 F.2d 74, 75 (7th Cir. 1992).

The Reporters Committee for Freedom of the Press, American Society of News Editors, Wisconsin Broadcasters Association, Wisconsin Freedom of Information Council, and Wisconsin Newspaper Association (collectively, the "Coalition") respectfully request that this Court reverse the judgment below.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343, as this case arises under 42 U.S.C. § 1983. This Court has jurisdiction under 28 U.S.C. § 1291 and the collateral order doctrine, as this appeal arises from a Decision and Order ("Order"), dated June 19, 2014, which is effectively a final judgment. *See United States v. Andreas*, 150 F.3d 766, 768 (7th Cir. 1998) (per curiam) (recognizing collateral-order jurisdiction where newspapers appealed pretrial denial of motion to unseal filings and modify protective orders); *In re Associated Press v. Ladd*, 162 F.3d 503, 507 n.5 (7th Cir. 1998) ("A closure order is appealable under the collateral order doctrine."); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 895 (7th Cir. 1994) ("[O]ur decisions make it evident that an order granting or refusing to grant access in favor of an intervening party is appealable under the collateral order doctrine.").

The collateral order doctrine permits appeal of a non-final judgment where the issues raised are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Montano v. City of Chicago*, 375 F.3d 593, 598 (7th Cir. 2004) (internal quotations omitted). Courts apply a three-part test to determine whether the doctrine applies: the order must "conclusively determine the disputed question"; it must "resolve an important issue completely separate from the merits of the action"; and it must be "effectively unreviewable on appeal from a final judgment." *Id*; *see also* Cir. R. 28(a)(3)(ii). The Order meets each of these criteria.

Finality: The Order conclusively determined the disputed question by holding that the public has no First Amendment or federal common law right of access with respect to the sealed filings in this case, and by denying the Coalition's motion to unseal in its entirety. D. Ct. Order at 10-12, 16. The district court also granted the motion to maintain sealing filed by two anonymous "Unnamed Intervenors," permanently sealing eight documents. *Id*. at 16 (sealing D.E. 53-35 (Ex. J), 110-22 (Ex. A), 110-24 (Ex. C), 110-25 (Ex. D), 110-27 (Ex. F), 117-8 (Ex. B), 117-9 (Ex. C), and 117-10 (Ex. D)). That the district court also held, with respect to "the balance of the record," that the "proper scope of disclosure implicates the 'willing speaker doctrine'" and directed Plaintiffs, Defendants, and the Unnamed Intervenors to "submit a report . . . explaining their respective positions regarding sealed information," so that the district court could issue a further order does not undercut the finality of the district court's erroneous legal conclusions that will guide future proceedings in this case. *Id*. at 14-15. Further, as discussed in detail below, the procedure employed by the district court with respect to the "balance of the record" not only rests on an erroneous interpretation of the law, but violates the public's contemporaneous right of access to court records.

Separability from the Merits: The Coalition's appeal concerns the unsealing of court records and thus raises issues of public access that are separate from the merits of Plaintiffs' underlying civil rights claims. *See*, *e.g.*, *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1307 (7th Cir. 1984) (finding appeal regarding disclosure of report to media "clearly *separable* from the merits of the underlying securities litigation" sufficient to support collateral-order jurisdiction); *United States v. Dorfman*, 690 F.2d 1230, 1231-32 (7th Cir. 1982) (finding motion to unseal "distinct" from underlying criminal case for purposes of collateral-order jurisdiction).

Moreover, the issues presented by this appeal are of substantial public importance and warrant immediate review by this Court. The broad sealing of information concerning the John Doe proceeding not only obstructs the public's constitutional and common law rights to observe the functioning of its judicial system, but also its "'right to know what the executive branch is about.'" *Smith v. U.S. Dist. Court*, 956 F.2d 647, 650 (7th Cir. 1992) (citation omitted).

Practical Unreviewability: Because the public's right of access is immediate and contemporaneous, and the newsworthiness of information is often short-lived, the Order is practically unreviewable on appeal from a final judgment. *See Dorfman*, 690 F.2d at 1232 (explaining that if media could not directly appeal denial of motion to unseal documents during trial, ruling "would probably be moot . . . by the time the trial was finished," because the documents "might well lose all newsworthiness by the time the trial was over"); *In re Boston Herald, Inc. v. Connolly*, 321 F.3d 174, 178 (1st Cir. 2003) (recognizing collateral-order jurisdiction where court acknowledged that "the news value of the [sealed] information would decline over time, lending the interlocutory appeal urgency"); *see also Neb. Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) (Blackmun, Circuit Justice) (state supreme court's delay in reviewing prior restraint of news media was a "final decision," since "each passing day may constitute a separate and cognizable infringement of the First Amendment" as the "suppressed information grows older" and "[o]ther events crowd upon it").

Indeed, "[t]he newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression." *Grove Fresh*, 24 F.3d at 897; *see also Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) ("[T]he element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly."). This is the case here; every day

that these documents remain sealed their newsworthiness declines, and the public loses the opportunity to timely observe this proceeding. Thus, if a direct appeal is unavailable, the Coalition will effectively be denied appellate review.

The Coalition timely noticed an appeal on July 17, 2014. D.E. 250.

STATEMENT OF THE ISSUES

I. Whether the district court erred in denying public access to court records in this proceeding.

II. Whether the district court erred in permanently sealing eight documents and in holding that the potential unsealing of other documents in the future will be guided by the "willing speaker" doctrine.

STATEMENT OF THE CASE

I. Plaintiffs filed this lawsuit on February 10, 2014, asserting violations of the First and Fourteenth Amendments arising out of the alleged misuse of a secret John Doe proceeding in Wisconsin state court. D.E. 1. On May 1, 2014, the Coalition moved to intervene and to unseal the filings based on the rights of access afforded by the First Amendment and common law. D.E. 172. The district court granted the Coalition's motion to intervene on May 7, 2014, agreeing with the Coalition that the court "must make more specific findings in order to justify keeping the filings in this case under seal." D.E. 192 at 2 (App. 19). The district court ordered any party that objected to unsealing any part of the record to respond. *Id.* On May 14, two anonymous Unnamed Intervenors moved to intervene and to maintain sealing. D.E. 212-13, 219-20. On June 19, 2014, the district court denied the Coalition's motion to unseal, holding that the public had no First Amendment or common law right of access to the sealed filings, and granted the Unnamed Intervenors' motion to maintain sealing with respect to eight documents: D.E. 53-35 (Ex. J), 110-22 (Ex. A), 110-24 (Ex. C), 110-25 (Ex. D), 110-27 (Ex. F), 117-8 (Ex.

B), 117-9 (Ex. C), and 117-10 (Ex. D). D. Ct. Order at 16, D.E. 243 (App. 16). With respect to the "balance of the record" under seal, the district court held that the "willing speaker" doctrine governs the "proper scope of disclosure" and directed Plaintiffs, Defendants, and the Unnamed Intervenors to meet and confer and submit a joint report "explaining their respective positions regarding sealed information" by July 3, 2014. *Id.* at 14, 17.

Those parties filed a joint report on August 7, 2014. That report included charts, themselves filed under seal, detailing the parties' respective positions on what should remain sealed or redacted. D.E. 262-1, 262-2; Text Order, Aug. 8, 2014. While the Coalition is not privy to these charts, it appears Defendants continue to support disclosure of the entire record, as do Plaintiffs, except with respect to the previously sealed eight documents and four additional documents (D.E. 4 (Ex. D), 53 (Ex. F), 109, 110 (Ex. E), and 114), which they want redacted. D.E. 262-3, 262-4. The Unnamed Intervenors, on the other hand, want to keep *all* of the documents covered by the John Doe secrecy order under seal, even those not pertaining to them. D.E. 262-5. As of the date of this filing, the district court has not ruled on the balance of the record.

II. The Wisconsin Club for Growth (the "Club"), a political advocacy group with tax-exempt status as a "social welfare organization" under 26 U.S.C. § 501(c)(4), and its director, Eric O'Keefe, challenge the constitutionality of a secret John Doe proceeding initiated and conducted by local government officials in Wisconsin. Compl. ¶¶ 1, 6-7, D.E. 1.

A John Doe proceeding is a statutory procedure unique to Wisconsin law. It takes place before a single state court judge whose aim is to determine whether probable cause exists to issue a criminal complaint. The judge has "investigatory" powers to subpoena and examine witnesses to "ascertain whether a crime has been committed and by whom . . . ." *See* Wis. Stat.

§ 968.26(2)(c). The judge "may" order that the proceeding "be secret," in which case "the record of the proceeding and the testimony taken shall not be open to inspection by anyone except the district attorney unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only to the extent that it is so used." Wis. Stat. § 968.26(3).

According to Plaintiffs, officials in the Milwaukee County District Attorney's Office began the first phase of a John Doe proceeding in 2010, purportedly to investigate the misappropriation of funds by employees in the Milwaukee County Executive's Office. Compl. ¶¶ 54, 64-66. Plaintiffs allege, however, that the proceeding was merely the beginning of an ongoing "politically motivated" fishing expedition by political opponents of then-Milwaukee County Executive and Wisconsin gubernatorial candidate Scott Walker, with the goal of linking Walker to any violation of law. *Id.* ¶¶ 1, 68. That initial phase resulted in a handful of convictions, including the conviction of Walker aide Kelly Rindfleisch. *Id.* ¶ 177. Earlier this year, the Coalition and other media organizations successfully intervened and obtained access to previously sealed court documents containing information relating to the John Doe proceeding that led to Rindfleisch's conviction. *See State v. Rindfleisch*, No. 2013AP362-CR (Wis. Ct. App. Feb. 10, 2014) (slip op.).

In 2012, the Milwaukee County District Attorney's Office began a second phase of the John Doe proceeding purportedly targeting "illegal campaign coordination between Friends of Scott Walker [FOSW], a campaign committee," and certain 501(c)(4) organizations, including the Club. Decision and Order at 5, D.E. 181. Media reports indicate that defendant officials subpoenaed O'Keefe, the Club, and other conservative political groups that supported Walker in his highly-publicized battle with state unions and his subsequent recall election. According to these reports, the ostensible purpose of the subpoenas was to determine whether political

organizations, including the Club, had committed state campaign finance violations during the 2011 and 2012 campaigns to recall Walker and certain state legislators.[1] On February 10, 2014, Plaintiffs filed this lawsuit alleging that the second phase of the John Doe proceeding was retaliation for the exercise of their constitutionally protected right to engage in political speech. Compl. ¶¶ 197-99.

The John Doe proceeding challenged by Plaintiffs "is governed by a sweeping 'Secrecy Order,' which purports to prohibit the disclosure of virtually all information regarding the investigation" of O'Keefe and the Club. D. Ct. Order at 3 (quoting D.E. 3); *see also* Compl. Ex. E (App. 20).[2] Accordingly, "to comply with the significant restrictions imposed upon them" by the secrecy order, Plaintiffs moved to seal substantial portions of their filings in this civil case, asserting only that compliance with the secrecy order satisfied the "good cause" standard of Local Rule 79(d)(4). D. Ct. Order at 3-4; D.E. 3 at 1. Defendants followed suit. D. Ct. Order at 4; *see also*, *e.g.*, D.E. 33. The district court summarily granted the parties' motions to seal "as a matter of course 'out of deference to the secrecy order in the state court John Doe Proceedings.'" D. Ct. Order at 3 (quoting D.E. 192 (App. 18)). As a result, a substantial number of documents filed by the parties—including documents submitted in support of and in opposition to Defendants' motion to dismiss, which was denied by the district court on April 8, 2014, D.E. 83, and Plaintiffs' motion for a preliminary injunction, which was granted by the district court on

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[1] *See Wisconsin Political Speech Raid*, Wall St. J., Nov. 18, 2013, *available at* http://online.wsj.com/news/articles/SB10001424052702304799404579155953286552832.

[2] The secrecy order was entered by then-presiding Judge Barbara A. Kluka on August 21, 2013. Compl. Ex. E, App. 20. Following Judge Kluka's recusal, Judge Gregory A. Peterson, who is named as a defendant in this litigation in his official capacity, became the presiding judge. *See* Decision and Order, D.E. 181 at 7-8. Unless otherwise indicated, the term "Defendants" in this brief refers to all defendants, collectively, with the exception of Judge Peterson.

May 6, 2014, D.E. 181—were (and remain) sealed in whole or in part on the district court's docket.

On May 1, 2014, the Coalition filed a motion to intervene and unseal these records, asserting the constitutional and common law rights of access to court records. D.E. 172. On May 7, 2014, the district court granted the Coalition's motion to intervene and directed any party objecting to unsealing to file a response. D.E. 192 at 1-2 (App. 18-19).

On May 14, 2014, the parties responded and—with some exceptions—did not oppose unsealing the record. D.E. 210, 211, 216, and 218. Judge Peterson filed a statement indicating that he neither supported nor opposed the Coalition's motion. D.E. 214. Three of the Defendants—John Chisholm, Bruce Landgraf, and David Robles (collectively, the "Milwaukee County Prosecutors")—stated that they "fully support unsealing the record." D.E. 216 at 1. Defendant Dean Nickel stated that he did not oppose the Coalition's request, noting that "the John Doe investigation has become so widely publicized and involves matters of such high public importance that secrecy may no longer be justified." D.E. 210 at 2. Defendant Francis Schmitz, similarly, did not oppose the Coalition's motion, D.E. 211 at 3, but, in the words of the district court, did not "affirmatively advocate for unsealing." D. Ct. Order at 6. Plaintiffs indicated that they largely supported unsealing the record but argued that certain documents "should remain under seal to protect Plaintiffs' rights and interests." D.E. 218 at 2. Specifically, Plaintiffs urged the district court to seal "four documents, and limited portions of five party filings that extensively rely upon those documents or otherwise implicate Plaintiffs' First Amendment privilege." *Id*.

In addition, two anonymous Unnamed Intervenors—who, according to the district court, were "targets" of the John Doe investigation—sought to intervene for the purpose of maintaining

the district court's sealing orders. D. Ct. Order at 1-2; D.E. 207-09, 212-13, 219-20. Asserting "on information and belief" that documents filed with the district court under seal disclosed "private and personal information" pertaining to them, including, among other things, their "identities," "political opinions" and "[p]ossibly other very personal, private information," the Unnamed Intervenors asked the district court to deny the Coalition's motion to unseal in its entirety. D.E. 209 at 2.

On June 19, 2014, the district court issued an Order denying the Coalition's motion to unseal and granting the Unnamed Intervenors' motion to maintain sealing, but only with respect to eight documents identified by Plaintiffs, which "largely consist of evidence that the defendants gathered during the course of their investigation into what they insist is illegal issue advocacy coordination." D. Ct. Order at 12-13, 16. According to the district court, those documents "include the Club's confidential documents and records, private communications, and donor records." *Id*. at 12.[3] Based on related public filings, the Coalition understands that those eight documents consist of "hundreds of pages" of the record. *See* D.E. 222 at 3.

"As for the balance of the record," the district court concluded that "the proper scope of disclosure implicates the 'willing speaker' doctrine," and that it was required to "balance the parties' First Amendment rights to publicize information about the John Doe investigation—and by extension, the rights of the press and the general public to receive such information—against

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[3] While the Coalition's motion was pending before the district court, on June 16, 2014, this Court granted an unopposed motion to unseal certain documents on its docket in connection with a related appeal. Civ. No. 14-1822, D.E. 44. The following day, the Unnamed Intervenors filed an emergency motion to intervene to oppose the unsealing of those documents, which was denied by this Court on June 19, 2014. Civ. No. 14-1822, D.E. 52. The documents unsealed by this Court correspond to the following district court docket entries: D.E. 1 (and accompanying exhibits), 4, 60, and 87. As the district court stated in its Order, "the Unnamed Intervenors' motion to maintain sealing is now moot with respect to these docket entries." D. Ct. Order at 15-16.

the privacy interests of the Unnamed Intervenors." D. Ct. Order at 14. To that end, the district court "direct[ed] the plaintiffs and the defendants to consult with the Unnamed Intervenors regarding what documents should remain under seal and what information should remain redacted," and "to file a joint report regarding the extent to which the balance of the record in this case should be unsealed" on or before July 3, 2014. *Id*. at 15, 17. After obtaining two extensions of this deadline, the parties filed their joint report on August 7, 2014. D.E. 262.

SUMMARY OF ARGUMENT

I. The district court shielded from public scrutiny hundreds of documents in this high-profile case involving alleged prosecutorial misconduct—a case where the court took the extraordinary step of enjoining a state court prosecution. The court's ruling is erroneous and should be reversed.

A. The press and the public have a First Amendment and common law right of access to court records and documents filed in civil actions that "requires rigorous justification" to overcome. *In re Krynicki*, 983 F.2d at 75. The right of access is fundamental to a democratic state because it ensures that the public can scrutinize the conduct of its court system, participate in debates about public affairs, and contribute to self-governance. In cases like this one involving alleged misconduct by government officials, the presumption that court records will be open to public scrutiny is especially strong. *Smith*, 956 F.2d at 650. The First Amendment grants a right of public access to "any documents" on which the court may rely "in making its decisions," *Grove Fresh*, 24 F.3d at 895-98, and can only be overcome by a showing that suppression is "essential to preserve higher values" and "narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"). The common law right of access is "[m]ore general in its contours" than the First Amendment right; it "establishes that court files and documents" are presumptively open to the

public, and can be overcome only by a finding that the values served by openness are outweighed by factors that militate against public access. *Grove Fresh*, 24 F.3d at 897 (citation omitted); *United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982).

B. The district court erred by concluding that the press and the public have no First Amendment or federal common law right of access to the sealed documents. The fact that the sealed materials are "governed by" a sweeping "secrecy" order entered in a state court John Doe proceeding, D. Ct. Order at 10, neither eliminates the public's constitutional or federal common law rights of access, nor relieves the district court of its obligation to independently evaluate requests to seal such material once it is filed on the federal court's docket. The district court's failure to apply the correct legal standards—identifying a compelling interest justifying sealing, and then narrowly tailoring its order only to the extent necessary to serve that interest—warrants reversal.

The district court relied on a flawed analogy between John Doe proceedings and federal grand jury proceedings. Unlike grand jury proceedings, John Doe proceedings are presumptively open to the public under Wisconsin law. *See State v. Unnamed Defendant*, 150 Wis. 2d 352, 359 (1989), *superseded by statute on other grounds as stated in State ex rel. Williams v. Fiedler*, 282 Wis. 2d 486 (2005). A John Doe judge may close a hearing, but only to the extent necessary to serve a compelling interest. *Id.* John Doe proceedings are also presumptively open under the First Amendment, which presumes a right of access to proceedings that have historically been open to the public (as John Doe proceedings have been) and where disclosure "would serve a significant role in the functioning of the process in question," *Grove Fresh*, 24 F.3d at 897.

Although preserving secrecy may be vital in *some* John Doe proceedings, it is not a concern in this case. The prosecutors involved in the John Doe proceeding have acknowledged

that there is no need for continued secrecy, particularly given the amount of information that has already been publicly disclosed by the press and by the parties themselves. As the district court itself noted, "much of the record compiled in this case has become public in any event." D. Ct. Order at 15. Even the John Doe judge had no objection to unsealing the entire district court docket. D.E. 214.

The district court based its decision in large part on the purported "privacy" interests of the anonymous "Unnamed Intervenors." But this Court has repeatedly "disapproved any general 'privacy' rationale for keeping documents confidential." *United States v. Foster*, 564 F.3d 852, 854 (7th Cir. 2009) ("Statutes, yes; privileges, yes; trade secrets, yes; risk that disclosure would lead to retaliation against an informant, yes; a witness's or litigant's preference for secrecy, no. The law could not be clearer.").

II. The district court's decision to permanently seal eight specific documents—and its process for determining whether some documents may be unsealed—should also be reversed.

A. The district court declined to unseal eight specific documents filed in connection with Plaintiffs' preliminary injunction motion and Defendants' motion to dismiss because it "did not rely upon any of [them]" in deciding the motions. D. Ct. Order at 13-14. This was error. Documents may be "made part of the public record either because the court has relied on them *or because the litigants have offered them as evidentiary support*." *Grove Fresh*, 24 F.3d at 898 (emphasis added). Indeed, the common law presumes that *all* court files and documents—"everything in the record"—will be open to the public. *Smith*, 956 F.2d at 650. The court further erred in holding that these documents are "also protected from disclosure because [they] implicate[] the plaintiffs' First Amendment privilege against the compelled disclosure of political associations." D. Ct. Order at 13 (quotation marks omitted). There is no absolute First

Amendment privilege that precludes disclosure of an organization's records and communications, *see AFL-CIO v. FEC*, 333 F.3d 168, 175-76 (D.C. Cir. 2003), and the district court made no findings to support its conclusion that this privilege applies here.

B. The procedure adopted by the district court to determine whether the remaining court records should remain under seal not only violates the public's "immediate and contemporaneous" right of access, *Grove Fresh*, 24 F.3d at 897, but also violates the First Amendment rights of the parties and the public under the "willing speaker" doctrine. *See Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 & n.15 (1976). The district court's approach—balancing the Unnamed Intervenors' "privacy" interests against the parties' right to speak about this investigation and the press and the public's right to receive such information—subordinates the well-recognized First Amendment rights at issue in favor of nonexistent "privacy" rights of anonymous litigants.

STANDARD OF REVIEW

This Court reviews the district court's legal conclusions *de novo*. *See Boyd v. Ill. State Police*, 384 F.3d 888, 897 (7th Cir. 2004); *see also United States v. Pickard*, 733 F.3d 1297, 1302 (10th Cir. 2013) (reviewing legal aspects of ruling on motion to unseal *de novo*); *In re Midland Nat'l Life Ins. Co. Annuity Sales Practices Litig.*, 686 F.3d 1115, 1119 (9th Cir. 2012) (per curiam) (same); *United States v. Wecht*, 484 F.3d 194, 208 (3d Cir. 2007) (same). This Court reviews the district court's factual findings for clear error. *Highmark Inc. v. Allcare Health Mgmt. Sys.*, 134 S. Ct. 1744, 1748 (2014).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING ACCESS TO THE COURT RECORDS IN THIS CASE

A. The Public Has A Constitutional And Common Law Right Of Access To Court Proceedings And Documents

"The public's right of access to court proceedings and documents is well-established." *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 895 (7th Cir. 1994) (citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*")), 464 U.S. 501); *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978). That right—which is rooted in both the First Amendment and common law—applies in civil as well as criminal matters. *See Grove Fresh*, 24 F.3d at 897; *Smith v. U.S. Dist. Court*, 956 F.2d 647, 649-50 (7th Cir. 1992); *see also In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308-09 (7th Cir. 1984) (recognizing that the public's right of access to civil proceedings and related judicial records is "of constitutional magnitude"). In either context, it is viewed as a right "fundamental to a democratic state" because it "serves to produce 'an informed and enlightened public opinion'" about the functioning of our court system, *United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982) (citation and quotation marks omitted), and "protect[s] the free discussion of governmental affairs" so that "the individual citizen can effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (citations omitted).

The First Amendment affords the public a right of access to "any documents" on which the court may rely "in making its decisions." *Grove Fresh*, 24 F.3d at 895, 897, 898; *see also Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 545 (7th Cir. 2002) (documents "that influence or underpin the judicial decision are open to public inspection"). Such documents include those filed in support of motions to determine substantive legal claims. *See In re Cont'l Ill. Sec. Litig.*,

732 F.2d at 1309-10. This constitutional right arises out of the recognition that "[p]ublic scrutiny over the court system serves to (1) promote community respect for the rule of law, (2) provide a check on the activities of judges and litigants, and (3) foster more accurate fact finding." *Grove Fresh*, 24 F.3d at 897.

The First Amendment right to access court documents can *only* be overcome by a showing that suppression is both "*essential* to preserve higher values" and "narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510 (emphasis added); *see also Globe Newspaper*, 457 U.S. at 607 (suppression must be "necessitated by a compelling governmental interest"); *United States v. Doe*, 63 F.3d 121, 128 n.3 (2d Cir. 1995) (finding no substantive distinction between the terms "compelling," "overriding," and "higher value" that the Supreme Court has used "to describe the type of interest that a party must advance in order to justify closure") (citations and quotation marks omitted). For a party seeking to restrict public access to court documents, overcoming the First Amendment's presumption of openness is a "formidable task." *In re Associated Press v. Ladd*, 162 F.3d 503, 506 (7th Cir. 1998).

"More general in its contours" than the First Amendment right, the public's common law right of access "establishes that court files and documents" are presumptively open to the public. *Grove Fresh*, 24 F.3d at 897 (citation omitted); *see also Smith*, 956 F.2d at 649-50. This broad common law right applies to "everything in the record," in addition to any other "materials on which a court relies in determining the litigants' substantive rights." *Smith*, 956 F.2d at 648, 650 (public's right of access applied to memo "sent by the Clerk of the Court to all of the judges in the district" even though it was neither evidence in a case nor filed on court's docket) (citations omitted). The "policy behind" this longstanding common law presumption is "that what transpires in the courtroom is public property." *Id.* at 650 (citation and quotation marks

omitted); *see also Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) (because "[j]udicial proceedings are public rather than private property," court documents and records must be "as open as possible" to public inspection); *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (because "the public at large pays for the courts," it "has an interest in what goes on at all stages of a judicial proceeding") (citation omitted). To overcome the common law's "strong presumption" in favor of disclosure, a court must find that the values served by openness are outweighed by factors that militate against public access—such as that the records would be used for "improper purposes." *Edwards*, 672 F.2d at 1293-94 (citations omitted).

The constitutional and common law presumption that judicial proceedings and court records will be open to the public is especially strong in cases like this one that concern alleged misconduct by government officials. *Smith*, 956 F.2d at 650. As this Circuit has recognized, "in such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch." *Id.* (citation and quotation marks omitted); *see also Globe Newspaper*, 457 U.S. at 604-05 (explaining that the "expressly guaranteed freedoms of the First Amendment shared a common core purpose of assuring freedom of communication on matters relating to the functioning of government") (citation and quotation marks omitted).

B. There Is No Compelling Interest Sufficient To Override The Public's Right Of Access To The Court Records In This Case

1. The State Court Secrecy Order Does Not Trump The Federal Right Of Access

While acknowledging that the "public's right to access court records and documents is well-established," D. Ct. Order at 6, the district court nevertheless held that the public has no such right with respect to the documents filed under seal in this case. The district court based

that holding on its conclusion that "there is no presumptive, unqualified First Amendment right to access materials" governed by a secrecy order entered in a John Doe proceeding, *id*. at 6, 10, and that "[i]f the Coalition has no right of access under the First Amendment, it stands to reason that the Coalition has no such right under the common-law as well." *Id*. at 7. The Order ignores the fact that, once filed by the parties in the district court, the John Doe materials became court records to which the public's constitutional and federal common law rights of access unquestionably apply. *Grove Fresh*, 24 F.3d at 897; *see also Union Oil*, 220 F.3d at 568. Thus, to justify its sealing order, the court was required under federal law to make independent, specific findings that such restrictions were essential to serve a compelling or overriding interest, and narrowly tailored to serve that interest. *Press-Enterprise I*, 464 U.S. at 510. The court's failure to do so warrants reversal.

"The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record" in his or her court. *Citizens First Nat'l Bank*, 178 F.3d at 945-46 (finding "blanket" protective order insufficient to warrant sealing of part of appellate record). That duty exists even where the material sought to be sealed is the subject of a protective order entered by a state court judge in a separate proceeding. *See Dixon v. Starring*, Civ. No. 11-2372, 2011 U.S. Dist. LEXIS 123982, *2-4 (E.D. La. Oct. 26, 2011) (denying motion to seal documents subject to protective order entered in separate state court action despite assertion that sealing was "necessary to comply with the terms" of the state court's order). Thus, the fact that the John Doe judge entered a sweeping protective order in the state proceeding did not relieve the district court of its independent obligation to evaluate whether the First Amendment and federal common law require access to these records in federal court. *Citizens First Nat'l Bank*, 178 F.3d at 945-46; *see also*, *e.g.*, *Ft. Wayne Journal-Gazette v.*

Baker, 788 F. Supp. 379, 385-87 (N.D. Ind. 1992) (protective order entered by judge in state court proceeding "offend[ed]" First Amendment presumption of access where, *inter alia*, it was "apparent that the [order] was not narrowly tailored" and no compelling interest or "extraordinary circumstance" required closure).[4]

In discharging that independent duty, the district court was required to apply the same stringent legal standards applicable whenever the public's constitutional and federal common law rights of access to civil court records are implicated. Wisconsin's John Doe statute, Wis. Stat. § 968.26, cannot be read to either require or authorize the district court to utilize a standard for sealing court records that is "insufficiently exacting to protect public access." *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 150 (1993) (per curiam) (holding Puerto Rico statute that allowed "hearings to be closed upon the request of the defendant, without more" unconstitutional); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 14-15 (1986) ("*Press-Enterprise II*") (holding California statute that allowed magistrate to close hearings only upon a determination that there was a reasonable likelihood of prejudice to the defendant

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[4] Judge Gregory Peterson, the judge currently presiding over the John Doe proceeding challenged by Plaintiffs, has apparently recognized as much. According to the district court, Judge Peterson issued an Order for Use of Information authorizing Defendants to "use the information, transcripts, documents and other materials gathered in [the John Doe proceedings] for all purposes related to the defense of" this lawsuit. *See* D. Ct. Order at 4 (citing D.E. 117, Ex. A). According to the Milwaukee County Prosecutors, that order not only permits John Doe materials to be used in this federal lawsuit it also "permit[s] them to be made public upon the order of [the district court]." D.E. 216; *see also* D.E. 211 (district court statement that "[t]here may be reason to maintain secrecy in order to protect non-party individuals identified in documents uncovered in the course of the investigation *but that decision, as contemplated by the John Doe judge [ECF 117-1]*, is now within the discretion of this Court . . . .") (emphasis added).

Because Judge Peterson's order was filed in the district court under seal, and remains under seal, the Coalition is unable to confirm the district court's or the Defendants' characterization of that order. It is clear, however, that Judge Peterson expressed no opposition to the unsealing of the John Doe material at issue. D.E. 214.

unconstitutional). Indeed, it is well-settled that a state statute cannot require or permit automatic, permanent, or otherwise unconstitutional restrictions on the public's First Amendment right of access to court records and documents. *See Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 509 (1st Cir. 1989) (holding unconstitutional state statute that automatically sealed records of cases ending in findings of "not guilty" or "no probable cause"); *Globe Newspaper Co. v. Fenton*, 819 F. Supp. 89, 100-01 (D. Mass. 1993) (holding unconstitutional state statute that denied public access to court-maintained indices of defendants in closed criminal cases "without an individualized judicial determination on an adequate record that a particular defendant's name must be sealed or impounded to serve a compelling state interest").

Nor may Wisconsin's John Doe statute permissibly be interpreted—as it was by the district court, D. Ct. Order at 11-12—to displace the public's *federal* common law right of access in this case. Wisconsin "can no more override" the long-recognized common law right of the press and the public to access federal court records and documents, and the "judicial rules" and standards "validly fashioned" by federal courts to uphold that right, "than [it] can override Acts of Congress." *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 314 (1955); *see*, *e.g.*, *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 181 (4th Cir. 1988); *Jaufre v. Taylor*, 351 F. Supp. 2d 514, 517 (E.D. La. 2005) (acknowledging state statutes favoring confidentiality of juvenile court records but applying federal common law presumption in favor of access).[5]

[5] In *Socialist Workers Party v. Grubisic*, this Court made clear that even state statutes intended to preserve the secrecy of state grand jury proceedings are "not controlling" where grand jury material is sought in discovery in a federal civil lawsuit. 619 F.2d 641, 644 (7th Cir. 1980) ("[A]lthough the state court may determine that the materials are privileged under state law, only the federal court may determine whether the materials are privileged under federal common law.").

Thus, regardless of whether the material filed under seal in the district court is "governed by" a secrecy order entered by a Wisconsin state court judge in a John Doe proceeding, the legal standards to be applied in determining whether such material should be sealed are the same. The court records under seal in this case are presumptively open to the public, and may *only* be sealed if necessary to serve a compelling interest, and *only* to the extent necessary to serve that interest. The district court's failure to apply the correct legal standards in ruling on the Coalition's motion to unseal and the Unnamed Intervenors' motion to maintain sealing warrants reversal.

2. John Doe Proceedings Are Not Grand Jury Proceedings And There Is No Need To Maintain Investigative Secrecy In Any Event

The district court based its holding that the public has no right of access to the sealed records almost exclusively on its conclusion that "Wisconsin's John Doe procedure is a 'kissing cousin' of the grand jury." D. Ct. Order at 7. Yet this analogy, at least for purposes of the First Amendment and common law presumption of access, is misplaced. Broad sealing of these court records cannot be justified by invoking grand jury secrecy.

The tradition of the federal grand jury—which, unlike a John Doe proceeding, consists not of a single judge, but of a panel of ordinary citizens—pre-dates even the United States. Enshrined in the Fifth Amendment, "[t]he grand jury is an integral part of our constitutional heritage which was brought to this country with the common law":

> The Framers, most of them trained in the English law and traditions, accepted the grand jury as a basic guarantee of individual liberty . . . . Its historic office has been to provide a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance.

United States v. Mandujano, 425 U.S. 564, 571 (1976) (plurality opinion); *see also In re Motions of Dow Jones & Co.*, 142 F.3d 496, 499 (D.C. Cir. 1998) ("The Fifth Amendment makes the 'Grand Jury' an essential element of the federal criminal justice system.").

"Since the 17th century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye." *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 218 n.9 (1979); *see also* Fed. R. Crim. P. 6(e). In light of the unique historical tradition and constitutional dimension of a grand jury, courts have concluded that "there is no First Amendment right of access to [federal] grand jury proceedings." *In re Motions of Dow Jones*, 142 F.3d at 499. In contrast, both the text and history of Wisconsin's John Doe statute make clear that John Doe proceedings are *presumptively open* as a matter of state law, and that the First Amendment's "presumption of openness" is likewise fully applicable to such proceedings. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality).

a. Unlike Grand Jury Proceedings, John Doe Proceedings Are Presumptively Open

A John Doe proceeding is a type of preliminary hearing—unique to Wisconsin law—in which a judge, acting as a judicial officer, may exercise his or her power to compel testimony and hear evidence in connection with making a probable cause determination. *See State v. Unnamed Defendant*, 150 Wis. 2d 352, 359 (1989), *superseded by statute on other grounds as stated in State ex rel. Williams v. Fiedler*, 282 Wis. 2d 486 (2005). Such hearings are presumptively open under Wisconsin law and the First Amendment, even though they may under certain circumstances be closed.

Wisconsin Law: John Doe proceedings are distinct from grand jury proceedings under Wisconsin law,[6] and are an outgrowth of the "procedure governing the determination of probable cause for the issuance of [arrest] warrants . . . ." *State v. Washington*, 83 Wis. 2d 808, 819

[6] *See* Wis. Stat. §§ 968.40-53 (statutes governing grand juries and grand jury secrecy).

(1978). The historical antecedent of the John Doe statute, Wis. Stat. § 968.26, is a statute that dates to the "latter part of the 19th century," and "provided that a magistrate upon complaint made to him that a crime has been committed 'shall examine, on oath, the complainant and any witness produced by him.'" *Washington*, 83 Wis. 2d at 819 n.6 (citing Wis. Rev. Stats. § 4776, (1898), *later renumbered* Wis. Stats. § 361.02 (1925)). That statute was "not intended to create a primarily investigative proceeding," but rather a mechanism for a magistrate to determine whether a crime had, in fact, been committed, and whether an arrest should be made. *Id*. And, while it was interpreted "[f]rom a relatively early date" to allow magistrates to require that witnesses appear and be examined, *id*. at 820, such investigative powers derived from, and were inextricably linked to, the magistrate's duty to "obtain[] the real facts before issuing the warrant." *State v. Keyes*, 75 Wis. 288, 295, 298 (1889).

In 1949, the Wisconsin Legislature enacted new provisions severing this traditional power of a magistrate to examine witnesses in connection with making a probable cause determination from the statutory procedures "for issuance of warrants generally," which are now found in sections 968.02-.04. *Washington*, 83 Wis. 2d at 820, n.7. The "function of the John Doe judge," however, has remained most closely analogous to "that of the magistrate who determines whether there is probable cause to issue an arrest warrant." *Id*. at 821. Indeed, notwithstanding the John Doe judge's power to investigate an alleged crime,[7] his or her function is, as a neutral magistrate, to make a probable cause determination. As the Wisconsin Supreme Court has explained:

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[7] 83 Wis. 2d at 823-34; *see also* Wis. Stat. § 361.02 (1947) note (explaining that the magistrate in a John Doe proceeding "may subpoena witnesses and may continue hearing from time to time until identity of offender has been discovered").

> The John Doe judge is a judicial officer who serves an essentially judicial function. . . . [He or she] should act with a view toward issuing a complaint or determining that no crime has occurred . . . [and] must conduct himself [or herself] as a neutral and detached magistrate in determining probable cause *which is the basic function of the proceeding*.

Id. at 823-24 (emphasis added, internal citations, quotation marks omitted).

Unlike grand jury proceedings, which "have traditionally been closed to the public and the accused," *Press-Enterprise II*, 478 U.S. at 10, John Doe proceedings were not viewed historically as requiring secrecy. Nor were they seen as analogous to grand jury proceedings. As the Wisconsin Supreme Court stated in 1930: "No cases or texts or other authorities are cited or found to the point that John Doe proceedings are secret, nor are any cited or found to the point that they are on a parity with grand jury proceedings." *State v. Thorson*, 202 Wis. 31, 34 (1930).

The Wisconsin Supreme Court has expressly acknowledged that John Doe proceedings under section 968.26 are "presumptively open" to the public. *Unnamed Defendant*, 150 Wis. 2d at 359. Thus, a John Doe judge "may" close a John Doe proceeding, but only to the extent necessary to serve a "compelling" interest. *Id*.; *see also State ex rel. Unnamed Person No. 1 v. State (In re Doe)*, 260 Wis. 2d 653, 688-89 (2003) (stating that "secrecy *may* be vital to the very effectiveness of a John Doe proceeding," but that "any secrecy order 'should be drawn as narrowly as is reasonably commensurate with its purposes'") (citation omitted, emphasis added). Similarly, the Wisconsin Supreme Court has also found analogous proceedings, including probable cause hearings under section 968.02, to be presumptively open. *See*, *e.g.*, *State ex rel. Newspapers, Inc. v. Circuit Court for Milwaukee Cnty.*, 124 Wis. 2d 499, 505-06 (1985) (holding that a pre-indictment probable cause hearing—though not a "sitting of the court"—was

nevertheless "subject to the same presumption of openness that applies to most judicial proceedings in Wisconsin").[8]

The district court downplayed the presumption of openness, reasoning that "John Doe proceedings are 'presumptively open,' but almost invariably, they are closed." Ct. Order at 8-9 (citations omitted). This gets the constitutional inquiry backwards. In *Globe Newspaper*, 457 U.S. 596, which involved a challenge to a state statute authorizing the mandatory closure of trials during the testimony of sexually assaulted minors, the Supreme Court rejected the state's argument that trials involving such assaults were traditionally subject to closure and, thus, that there was no presumption of access. The Court explained:

> Whether the First Amendment right of access to criminal trials can be restricted in the context of any particular criminal trial, such as . . . a rape trial, depends not on the historical openness of that type of criminal trial but rather on the state interests assertedly supporting the restriction.

Id. at 605 n.13; *see also Pokaski*, 868 F.2d at 503 ("[T]he fact that access to records 'has never been unfettered' or that courts traditionally have claimed a supervisory power to refuse disclosure in certain cases does not answer the question whether the records of closed criminal proceedings have been 'presumptively open.'") (citation omitted).

To be sure, as the language of the John Doe statute provides, and as the Wisconsin state courts have recognized, there "may" be certain circumstances where secrecy of a John Doe

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[8] Even assuming, *arguendo*, that John Doe proceedings are analogous to grand jury proceedings for purposes of the public's right of access—which they are not—that analogy does not relieve the district court of its obligation to independently evaluate whether a document, once filed on its docket, warrants sealing. *See Socialist Workers Party*, 619 F.2d at 643-44. Even in the context of civil proceedings "ancillary" to grand jury proceedings, courts do not suppress grand jury material that, being "sufficiently widely known," has "lost its character as Rule 6(e) material." *In re Motions of Dow Jones*, 142 F.3d at 500, 505 (citations omitted).

proceeding—or sealing of John Doe materials filed in a civil proceeding—is necessary to serve a compelling interest. Wis. Stat. § 968.26; *Unnamed Defendant*, 150 Wis. 2d at 359. That simply means that the presumption of access afforded by the First Amendment and common law may be overcome in specific cases, where "such secrecy is vital to the very effectiveness of the John Doe proceeding."[9] It does not mean that there is no presumption of access at all.

First Amendment: John Doe proceedings are also presumptively open under the First Amendment, which "presumes that there is a right of access to proceedings and documents which have 'historically been open to the public' and where the disclosure of which would serve a significant role in the functioning of the process in question." *Grove Fresh*, 24 F.3d at 897 (citation omitted); *see also Globe Newspaper*, 457 U.S. at 606 (recognizing that this analysis considers "both logic and experience"). "'[T]he press . . . guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.'" *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035 (1991) (plurality) (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)).

The Supreme Court in *Press-Enterprise II* held that the public has a First Amendment right of access applicable to preliminary hearings. *Press-Enterprise II*, 478 U.S. at 13; *see also El Vocero de P.R.*, 508 U.S. at 148 (holding unconstitutional provision of Puerto Rico's criminal procedure code requiring that preliminary hearings "be held privately" unless defendant requests otherwise). In so holding, the Court relied on the fact that similar pretrial proceedings

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[9] D. Ct. Order at 9 (citing *State v. Cummings*, 199 Wis. 2d 721, 735-39 (1996)). The Order cites *Cummings* for the proposition that there are a "number of reasons why such secrecy" of a John Doe proceeding may be "vital" that "mirror" justifications "cited in support of grand jury secrecy," including "keeping knowledge from an unarrested defendant which could encourage escape" and "preventing the defendant from collecting perjured testimony for the trial." D. Ct. Order at 9. Yet, as discussed below, those "reasons" are not present here.

"conducted before neutral and detached magistrates have been open to the public." *Press-Enterprise II*, 478 U.S. at 10.[10] Additionally, in considering whether "public access plays a significant positive role in the functioning" of preliminary hearings, the Court concluded that denying access to such proceedings would frustrate the "community therapeutic value of openness" and undermine "both the basic fairness of the [proceeding] and the appearance of fairness so essential to public confidence in the system." *Id*. at 13 (citations and internal quotation marks omitted).

As discussed above, John Doe proceedings have historically been presumptively open to the public. And, while such proceedings are unique to Wisconsin law, "the experience in th[is] type or kind" of proceeding—a preliminary hearing before a neutral judge—has been one of openness, not just in Wisconsin, but "throughout the United States." *El Vocero de P.R.*, 508 U.S. at 150 (emphasis omitted).

Moreover, John Doe proceedings are precisely the type of proceedings for which public access plays a particularly significant, positive role. That such proceedings are generally conducted at the behest of local prosecutors, and before a single John Doe judge, "makes the importance of public access . . . even more significant." *Press-Enterprise II*, 478 U.S. at 12-13 (citation omitted). In "the absence of a jury," which has been "long recognized as an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge," public scrutiny is vital. *Id*.; *see also* D. Ct. Order at 8 (acknowledging that

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[10] As an example, the Court noted that in 1807, in connection with Aaron Burr's trial for treason, Chief Justice Marshall conducted a probable cause hearing in the Hall of the House of Delegates in Virginia, "the courtroom being too small to accommodate the crush of interested citizens." 478 U.S. at 10.

John Doe proceedings, unlike grand jury proceedings, "lack[] the oversight of a jury"). Indeed, the very allegations made by Plaintiffs in this case illustrate precisely why public involvement and scrutiny can only benefit such proceedings, Compl. ¶ 1 (alleging that "the Milwaukee County District Attorney's Office . . . has been using the unique power granted to prosecutors under Wisconsin's 'John Doe' statute to engage in a continuous campaign of harassment and intimidation of conservative individuals and organizations."). *Gentile*, 501 U.S. at 1035-36 (plurality) (recognizing that "public awareness and criticism have even greater importance" when they concern allegations of police corruption and prosecutorial misconduct).

b. There Is No Need To Maintain Investigative Secrecy In This John Doe Proceeding

Under Wisconsin law, secrecy is permissible where "vital" to a John Doe proceeding's "very effectiveness." *In re Doe*, 260 Wis.2d at 688. Wisconsin courts have found secrecy justified where necessary for a John Doe judge to effectively "investigat[e]" whether a crime has occurred. *Id*. at 689 ("The policy underlying secrecy is directed to promoting the effectiveness of the investigation."); *see also* D. Ct. Order at 9 (identifying reasons why secrecy may be "vital to the very effectiveness" of a John Doe proceeding, including "keeping knowledge from an unarrested defendant which could encourage escape" and "preventing those interested in thwarting the inquiry from tampering with prosecutive testimony or secreting evidence") (internal quotation marks omitted). Yet here, the very prosecutors involved in the John Doe proceeding conceded that sealing the John Doe material filed in this case is *not* "vital" to ensuring the effectiveness of any investigation. They, along with the judge currently presiding over the John Doe proceeding, did not oppose the Coalition's motion to unseal in the district

court and have not sought to maintain the "secrecy" of any of the John Doe material filed in this case—and rightfully so.[11]

The parties are correct that sealing is unnecessary to protect the "effectiveness" of the John Doe proceeding—a proceeding the district court has deemed "unlawful" and brought to a halt. D. Ct. Order at 9, 11. In fact, the district court "agree[d]" with the parties "that much of the record compiled in this case has become public in any event." D. Ct. Order at 15; *see also* D.E. 210 at 2 (Def. Nickel's Resp. to Mot. to Unseal) (conceding that "the John Doe investigation has become so widely publicized and involves matters of such high public importance that secrecy may no longer be justified"); D.E. 211 at 3 (Def. Schmitz's Resp. to Mot. to Unseal) (conceding that "the John Doe investigations at issue in this litigation have become so widely known that maintaining the integrity of the investigation may no longer justify maintaining secrecy"); D.E. 216 (Milwaukee County Prosecutors' Resp. to Mot. to Unseal) (stating that they "fully support unsealing the record"). Indeed, various state and national media outlets have reported a considerable amount of information concerning this John Doe proceeding[12]—including detailed information obtained due to Defendants' failure to properly

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[11] The district court's Order criticizes the Milwaukee County Prosecutors for supporting unsealing of the John Doe material filed in this case, a position that the district court called "at odds with their duty as prosecutors which is to see that in any John Doe proceeding the rights of the innocent accused are protected in pursuit of a criminal investigation." D. Ct. Order at 5. As the Supreme Court has explained, however, the "responsibility of the prosecutor as a representative of the public" also "encompasses a duty to protect the societal interest in an open trial." *Gannett Co. v. DePasquale*, 443 U.S. 368, 384 n.12 (1979).

[12] *See, e.g.*, *Wisconsin Political Speech Raid*, Wall St. J., Nov. 18, 2013, *available at* http://online.wsj.com/news/articles/SB10001424052702304799404579155953286552832; *Wisconsin Political Speech Victory*, Wall St. J., Jan. 10, 2014, *available at* http://online.wsj.com/news/articles/SB10001424052702303393804579312670195586080; Rosalind S. Helderman, *Scott Walker, Eyeing 2016, Faces Fallout from Probes as Ex-Aide's Emails Are*

[Footnote continued on next page]

redact their filings in this case,[13] as well as information obtained from documents unsealed by this Court.[14]

Unsealing information in the parties' filings that has been "announced to the world" or may be "surmised from what is already in the public record" can "hardly [] pose" any threat to the effectiveness of a John Doe proceeding. *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 579 (4th Cir. 2004) (unsealing court documents containing publicly disclosed information concerning ongoing criminal investigation); *Wash. Post v. Robinson*, 935 F.2d 282, 292 (D.C. Cir. 1991) (citation omitted) (disclosure of publicly disclosed information posed no "threat to [an] ongoing criminal investigation"). Given the information that has already been made public concerning this John Doe proceeding, no investigative purpose is served by sealing any portion of the district court's docket.

[Footnote continued from previous page]
Released, Wash. Post, Feb. 18, 2014, *available at* http://www.washingtonpost.com/politics/scott-walker-eyeing-2016-faces-fallout-from-investigations-as-ex-aides-e-mails-are-released/2014/02/18/8b26bfa4-98b2-11e3-b931-0204122c514b_story.html.

[13] The *Wisconsin Reporter* reported that "[l]arge sections" of a redacted copy of Dean Nickel's motion to dismiss "became visible when copying and pasting them into a Word document." M.D. Kittle, *Secret Agent Dean Nickel's Defense: "Dean Nickel Is Not Responsible"*, Wis. Reporter, Mar. 13, 2014, *available at* http://watchdog.org/132551/secret-civil-right-lawsuit/. It further reported that Nickel's motion quoted extensively from Judge Peterson's sealed orders quashing subpoenas issued to conservative groups and asserted that Judge Peterson's predecessor, Judge Kluka, had "determined that there was a reasonable belief that a crime had occurred . . . based on affidavits and evidence" showing possible violations of campaign finance laws. *Id.* The *Wisconsin Reporter* links to the filing that was not properly redacted. *See, e.g.*, *id.*; M.D. Kittle, *D'oh! John Doe Prosecutors Claim Secrecy Protection—After Filing Secret Documents*, Wis. Reporter, Mar. 14, 2014, *available at* http://watchdog.org/132803/secrecy-prosecutors-lawsuit/.

[14] *See*, *e.g.*, Patrick Marley, Daniel Bice & Bill Glauber, *John Doe Prosecutors Allege Scott Walker at Center of 'Criminal Scheme'*, Milwaukee J. Sentinel, Jun. 19, 2014, *available at* http://www.jsonline.com/news/statepolitics/john-doe-prosecutors-allege-scott-walker-at-center-of-criminal-scheme-263839791.html; Matea Gold & Tom Hamburger, *Wisconsin Gov. Scott Walker Suspected of Coordinating with Outside Groups*, Wash. Post, Jun. 19, 2014, *available at* http://www.washingtonpost.com/politics/wisconsin-gov-scott-walker-suspected-of-coordinating-with-outside-groups/2014/06/19/1c176676-f7ea-11e3-a3a5-42be35962a52_story.html.

3. The District Court Erred In Relying On The "Privacy" Interests Of The Unnamed Intervenors

The district court seemed to recognize that sealing could not be justified by a need for investigative secrecy. But it looked instead to the general privacy and reputational interests of the anonymous Unnamed Intervenors, reasoning that they "simply do not want their private affairs to become public, which is a legitimate and natural reaction when being investigated by law enforcement authorities . . . ." D. Ct. Order at 2; *see also id*. at 10-12. While perhaps a "natural reaction," the Unnamed Intervenors' desire for privacy is not an adequate basis for broadly sealing court records. "Many a litigant would prefer that the subject of the case . . . be kept from the curious . . . but the tradition that litigation is open to the public is of very long standing." *See Union Oil*, 220 F.3d at 567.

It is well-settled that court records cannot be sealed on the basis of general reputational and privacy interests. This Court has repeatedly "disapproved any general 'privacy' rationale for keeping documents confidential" even in cases involving the privacy interests of nonparty witnesses. *See Foster*, 564 F.3d at 854 (rejecting government's motion to maintain documents under seal "'in order to protect the privacy interests of the . . . witness involved'"); *see also Baxter Int'l*, 297 F.3d at 547 ("[M]any litigants would like to keep confidential the salary they make, the injuries they suffered, or the price they agreed to pay under a contract, but when these things are vital to claims made in litigation they must be revealed."); *Union Oil*, 220 F.3d at 568 ("This is not the first time we have encountered requests to seal proceedings in order to implement the parties' preference for seclusion. The requests have been uniformly rejected.") (citation omitted, alteration in original).

Only narrow categories of information—such as trade secrets, information covered by a recognized privilege, and "information required by statute to be maintained in confidence (such

as the name of a minor victim of a sexual assault)"—implicate a "compelling interest" that may justify sealing. *Baxter Int'l*, 297 F.3d at 547; *see also Foster*, 564 F.3d at 853 ("Information that affects the disposition of litigation belongs in the public record unless a statute or privilege justifies nondisclosure."). As this Court has stated: "Statutes, yes; privileges, yes; trade secrets, yes; risk that disclosure would lead to retaliation against an informant, yes; a witness's or litigant's preference for secrecy, no. The law could not be clearer." *Foster*, 564 F.3d at 854. Thus, that public access to court records in this case might "subject[] those who facilitated protected political speech to unwanted political scrutiny," is not a compelling interest that justifies sealing. D. Ct. Order at 12.[15]

The Unnamed Intervenors bore the burden of demonstrating—with specificity—that ongoing suppression of the court records in this case is necessary to further a compelling interest with respect to all of the information they seek to keep hidden from public view. *Baxter Int'l*, 297 F.3d at 548. Concluding that the Unnamed Intervenors had "no idea what information is under seal," and thus had "no choice but to argue in favor of maintaining all of the Court's sealing orders," the district court made no findings with reference to any document sealed on its docket. D. Ct. Order at 15. It simply concluded that the Unnamed Intervenors' interest in "privacy" was paramount, and that the mere possibility that unsealing might implicate that privacy interest justified "maintaining all of the Court's sealing orders." *Id*. at 11, 15. This

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[15] Indeed, not only do "those who facilitate[] protected political speech" not have any absolute right to do so free from any "unwanted" public "scrutiny," D. Ct. Order at 12, but such scrutiny is itself a beneficial component of a functioning democracy. As Justice Scalia stated in his concurring opinion in *Doe v. Reed*: "Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which . . . campaigns anonymously [] and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave." 561 U.S. 186, 228 (2010) (Scalia, J., concurring).

holding is contrary to law. Bald assertions that a person's "privacy" may be implicated or his or her "reputation" harmed are insufficient to justify sealing, particularly where, as here, the public's ability to observe the conduct of its judicial and executive branches of government is at stake. *Id*. The Unnamed Intervenors' purported reputational interest is particularly questionable with respect to documents that do not even pertain to them—but that they nonetheless demand be kept under seal. D.E. 262-5 at 2. The same is true with regard to the Unnamed Intervenors' demand that the substance of their legal arguments be kept under seal. Among the many documents currently under seal in the district court is the unredacted version of the Unnamed Intervenors' joint memorandum in support of their motion to maintain sealing. The publicly filed version of that memorandum redacts the entirety of the Unnamed Intervenors' argument as to why "maintaining the secrecy" of the John Doe material filed in the district court is purportedly "essential." See D.E. 220 at 19-22. The sealing of that document was plainly improper. *See In re Krynicki*, 983 F.2d at 76 ("[B]riefs themselves, including all of the legal argument, belong in the public domain.").

Finally, this Court should not allow the Unnamed Intervenors to litigate this appeal anonymously. This Circuit has repeatedly recognized that, as with secrecy in judicial proceedings generally, the "concealment of parties' names is disfavored." *Mueller v. Raemisch*, 740 F.3d 1128, 1135 (7th Cir. 2014) (citations omitted); *see also Coe v. Cook Cnty.*, 162 F.3d 491, 498 (7th Cir. 1998) (anonymity in litigation is presumptively forbidden); Seventh Circuit Handbook at 115-16. "Secrecy makes it difficult for the public (including the bar) to understand the grounds and motivations of a decision, why the case was brought (and fought), and what exactly was at stake in it." *Mueller*, 740 F.3d at 1135-36. "Identifying the parties to the proceeding is an important dimension of publicness. The people have a right to know who is

using their courts." *Blue Cross & Blue Shield United of Wis.*, 112 F.3d at 872. This presumption can only be rebutted in exceptional circumstances, such as to protect the privacy of children, rape victims, and other particularly vulnerable parties or witnesses; and even in such cases, the litigant seeking anonymity must produce evidence of harm. *Id.*; *Mueller*, 740 F.3d at 1136; *Goesel v. Boley Int'l (H.K.) Ltd.*, 738 F.3d 831, 833 (7th Cir. 2013) (Posner, J., in chambers) (noting that a litigant may proceed under a pseudonym "if there are compelling reasons of personal privacy").

Because the district court has permitted the Unnamed Intervenors to litigate under pseudonyms and to file substantive briefing under seal or in heavily redacted form, the Coalition and the public have little insight into why they seek not only anonymity, but broad sealing of the record. The rationale offered by the Unnamed Intervenors publicly and explained by the district court is that they wish to avoid potential public scrutiny and the possibility of reputational harm from being associated with the John Doe proceeding, even though they were found not to have committed any crime. These are not exceptional circumstances warranting anonymity, particularly in a case of such great public importance.

II. THE DISTRICT COURT'S RULINGS AS TO SPECIFIC DOCUMENTS ARE ERRONEOUS

A. The District Court's Rationale For Permanently Sealing Eight Documents is Unsustainable

Seven of the eight documents that the district court permanently sealed were submitted as evidence in connection with Plaintiffs' motion for a preliminary injunction. D. Ct. Order at 12-13; D.E. 110-22 (Ex. A), 110-24 (Ex. C), 110-25 (Ex. D), 110-27 (Ex. F), 117-8 (Ex. B), 117-9 (Ex. C), 117-10 (Ex. D). In response to that motion, the district court granted the preliminary injunction, "halt[ing]" what it determined to be an "unlawful" John Doe investigation. D. Ct. Order at 11. The remaining document was submitted in connection with Defendants' motion to dismiss, which the district court denied. D.E. 53-35 (Ex. J).

Notwithstanding its decision to enter a preliminary injunction and to deny Defendants' motion to dismiss, the district court concluded that the press and the public have "no right to access" the sealed evidence submitted in connection with those motions because the court ultimately "did not rely upon any of it in 'determining the litigants' substantive rights.'" D. Ct. Order at 14 (citation omitted); *id*. at 13 ("[T]he evidence reflected in these docket entries was completely irrelevant to the Court's preliminary injunction."). The court further reasoned that unsealing these eight documents could jeopardize Plaintiffs' privilege against the compelled disclosure of political associations. *Id*. at 13.

Neither of the district court's rationales has merit. With regard to the court's suggestion that sealing was warranted because it did not actually rely on the documents, the First Amendment right of access extends to "any documents" upon which the Court may rely "in making its decisions." *Grove Fresh*, 24 F.3d at 895, 897-98. Thus, documents may, as a constitutional matter, be "made part of the public record either because the court has relied on them *or because the litigants have offered them as evidentiary support*." *Id*. at 898 (emphasis added); *see also In re Cont'l Ill. Sec. Litig.*, 732 F.2d at 1309-10 (holding that First Amendment right of access applied to the "evidence introduced in connection with [a party's] motion to terminate").[16] That evidence submitted by a party in support of a motion is ultimately deemed

[16] The public's common law right of access to court records and documents has been framed even more broadly to "include transcripts of proceedings, [and] everything in the record, including items not admitted into evidence." *See Smith*, 956 F.2d at 650 (citation omitted); *see also Nixon*, 435 U.S. at 597-98. The district court's reliance on *Smith* for the proposition that the public has no right of access to evidence that the court "did not rely upon" is misplaced. *Smith*, which addressed only the public's federal common law right of access, states, "[t]he First Circuit has clearly held that 'materials on which a court relies in determining the litigants' substantive rights,' are judicial records, subject to the right of public access." *Smith*, 956 F.2d at 650 (citation omitted). *Smith* does not stand for the proposition that the public's right of access is limited *solely* to materials "on which a court relies."

unpersuasive or "irrelevant" by the court in ruling on that motion is simply part of the process of judicial decision-making—which the public is entitled to oversee. Indeed, because "the presumption of access normally involves a right of contemporaneous access," public disclosure of *all* the evidence filed in connection with Plaintiffs' motion for preliminary injunction, and Defendants' motion to dismiss, would have been "proper" when "the motion was still pending." 732 F.2d at 1310.

"Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view." *Gannett Co. v. DePasquale*, 443 U.S. 368, 429 (1979) (Blackmun, J, concurring & dissenting) (internal quotation omitted). The eight documents that the district court permanently sealed were submitted as evidence and relied upon by the parties in presenting their arguments to the district court. The public is entitled to evaluate the district court's determination that such evidence was "irrelevant" to whether a preliminary injunction should issue. In short, those documents fall squarely within the scope of the public's First Amendment and common law rights of access. *In re Cont'l Ill. Sec. Litig.*, 732 F.2d at 1310 (concluding that "the policies favoring public scrutiny of judicial decision-making" required access); *see also Union Oil*, 220 F.3d at 568 ("Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.").

With regard to its second rationale, the district court further erred when it held that eight documents Plaintiffs "insist should remain under seal"—"the Club's confidential documents and records, private communications and donor records"—warrant permanent sealing for the

separate reason that they "implicate[] the plaintiffs' First Amendment privilege against the 'compelled disclosure of political associations.'" D. Ct. Order at 12-13.

While the Supreme Court has recognized that "compelled disclosure of political affiliations and activities" can, under certain circumstances, impose a substantial burden on First Amendment rights, there is no absolute privilege protecting such information. *AFL-CIO v. FEC*, 333 F.3d 168, 175-76 (D.C. Cir. 2003). Rather, courts must "balance the burdens imposed on individuals and associations against the significance of the government interest in disclosure and consider the degree to which the government has tailored the disclosure requirement to serve its interests." *Id.* (where a "political group demonstrate[s] that the risk of retaliation and harassment is 'likely to affect adversely the ability of . . . [the group] and its members to pursue their collective effort to foster beliefs' . . . the government may justify the disclosure requirement only by demonstrating that it directly serves a compelling state interest"); *Citizens United v. FEC*, 558 U.S. 310, 370 (2010) (rejecting argument that disclosure requirements would "chill donations to an organization by exposing donors to retaliation" where there was "no evidence" that its members would face "threats or reprisals"); *Reed*, 561 U.S. at 198-200 (rejecting challenge to public records law where disclosure of petition signers' names would foster government transparency and accountability and petitioners failed to prove risk of "threats, harassment, or reprisals").[17]

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[17] Contrary to the district court's Order, the fact that 501(c)(4) organizations generally are not required by federal regulations to publicly disclose the identities of their donors, does not speak to whether the public has a right of access to such information when it is filed in federal court in connection with a civil lawsuit initiated by such an organization. The Supreme Court has not held that such information is absolutely shielded from disclosure by the First Amendment. To the contrary, the Court has recognized that "transparency" with respect to those who facilitate protected political speech "enables the electorate to make informed decisions and give proper weight to different speakers and

[Footnote continued on next page]

Plaintiffs did not establish that the eight documents at issue should be sealed on the basis of their "First Amendment privilege against the 'compelled disclosure of political associations.'" D. Ct. Order at 12-13. Nor did the district court make any findings that would support that conclusion. Regardless of whether, as Plaintiffs claim, the John Doe proceeding itself "served to chill the Club's political speech and associations, in violation of its and its associates' First Amendment rights," D.E. 218 at 5-7, that does not establish that unsealing these eight documents substantially burdens Plaintiffs' First Amendment rights sufficient to outweigh the public's right to observe this judicial proceeding.

Plaintiffs not only chose to file this lawsuit, but have repeatedly objected to the secrecy order entered by the John Doe judge "and the concomitant lack of public scrutiny" of what they allege is a politically motivated and unlawful John Doe proceeding. Compl. ¶ 72, D.E. 1. Plaintiffs have alleged that the "secret" nature of the John Doe proceeding enabled Defendants to abuse their official power without public oversight and to selectively leak information to the press, while simultaneously preventing Plaintiffs from publicly defending themselves. *Id*. Indeed, O'Keefe has publicly stated that "he wants the public to know what is going on."[18] Plaintiffs' bid for selective secrecy with respect to documents relied on by Defendants in their defense, on the grounds that these documents "do[] little in themselves to advance public understanding of the John Doe investigation," *see* D. Ct. Order at 4, rings hollow and should be rejected. As this Court has explained: "When [parties] call on the courts, they must accept the

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messages." *Citizens United*, 558 U.S. at 371; *see also McCutcheon v. FEC*, 134 S. Ct. 1434, 1459-60 (2014).

[18] *Wisconsin Political Speech Raid*, Wall St. J., Nov. 18, 2013, *available at* http://online.wsj.com/news/articles/SB10001424052702304799404579155953286552832.

openness that goes with subsidized dispute resolution by public (and publicly accountable officials)." *Union Oil*, 220 F.3d at 568.

B. The District Court's Approach To Potential Future Unsealing Misapplies The "Willing Speaker" Doctrine And Violates The First Amendment

Apart from the eight documents that it ordered permanently sealed, the district court held that the "proper scope of disclosure" with respect to the "balance" of the documents currently under seal must be determined by reference to the "willing speaker" doctrine. D. Ct. Order at 14. While the "willing speaker" doctrine is implicated here, the district court misapplied it. Moreover, the procedure the district court imposed with respect to the "balance of the record" violates not only the public's right of access but also the First Amendment rights of the parties and the public under that doctrine.

As an initial matter, the public's right to access these judicial records is not confined solely to the "willing speaker" doctrine; the First Amendment and common law afford the public a right to access court records and documents in civil proceedings regardless of whether the parties would prefer them to be sealed. *Grove Fresh*, 24 F.3d at 895, 897, 898. And that right of access is "a right of *contemporaneous* access." *In re Cont'l Ill. Sec. Litig.*, 732 F.2d at 1310 (emphasis added); *Grove Fresh*, 24 F.3d at 897 ("access should be immediate and contemporaneous").

Relying on the Unnamed Intervenors' generalized "privacy" interest, the district court ordered that everything it had previously summarily sealed would remain under seal indefinitely, until further order of the court. The district court directed the Plaintiffs, Defendants, and the Unnamed Intervenors to submit a "joint report" no later than , 2014, "explaining their respective positions regarding sealed information," which—after two July 3separate requests for extensions—was filed on August 7, 2014. D.E. 262. As of the filing of this brief, not a single

document has been unsealed by the district court, and no findings that would justify such broad, continued suppression of court records have been made. In short, even assuming that a compelling interest necessitates the sealing of any portion of the record in this matter, the district court itself acknowledged that "keeping *everything* under seal would likely be an overbroad remedy." D. Ct. Order at 14 (emphasis added). Yet the practical effect of the district court's Order has been to do just that, in violation of the public's right of contemporaneous access to court records. *Grove Fresh*, 24 F.3d at 897 ("Each passing day may constitute a separate and cognizable infringement of the First Amendment.") (citation, quotation marks, and alterations omitted).

The Order also violates the constitutional rights of the parties, the press, and the public under the "willing speaker" doctrine. The Supreme Court has long recognized that the public's interest in receiving news is of constitutional dimensions. *See Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972). "[W]here a speaker [of that information] exists," the First Amendment's protection broadly extends "to the communication, *to its source and to its recipients both*." *Va. State Bd. of Pharm.*, 425 U.S. at 756-57 & n.15 (emphasis added); *see also Bond v. Utreras*, 585 F.3d 1061, 1077 (7th Cir. 2009) ("Media challenges to trial-court gag orders have been allowed where the orders interfere with the right to receive information from parties and their attorneys who wish to disseminate it."). Because the parties to this proceeding seek to unseal and make public virtually all of the sealed records in this case, their First Amendment rights as "willing speakers," and the public's First Amendment right to receive this information are implicated here. And the district court erred by not *immediately* unsealing all of the documents that the parties agree should be unsealed pursuant to the "willing speaker" doctrine.

Instead, the district court erroneously concluded that it "must balance the parties' First Amendment rights to publicize information about the John Doe investigation—and by extension, the rights of the press and the general public to receive such information—against the privacy interests of the Unnamed Intervenors." D. Ct. Order at 14; *see also id*. at 6. The case law, however, makes clear that mere privacy or reputational interests alone—even the purported reputational interests of the "innocent accused"—do not justify restrictions on the speech of willing speakers. In *Butterworth v. Smith*, 494 U.S. 624 (1990), a case relied upon by the district court in its Order, the Supreme Court expressly stated that:

> [E]ven in those situations where the disclosure by the witness of his own testimony [before a grand jury] *could have the effect of revealing the names of persons who had been targeted by the grand jury but exonerated*, our decisions establish that absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech.

Id. at 634 (emphasis added).

Accordingly, the district court's conclusion that it is required to balance the "privacy" interests of the Unnamed Intervenors against the First Amendment rights of the parties and the public under the "willing speaker" doctrine was erroneous. The court compounded its error by holding that "this balance tips largely in favor of privacy." D. Ct. Order at 14.

CONCLUSION

"'People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.'" *Press-Enterprise II*, 478 U.S. at 13 (quoting *Richmond Newspapers*, 448 U.S. at 572). For the foregoing reasons, the district court's Order denying the Coalition's motion to unseal and granting the motion to maintain sealing filed by the Unnamed Intervenors should be reversed.

Respectfully submitted this 12th day of August 2014.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 13,608 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12-point Times New Roman font.

Dated: August 12, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I also hereby certify that I had 15 copies sent to the Clerk's office by a third-party commercial carrier for delivery within 3 days.

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I further certify that one of the participants in the case is not a CM/ECF user. I have dispatched the foregoing document to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participant:

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CIRCUIT RULE 30(d) STATEMENT

The undersigned attorney hereby certifies, pursuant to Circuit Rule 30(d), that all material required under Circuit Rule 30(a) and (b) is included in the Appendix.

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APPENDIX

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ERIC O'KEEFE and WISCONSIN CLUB FOR GROWTH, Inc.,

Plaintiffs,

-vs-

FRANCIS SCHMITZ, JOHN CHISHOLM, BRUCE LANDGRAF, DAVID ROBLES, and DEAN NICKEL, in their official and personal capacities, and GREGORY PETERSON, in his official capacity,

Defendants,

-vs-

Case No. 14-C-139

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF NEWS EDITORS, WISCONSIN BROADCASTERS ASSOCIATION, WISCONSIN FREEDOM OF INFORMATION COUNCIL, and WISCONSIN NEWSPAPER ASSOCIATION,

Intervenors,

-vs-

UNNAMED INTERVENOR No. 1 and UNNAMED INTERVENOR No. 2,

Intervenors.

DECISION AND ORDER

Two competing motions are currently pending before the Court. First, the Reporters Committee for Freedom of the Press, American Society of News Editors,

Wisconsin Broadcasters Association, Wisconsin Freedom of Information Council, and Wisconsin Newspaper Association (collectively, the "Coalition") moved to intervene and to unseal all of the documents that the Court has allowed to be filed under seal in this case. Second, two people moved to intervene anonymously for the purpose of maintaining the Court's sealing orders (the "Unnamed Intervenors").

The Unnamed Intervenors are targets of a criminal investigation into conduct which, in the opinion of this Court, and also that of Judge Gregory Peterson, is not illegal. ECF No. 181, *O'Keefe v. Schmitz*, --- F. Supp. 2d ---, 2014 WL 1795139 (E.D. Wis. May 6, 2014). Still, the Unnamed Intervenors can't defend themselves publicly for fear of violating the investigation's mandate of secrecy. Aside from that restriction, the Unnamed Intervenors simply do not want their private affairs to become public, which is a legitimate and natural reaction when being investigated by law enforcement authorities, and is also a protection afforded any "innocent accused" in a John Doe proceeding. Meanwhile, the plaintiffs in this case — Eric O'Keefe and the Wisconsin Club for Growth — are "willing speakers" regarding the John Doe, and the prosecutors who formerly insisted upon secrecy now want to disregard it. Accordingly, the Unnamed Intervenors' motion to intervene and to proceed anonymously is granted. Fed. R. Civ. P. 24(a); *In re Sealed Case*, 237 F.3d 657, 663-64 (D.C. Cir. 2001) (targets of FEC investigation have a "legally cognizable interest in maintaining the confidentiality of the documents the FEC seeks to disclose in the public record"). For reasons that will become apparent, the Unnamed Intervenors'

interests are not adequately represented by any of the other parties to this litigation.

I.

Upon allowing the Coalition to intervene, the Court invited all of the parties in this litigation to explain their respective positions on the Coalition's motion to unseal. In an about-face from their initial stance, the defendants[1] now support unsealing the entire record in this case. The plaintiffs also support unsealing, with the exception of four documents which, they argue, should remain entirely under seal, and also five documents that should be redacted to some extent. ECF No. 218-2 (Table of Sealed Filings).

As the Court noted when it granted the Coalition's motion to intervene, the motions to seal in this case were granted as a matter of course "out of deference to the secrecy order in the state-court John Doe Proceedings." ECF No. 192, May 7 Decision and Order at 1-2. Indeed, at the very outset of this litigation, the plaintiffs moved for leave to file certain materials under seal because "the John Doe proceeding is governed by a sweeping 'Secrecy Order,' which purports to prohibit the disclosure of virtually all information regarding the investigation — including the nature of and bases for Plaintiffs' constitutional claims and right to relief." ECF No. 3. Thus, the plaintiffs sought leave to file materials under seal "in order to comply with the significant restrictions imposed upon them by the Secrecy Order entered in the John Doe

[1] One of the defendants, Special Prosecutor Francis Schmitz, takes a slightly different stance, discussed below. Judge Peterson "takes no position" on the matter and "neither supports nor opposes the motion."

proceeding, . . .” *Id.* The defendants followed suit upon their initial appearances in this case. *See* ECF No. 33 (“As already pointed out by Plaintiffs, the John Doe proceeding is governed by a secrecy order that limits the disclosure of information regarding the investigation”). Later, when the defendants asked the Court to stay injunction proceedings pending resolution of their motions to dismiss, the defendants argued that the Secrecy Order hampered their ability to present an effective defense. ECF No. 35. Subsequently, the defendants obtained authorization from Judge Peterson to “use the information, transcripts, documents and other materials gathered in [the John Doe proceedings] for all purposes related to the defense of” this lawsuit. ECF No. 117, Ex. A (Order for Use of Information). All such information, of course, was filed under seal.

Now the defendants, and to some extent the plaintiffs, seek to jettison the Secrecy Order entirely in favor of full-blown public disclosure. The plaintiffs, at least, take a somewhat measured approach. First, they argue that the Coalition’s motion should be granted in most respects because they are willing speakers and the public has a right to know about the “enormous injury that Defendants’ actions have inflicted on Wisconsin’s political and public-policy communities.” ECF No. 218, at 5. On the other hand, the plaintiffs seek to keep under seal documents that “while doing little in themselves to advance public understanding of the John Doe investigation, implicate Plaintiffs’ First Amendment privilege and, if disclosed at all, would require substantial redactions to protect personal, financial, and other confidential information.” *Id.* at 6.

As for the defendants, they have reversed their previous position. The defendants want everything unsealed under the theory that the John Doe investigation has become so widely publicized that secrecy is no longer justified. Moreover, in response to the plaintiffs' proposal to maintain certain documents under seal, four of the defendants — Milwaukee County District Attorney John Chisholm, his assistants Bruce Landgraf and David Robles (collectively, the Milwaukee Defendants), and Government Accountability Board investigator Dean Nickel — lodged vociferous objections. In a submission that smacks of irony itself,[2] the Milwaukee Defendants contend that it is "beyond irony that the plaintiffs and their counsel now ask the Court to block media access to the documents that outline the investigation and detail the reasons why the plaintiffs' conduct was subject to scrutiny. Having rarely passed on an opportunity to comment on the 'evidence' and excoriate the defendants in the press, plaintiffs and their counsel ask the Court to be complicit in preventing a public airing of the evidence." ECF No. 221, at 1-2.[3] The position of the defendants here is at odds with their duty as prosecutors which is to see that in any John Doe proceeding the rights of the innocent accused are protected in pursuit of a criminal investigation.

[2] In particular, the Milwaukee Defendants' characterization of the plaintiffs' lawsuit as "baseless" is completely divorced from the reality of the conclusion reached by this Court.

[3] *See also* Nickel Objection, ECF No. 222, at 4 ("It is fundamentally unfair to allow Plaintiffs to publicly accuse Nickel and the other Defendants of conducting a bad-faith investigation while at the same time asking this Court to keep hidden from the public the documents that form the basis for Nickel's signing of the affidavit and the basis for the investigation in the first instance. By making these public allegations against Nickel, Plaintiffs should not be permitted to serve as a roadblock to prevent the public from viewing the documents that support Nickel and the other Defendants' defenses").

United States v. Sells Eng'g, Inc., 463 U.S. 418, 424-25 (1983) (grand jury secrecy is "as important for the protection of the innocent as for the pursuit of the guilty"). That duty would seem to dictate that the defendants' position on this issue should coincide with that of the Unnamed Intervenors even though the information gained through the John Doe investigation is being used in this civil action. The defendants by their position appear to seek refuge in the Court of Public Opinion, having lost in this Court on the law.

That being said, Special Prosecutor Francis Schmitz does not resort to such tactics. Schmitz does not affirmatively advocate for unsealing, nor does he oppose it. Moreover, as the Unnamed Intervenors emphasize in their most recent filing, Schmitz concedes that there "may be reason to maintain secrecy in order to protect *non-party individuals identified in documents uncovered in the course of the investigation* . . ." ECF No. 211, at 3 (emphasis added). Such are the interests of the Unnamed Intervenors, which must be balanced against those of the Coalition, the general public, and the primary parties to this litigation.

II.

The public's right to access court records and documents is well-established. *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984)). Public scrutiny of the court system promotes community respect for the law, provides a check on the activities of judges and litigants, and fosters more accurate fact-finding. *Id.* (citing

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)). The "public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding. That interest does not always trump the property and privacy interests of the litigants, but it can be overridden only if the latter interests predominate in the particular case, that is, only if there is good cause for sealing a part or the whole of the record in that case." *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999).

The public's right of access arises from both the common law and the First Amendment, but neither aspect of the right is absolute. "More general in its contours, the common-law right of access establishes that court files and documents should be open to the public unless the court finds that its records are being used for improper purposes." *Grove Fresh* at 897. The Court will begin its analysis under the First Amendment because, as courts have recognized, the common law "does not afford as much substantive protection to the interests of the press and the public as does the First Amendment." *Virginia Dep't of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004). If the Coalition has no right of access under the First Amendment, it stands to reason that the Coalition has no such right under the common-law as well.

Under the First Amendment, courts consider whether "the place and process have historically been open to the press and general public," and also whether "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986). Although

"many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly. A classic example is that 'the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.'" *Id.* at 8-9 (quoting *Douglas Oil Co. v. Petrol Stops N.W.*, 441 U.S. 211, 218 (1979)).

To use the Unnamed Intervenors' turn of phrase, Wisconsin's John Doe procedure is a "kissing cousin" of the grand jury. As this Court already recognized, the John Doe is "an investigatory device, similar to a grand jury proceeding, but lacking the oversight of a jury." ECF No. 83, *O'Keefe v. Schmitz*, 2014 WL 1379934, at *2 (E.D. Wis. April 8, 2014). Wisconsin courts have repeatedly recognized that a John Doe proceeding is a "one-man grand jury." *State v. Washington*, 266 N.W. 2d 597, 603 n.7 (Wis. 1978); *Wis. Family Counseling Servs., Inc. v. State of Wis.*, 291 N.W. 2d 631, 635 (Wis. Ct. App. 1980) (noting that the John Doe judge "functions as a one-man grand jury[,] an investigatory body that antedates the constitutions of the United States and the state of Wisconsin where its investigatory functions, ancillary to its historical authority to return criminal indictments, is preserved"). A John Doe proceeding "requires a judge to assume two functions: investigation of alleged violations of the law and, upon a finding of probable cause, initiation of prosecution." *State v. Unnamed Defendant*, 441 N.W. 2d 696, 698 (Wis. 1989).

John Doe proceedings are "presumptively open," *id.*, but almost invariably,

they are closed. *See, e.g., In re Doe*, 766 N.W. 2d 542 (Wis. 2009); *In re John Doe Proceeding*, 680 N.W. 2d 792 (Wis. 2004); *In re John Doe Proceeding*, 660 N.W. 2d 260 (Wis. 2003). The justifications for John Doe secrecy mirror those that are cited in support of grand jury secrecy. *United States v. Crumble*, 331 F.2d 228, 231 (7th Cir. 1964) (the "secrecy provision of the Wisconsin [John Doe] statute has been likened to the secrecy attending grand jury testimony"). Those reasons were cited by the John Doe judge in support of the Secrecy Order at issue in this case. *State v. Cummings*, 546 N.W. 2d 406, 411-12 (Wis. 1996) (citing "a number of reasons why such secrecy is vital to the very effectiveness of the John Doe proceeding," including "keeping knowledge from an unarrested defendant which could encourage escape," "preventing the defendant from collecting perjured testimony for the trial," "preventing those interested in thwarting the inquiry from tampering with prosecutive testimony or secreting evidence," "rendering witnesses more free in their disclosures," and "preventing testimony which may be mistaken or untrue or irrelevant from becoming public"). As the United States Supreme Court explained:

> If preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, *we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule*.

Douglas Oil, 441 U.S. at 219 (emphasis added); *see also United States v. Rose*, 215 F.2d 617, 629 (3d Cir. 1954), cited with approval in *Douglas Oil* at 219, n.10 and *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-82, n.6 (1958), explaining that one purpose of secrecy is to "protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

Thus, there is no presumptive, unqualified First Amendment right to access materials that are governed by the John Doe Secrecy Order. John Doe proceedings, like grand jury proceedings, are historically closed. *Washington*, 266 N.W. 2d at 602 (John Doe proceedings "typically operate in complete secrecy"). Nor does public access play a "significant positive role" in the functioning of the John Doe. *Press-Enterprise*, 478 U.S. at 8. The dual function of a grand jury is to "determine if there is probable cause to believe a crime has been committed and to protect citizens against unfounded prosecutions." *Matter of the Special February 1975 Grand Jury (Lopez)*, 565 F.2d 407, 411 (7th Cir. 1977). So too, the John Doe:

> When [the John Doe] statute was first enacted the common-law practice was for the magistrate to issue the warrant on a complaint of mere suspicion, and he was protected in doing so. This was found to be a very unsafe practice. Many arrests were made on groundless suspicion, when the accused were innocent of the crime and there was no testimony whatever against them. This statute was made to protect citizens from arrest and imprisonment on frivolous and groundless suspicion.

State ex rel. Reimann v. Circuit Court, 571 N.W. 2d 385, 390-91 (Wis. 1985) (quoting

State ex rel. Long v. Keyes, 44 N.W. 13, 15 (Wis. 1889)). In this context, secrecy is "as important for the protection of the innocent as for the pursuit of the guilty." *Sells*, 463 U.S. at 424-25. Where, as here, the investigation has not concluded — more than that, it has been halted, and deemed unlawful by two separate judges — the ongoing risk to the Unnamed Intervenors' reputations and livelihoods is all too real. "A glaring injustice could be inflicted and irreparable injury caused to the reputation of a person if it were to become known that there is or ever was before the grand jury any proceeding concerning him if he were not subsequently indicted." *In re Grand Jury of Cuisinarts, Inc.*, 665 F.2d 24, 33 (2d Cir. 1981); *Lucas v. Turner*, 725 F.2d 1095, 1100 (7th Cir. 1984) ("One of the principal reasons for preserving the secrecy of grand jury proceedings is to protect the reputations of both witnesses and those under investigation").

Regarding the common-law right to access, the answer is more straightforward, and not surprising given the foregoing analysis. As the statute itself provides, if the "proceeding is secret, the record of the proceeding and the testimony taken *shall not be open to public inspection by anyone* except the district attorney *unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only to the extent that it is so used*." Wis. Stat. § 968.26(3) (emphases added). This is a "clear statement of legislative policy and constitutes a specific exception to the public records law. It is critical that when a John Doe judge issues a secrecy order pursuant to Wis. Stat. § 968.26, the judge must be assured that secrecy will be preserved . . ." *In re*

John Doe Proceeding, 660 N.W. 2d 260 (Wis. 2003). Obviously, the John Doe hasn't generated any criminal prosecutions, so there is no common-law right of access.

Ultimately, the Court agrees with the Unnamed Intervenors that it must not permit the original parties to this litigation to "safeguard their own interests to the detriment of non-parties who have not 'opened the door' to exposure by filing suit, who have consistently sought to abide by secrecy orders and to safeguard their privacy, and who will suffer far greater personal harm than any organization can assert." ECF No. 232-2, at 12. Indeed, while the Court appreciates the intense public interest surrounding this case, the zealous pursuit of information threatens to envelop and irreparably harm the Unnamed Intervenors, alongside all the other targets of the John Doe investigation who have suffered in silence. In this manner, wholesale unsealing would actually undermine the Court's injunction by subjecting those who facilitated protected political speech to unwanted public scrutiny.

III.

That being said, the plaintiffs' interests do align with the Unnamed Intervenors in some respects. The materials that the plaintiffs insist should remain entirely under seal include the Club's confidential documents and records, private communications, and donor records that were unlawfully obtained. These documents largely consist of evidence that the defendants gathered during the course of their investigation into what they insist is illegal issue advocacy coordination. ECF Nos. 53-35 (Ex. J), 110-22 (Ex. A), 110-24 (Ex. C), 110-25 (Ex. D), 110-27 (Ex. F), 117-8 (Ex. B), 117-9 (Ex. C), and

117-10 (Ex. D).[4] For the reasons already discussed, the Coalition does not have an absolute, unqualified right to access this information. This evidence is also protected from disclosure because it implicates the plaintiffs' First Amendment privilege against the "compelled disclosure of political associations." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir. 2010); *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003) ("The Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation"). This First Amendment principle is recognized and reinforced by right to remain anonymous as a 501(c)(4) donor.

Moreover, the evidence reflected in these docket entries was completely irrelevant to the Court's preliminary injunction, which involved a legal analysis regarding the proper scope of campaign finance regulations. ECF No. 181, May 6 Decision and Order at 19; 2014 WL 1795139, at *9 ("A candidate's coordination with and approval of issue advocacy speech, along with the fact that the speech may benefit his or her campaign because the position taken on the issues coincides with his or her own, does not rise to the level of 'favors for cash.' Logic instructs that there is no room for a *quid pro quo* arrangement when the views of the candidate and the issue advocacy organization coincide"). In other words, the Court's ruling would have been the same even in the absence of this evidence because, as the Court held, regulation of

[4] The last three entries are duplicates of ECF Nos. 53-35, 110-24, and 110-27, respectively. ECF No. 110-24 is largely duplicative of 110-22.

coordinated issue advocacy is unconstitutional. The Coalition has no right to access this evidence because the Court did not rely upon any of it in "determining the litigants' substantive rights." *Smith v. U.S. Dist. Ct. for S.D. of Ill.*, 956 F.2d 647, 650 (7th Cir. 1992).

As for the balance of the record, the proper scope of disclosure implicates the "willing speaker"[5] doctrine. *Bond v. Utreras*, 585 F.3d 1061, 1077-78 (7th Cir. 2009); *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 83 (2d Cir. 2003) (the First Amendment protects "not only the right to engage in protected speech, but also the right to receive such speech" where a "willing speaker exists"). Relatedly, the invocation of grand jury interests is not "some talisman that dissolves constitutional protections." *Butterworth v. Smith*, 494 U.S. 624, 630 (1990) (quoting *United States v. Dionisio*, 410 U.S. 1, 11 (1973)). Thus, the Court must balance the parties' First Amendment rights to publicize information about the John Doe investigation — and by extension, the rights of the press and the general public to receive such information — against the privacy interests of the Unnamed Intervenors. *Id*.

For many of the reasons already stated, this balance tips largely in favor of privacy. At the same time, keeping *everything* under seal would likely be an overbroad remedy. This is particularly true because O'Keefe seeks to publicize "information relating to alleged governmental misconduct — speech which has

[5] The defendants do not advance an argument under the "willing speaker" doctrine, but the concept should apply to them to the extent that they argue in favor of unsealing.

traditionally been recognized as lying at the core of the First Amendment." *Id.* at 632. Moreover, the Court agrees with the general consensus that much of the record compiled in this case has become public in any event. The problem, at least from the perspective of the Unnamed Intervenors, is that they have no idea what information is under seal, leaving them no choice but to argue in favor of maintaining all of the Court's sealing orders. Therefore, the Court will direct the plaintiffs and the defendants to consult with the Unnamed Intervenors regarding what documents should remain under seal and what information should remain redacted. Obviously, this means that the plaintiffs and the defendants must allow the Unnamed Intervenors to access the sealed record in this case. The plaintiffs, the defendants, and the Unnamed Intervenors should then submit a report to the Court explaining their respective positions regarding sealed information.[6] In this manner, the Court will be better-positioned to strike an appropriate balance between the privacy interests of the Unnamed Intervenors and the public's right to gain access to the record.[7]

Finally, on June 16, the Seventh Circuit granted an unopposed motion to unseal certain documents. The Unnamed Intervenors filed an emergency motion to stay, but the Seventh Circuit denied this motion and immediately unsealed certain documents that had been sealed on the Seventh Circuit's docket. The documents unsealed by the

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[6] Any unsealed documents must comply with Fed. R. Civ. P. 5.2 (Privacy Protection For Filings Made With the Court).

[7] The plaintiffs, the defendants, and the Unnamed Intervenors should also consider the possibility of developing a Protective Order to govern future proceedings and filings in this case.

Seventh Circuit correspond to the following district court docket entries that are currently redacted or under seal: ECF Nos. 1 (and accompanying exhibits), 4, 60, and 87. Therefore, the Unnamed Intervenors' motion to maintain sealing is now moot with respect to these docket entries.

***

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. Schmitz's motion to withdraw his motion for a protective order [ECF No. 211] is **GRANTED**, such that Schmitz's motion for a protective order [ECF No. 119] is **DENIED** as moot;

2. Schmitz's motion for leave to file document under seal [ECF No. 175] is **GRANTED**;

3. The Unnamed Intervenors' motions to seal disclosure statements and pleadings, to proceed pseudonymously, to intervene, and to seal their reply brief [ECF Nos. 209, 212, 219 and 233] are **GRANTED**;

4. The Coalition's motion to unseal [ECF No. 172] is **DENIED** and the Unnamed Intervenors' motion to maintain sealing [ECF Nos. 212 and 219] is **GRANTED** with respect to the following documents: ECF Nos. 53-35 (Ex. J), 110-22 (Ex. A), 110-24 (Ex. C), 110-25 (Ex. D), 110-27 (Ex. F), 117-8 (Ex. B), 117-9 (Ex. C), and 117-10 (Ex. D);

5. The plaintiffs' motions to file various materials under seal [ECF Nos. 217 and 239] are **GRANTED**;

6. The Milwaukee Defendants' motion for leave to file materials under seal [ECF No. 236] is **DENIED**; and

7. The plaintiffs, the defendants, and the Unnamed Intervenors are directed to file a joint report regarding the extent to which the balance of the record in this case should be unsealed within **fourteen (14) days** of the date of this Order.

Dated at Milwaukee, Wisconsin, this 19th day of June, 2014.

SO ORDERED:

HON. RUDOLPH T. RANDA
U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ERIC O'KEEFE and
WISCONSIN CLUB FOR GROWTH, Inc.,

Plaintiffs,

-vs-

FRANCIS SCHMITZ, in his official and personal capacities,

JOHN CHISHOLM, in his official and personal capacities,

BRUCE LANDGRAF, in his official and personal capacities,

DAVID ROBLES, in his official and personal capacities,

DEAN NICKEL, in his official and personal capacities, and

GREGORY PETERSON, in his official capacity,

Defendants.

Case No. 14-C-139

DECISION AND ORDER

This matter comes before the Court on a motion to intervene and unseal filed by the Reporters Committee for Freedom of the Press, American Society of News Editors, Wisconsin Broadcasters Association, Wisconsin Freedom of Information Council, and Wisconsin Newspaper Association (collectively, the "Coalition").

To date, the Court has granted the various motions to seal in this case out of

deference to the secrecy order in the state-court John Doe proceedings. The Coalition is correct, however, that the Court must make more specific findings in order to justify keeping the filings in this case under seal.

To that end, the Coalition's motion to intervene [ECF No. 172] is **GRANTED**. *See Bond v. Utreras*, 585 F.3d 1061, 1073 (7th Cir. 2009).

If any party objects to unsealing any part of the record in this case, that party should respond to the Coalition's motion to unseal on or before **May 14, 2014**.

If any response is filed, the Coalition may file a reply brief in support of its motion on or before **May 21, 2014**.

Dated at Milwaukee, Wisconsin, this 7th day of May, 2014.

SO ORDERED:

HON. RUDOLPH T. RANDA
U.S. District Judge

COPY

STATE OF WISCONSIN CIRCUIT COURT IOWA COUNTY

IN THE MATTER OF A JOHN DOE PROCEEDING Case No. 13JD000001

Circuit Court, Iowa County, WI
FILED
AUG 27 2013
LIA N. GUST, CLERK

SECRECY ORDER

IT IS HEREBY ORDERED that the John Doe proceeding, commenced by order of the court rendered this day and pending before me, shall be secret. All persons having access to these proceedings are hereby ordered not to disclose to anyone the court docket and activity records, court filings, process issued by the court, information concerning the questions asked and the answers given during a John Doe hearing, transcripts of the proceedings, exhibits and other papers produced during the proceedings, as well as all other matters they may observe or hear in the John Doe proceeding. This order is made:

1) To prevent persons from collecting perjured testimony for any future trial.
2) To prevent those interested in thwarting the inquiry from tampering with prospective testimony or secreting evidence.
3) To render witnesses more free in their disclosures.
4) To prevent testimony which may be mistaken, untrue, insubstantial or irrelevant from becoming public.

IT IS FURTHER ORDERED that all Investigators admitted to this John Doe may also be present at any and all sessions of this John Doe. I find that they are public officials with law enforcement responsibilities and that their presence will materially aid this investigation in the following ways:

1) They may be conducting interviews of witnesses outside of these proceedings. Information gained from these proceedings may be useful to them in eliciting relevant and accurate information from those witnesses.

2) Because they are and will be familiar with the subject matter of this investigation, they will aid the court and the prosecutors assigned to this investigation in the eliciting of relevant and accurate information from witnesses who may be called at these proceedings.

3) They will be able to help examine, organize and summarize the records and documents expected to be obtained during this investigation.

EXHIBIT
tabbies #10

IT IS FURTHER ORDERED that the following persons may have access to the record of these proceedings to the extent necessary for the performance of their duties, because such access will materially aid the progress of this investigation:

District Attorney Larry E. Nelson; and

Legal Assistant Jennifer H. Ramsden

IT IS FURTHER ORDERED that the persons acting in support of this John Doe proceeding may use the information, transcripts, documents and other materials that will be gathered in this investigation for all appropriate law enforcement purposes, including but not limited to the interview of witnesses outside the context of John Doe hearings, in support of this investigation.

IT IS FURTHER ORDERED that secrecy shall be maintained during this John Doe proceeding as to court docket and activity records, court filings, process issued by the court, information concerning the questions asked and the answers given during a John Doe hearing, transcripts of the proceedings, exhibits and other papers produced during the proceedings, as well as to all other matters observed or heard in the John Doe proceeding. See, generally, In re John Doe Proceeding, 2003 WI 30 at ¶62.

Dated at Dodgeville, Wisconsin this 21st day of August 2013.

BY THE COURT:

Honorable Barbara A. Kluka
Reserve Judge
Iowa County, Wisconsin