No. 14-2585

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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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*.

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

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# REPLY BRIEF 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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## INTRODUCTION

The parties asking this Court to keep hundreds of pages of judicial records under seal have failed to rebut the strong presumption of openness and public access that this Court has repeatedly held attaches to judicial records. *See*, *e.g.*, *Grove Fresh Distrib., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994). Rather than demonstrating the kind of "compelling" and "overriding" interests required to defeat the First Amendment presumption of access, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"), they rely on the wrong legal standards and offer only the vaguest of unsubstantiated and speculative reasons for shielding key swaths of the record from public view.

This Court should reject these baseless arguments. The public's right of access is especially compelling in this case, which involves allegations of a politically motivated and retaliatory "John Doe" proceeding and an extraordinary order from a federal district court enjoining this state criminal inquiry. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035 (1991) (plurality) ("public awareness and criticism have even greater importance" when they concern allegations of police corruption and prosecutorial misconduct). No party has come close to justifying secrecy in this case, which has already generated widespread public attention and debate.

This Court reiterated just last month that "documents that affect the disposition of federal litigation are presumptively open to public view," emphasizing that "[t]his transparency enables interested members of the public to know who's using the courts, to understand judicial decisions, and to monitor the judiciary's performance of its duties." *City of Greenville v. Syngenta Crop Protection, LLC*, -- F.3d --, No. 13-1626, 2014 WL 4092255, at *2 (7th Cir. Aug. 20, 2014) (citations and internal alterations omitted). "What happens in the halls of government is presumptively open to public scrutiny"; accordingly, judges "issue public decisions after

public arguments based on public records." *In re Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992). As shown below, these principles require that the documents at issue here be unsealed immediately.[1]

## I. ANY CLAIM THAT THE PRESUMPTION OF ACCESS DOES NOT APPLY HERE IS BASELESS

The appellees make three main arguments contending that there is no public right of access to these documents. All three are baseless.

**First**, Unnamed Intervenors and plaintiffs contend that the district court did not "rely" on these documents in determining the litigants' substantive rights, and therefore the public's right of access is not implicated. UI Br. at 31; Pl. Br. 25. But documents are "made part of the public record either because the court has relied on them or because the litigants have offered them as evidentiary support." *See Grove Fresh*, 24 F.3d at 898.

As this Court recently reaffirmed in *City of Greenville*, the right of access also applies to documents—like those at issue here—that reveal information about the judicial decisionmaking process itself. 2014 WL 4092255, at *2; *see also In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) (recognizing "policies favoring public scrutiny of judicial decisionmaking"). In *City of Greenville*, the Court found no right of access to confidential discovery materials filed by the plaintiff in connection with a dispositive motion where the plaintiff did not cite or explain why they were filed, and the district court did not consult them. 2014 WL 4092255, at *1. The Court held that while "[p]ublic access depends on whether a document 'influenced or underpinned the judicial decision,'" this analysis must also consider whether the documents "aid the understanding of judicial decisionmaking." *Id.* (citing *Baxter*

[1] For the Court's convenience, the Addendum to this brief lists the documents that remain under seal. These documents are: R. 53 (Exs. D, E, F, G, H, J, V), 109, 110 (Exs. A, C, D, E, F), 114, and 117 (Exs. B, C, D). D.E. 40, 42; D.E. 119 (Appeal No. 14-1822).

*Int'l Inc. v. Abbott Labs.*, 297 F.3d 544, 545 (7th Cir. 2002)). Accordingly, the Court carefully limited its holding: "The documents that our intervenors seek were not reviewed and deemed irrelevant, a step that could reveal something valuable about the judicial process; instead the district judge explicitly declined to consider them after plaintiffs failed to offer a justification for their filing." *Id.* at *2.

*City of Greenville* thus directly supports public disclosure of the documents at issue here. These documents were not gratuitously placed in the record and then ignored by the parties and the district court. Rather, defendants in this case filed, cited, and relied on the sealed documents in support of their motions to dismiss and in opposition to the preliminary injunction motion. Indeed, defendants argue that this evidence is critical to their defense against plaintiffs' claims of retaliation and political bias. *See, e.g.*, Schmitz Motion to Maintain Sealing 17, No. 14-2585, D.E. 38 (special prosecutor argues these documents "form the basis of the parties' dispute as they provide the legal and factual grounds" for the John Doe proceeding); R. 221 at 2 (county prosecutors argue below that these documents "are the most important documents" to their defense, because they "demonstrate their good faith and lack of merit to plaintiffs' claim of political retaliation."); R. 222 at 2-3 (government investigator asserts he relied on these documents "[t]o properly defend himself" against allegations of political bias and bad faith and that the "emails and other documents" attached to his sealed affidavit "form the basis for the John Doe investigation").

Unlike the district court in *City of Greenville*, which simply disregarded the documents at issue because no one argued they were relevant, here the district court specifically held that these documents were "irrelevant" to its legal analysis, R. 243 at 13, notwithstanding defendants' arguments that the documents are crucial to their defense. The district court's ruling that these

documents were "irrelevant" to the propriety of the John Doe investigation forms the basis of defendants' present appeal challenging the preliminary injunction. *See* Defs. Joint App. Br. 26, No. 14-1822, D.E. 111 (arguing that district court erred by holding that defendants "'targeted' the Plaintiffs without even considering—by the district court's own admission—the significant evidence that compelled their investigation and the unanimous endorsement and support of the non-partisan agency charged with enforcing fairness in elections in the State of Wisconsin") (citing R. 243 and one of the sealed documents, R. 110, Ex. A); *id.* at 4 (framing the first "issue presented" on appeal as whether the district court erred "in its assessment of Plaintiffs' likelihood of success on the merits . . . by failing to consider the evidence supporting the John Doe proceedings"); Schmitz Motion to Maintain Sealing at 18, D.E. 38 (the sealed documents are "directly relevant to the Defendants' appeals and are cited and discussed extensively in Defendants' appellate briefing as reasons why the district court's orders should be reversed"). Indeed, the reason why defendants' appellate brief is heavily redacted is precisely because it liberally relies on these sealed documents. D.E. 111.

As the parties themselves have acknowledged, these documents are critical to the public's understanding of this case and this appeal. Schmitz Br. 20, D.E. 72 ("[T]he files that remain sealed in the district court record would greatly advance public understanding of the John Doe Proceedings and would address Plaintiffs' unfounded allegations that the State has committed a 'massive abuse of governmental power' by 'wielding criminal law to intimidate activists and silence political speech.'"); Schmitz Motion to Maintain Sealing 18, D.E. 38 (same); Defendants Chisholm, Landgraf and Robles' Objection to Plaintiffs' Proposed Unsealing Order 2, R. 221 ("The plaintiffs' selection of [these] documents [that it wants sealed] could not have been more surgical in preventing the public from understanding this lawsuit."). Accordingly, because these

documents will unquestionably "aid the understanding of judicial decisionmaking," *City of Greenville*, 2014 WL 4092255, at *2, they are subject to the presumption of openness and should be unsealed.

**Second**, Unnamed Intervenors argue that the common law right of access is inapplicable because these documents were "properly submitted to the court under seal," and thus, that the Coalition was required to "make a specific showing of need" to justify unsealing them. UI Br. at 30-31 (citing *United States v. Corbitt*, 879 F.2d 224, 238 (7th Cir. 1989)). But this argument "flips the proper analysis on its head" by creating a presumption of secrecy that the public must rebut. *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 71 n.51 (1st Cir. 2011) ("[I]t is the party seeking to keep documents sealed who must make a showing sufficient to overcome the presumption of public access.") (citation omitted); *see also Grove Fresh*, 24 F.3d at 897 (presumption of access may only be "rebutt[ed]" "upon demonstration that suppression is essential to preserve higher values and is narrowly tailored to serve that interest") (citation and quotation marks omitted).

Moreover, the district court did *not* properly seal these documents. As the Court stated in *Corbitt*, immediately after the language quoted by Unnamed Intervenors: "Of course, the public's right to inspect judicial documents may not be evaded by the wholesale sealing of court papers. Instead, the district court must be sensitive to the rights of the public in determining whether any particular document, or class of documents, is appropriately filed under seal." 879 F.2d at 228. Because the "question" before this Court is "whether" any of the sealed documents were "properly filed under seal," the *Corbitt* standard is inapplicable. *Id.*

**Third**, Unnamed Intervenors erroneously claim that "the Court need not look to common law because there is a Wisconsin statute on point [the John Doe statute]." UI Br. 32. However,

Wisconsin's John Doe statute "can no more override" the long-recognized common law right of access to 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 also Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 181 (4th Cir. 1988) (district court erred in sealing judicial record based on state law prohibiting discovery and admissibility of medical review committee records, without first considering whether federal right of access outweighed state policy); *Jaufre v. Taylor*, 351 F. Supp. 2d 514, 517 (E.D. La. 2005) (acknowledging state statutes favoring confidentiality of juvenile court records but nevertheless applying federal common law presumption in favor of access). Whatever power Congress may possess to override federal common law, state legislatures possess no such power.

Although appellees cite *Socialist Workers Party v. Grubisic*, 619 F.2d 641, 644 (7th Cir. 1980), UI Br. 16, 33, that case does not support sealing here. There, the federal district court had issued an order *compelling* the state attorney to produce state grand jury transcripts, and under those very different circumstances, this Court found that "notions of comity between the state and federal courts require[d] that the plaintiffs first seek disclosure in the state court with supervisory powers over the grand jury." *Id.* at 643. In doing so, this Court emphasized that federal, not state, law governed the decision. *Id.* at 644 ("[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.").

Here, the John Doe materials have already been filed in two separate federal civil proceedings—in the district court and now in this Court—and thus the public's right of access clearly applies. *See* Coalition Br. 18. Once sealed documents are filed in federal court and

become part of the record, the fact that another court previously sealed the same documents in a separate proceeding neither eliminates the public's right of access to those documents, nor relieves the court of its independent obligation to evaluate the request to seal under First Amendment and federal common law standards. *See United States v. Foster*, 564 F.3d 852, 853 (7th Cir. 2009) ("[A]ny claim of secrecy must be reviewed independently in this court."); *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945-46 (7th Cir. 1999); *Ft. Wayne Journal-Gazette v. Baker*, 788 F. Supp. 379, 385-87 (N.D. Ind. 1992). Accordingly, in determining whether to seal judicial records, the district court was required to apply the same exacting standards that would apply in any civil lawsuit filed in federal court.[2]

## II. THESE JUDICIAL RECORDS ARE NOT ANALOGOUS TO GRAND JURY MATERIALS

Unnamed Intervenors and defendant Schmitz base their arguments on the same erroneous reasoning as the district court—that Wisconsin John Doe proceedings and federal grand jury proceedings are analogous, and therefore the documents here must be accorded the same degree of secrecy that protects state and federal grand jury materials. UI Br. 10-30; Schmitz Br. 16-21. They argue that to justify disclosure of these documents, the Coalition must meet the

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[2] Unnamed Intervenors also argue that the two-step inquiry set forth in *Press–Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986) ("*Press-Enterprise II*"), must be applied to determine whether the documents here are within the public's presumptive right of access. UI Br. 25. That inquiry, however, "relates to the categorical determination of whether a particular type of proceeding or class of court documents falls within the public's right of access; it does not govern whether individual documents filed with a court should be made public." *Nat'l Org. for Marriage*, 649 F.3d at 71 n.51. Unnamed Intervenors do not dispute that the First Amendment right of access extends to judicial records in civil litigation like this lawsuit. Thus, "*Press-Enterprise's* two-step inquiry is inapplicable." *Id.* at 71; *see also In re Cont'l Sec. Litig.*, 732 F.2d at 1308 (recognizing First Amendment right of access to judicial records in civil proceedings).

"demanding test" set forth in *Douglas Oil Co. v. Petrol Stops Northwest.*, 441 U.S. 211 (1979). UI Br. 22-24 (citing *United States v. Crumble*, 331 F.2d 228, 231 (7th Cir. 1964) (considering the propriety of a district court *compelling* secret testimony from a state court John Doe proceeding)). This reliance on *Douglas Oil* is misplaced. *Douglas Oil* addressed whether a district court may *compel* the production of federal grand jury transcripts under Federal Rule of Criminal Procedure 6(e). 441 U.S. at 218-19. Here, of course, the relevant documents are already part of the district and appellate court record, triggering the presumption of public access.

Unnamed Intervenors and Schmitz also argue that John Doe proceedings are equivalent to federal grand jury proceedings for purposes of maintaining secrecy under Federal Rule of Criminal Procedure 6. They rely on a handful of inapposite cases observing certain similarities between grand jury and John Doe proceedings, *e.g.*, that they serve an investigatory function. UI Br. 10-13, 18-22. None of these cases speak to whether John Doe proceedings are analogous to federal grand jury proceedings for purposes of *openness*. In fact, the language of the John Doe statute confirms that they are not. According to Wis. Stat. § 968.26, John Doe proceedings—unlike federal grand jury proceedings—are *not* automatically sealed. An "examination" under the John Doe statute "*may* be secret," and "*if* the proceeding is secret, the record of the proceeding and the testimony taken shall not be open to inspection . . . ." *Id.* (emphasis added). The federal rule governing grand jury proceedings, on the other hand, makes secrecy the default: "Records, orders, and subpoenas relating to grand-jury proceedings *must* be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury." Fed. R. Crim. P. 6(e)(6) (emphasis added). The rule further states, "[u]nless these rules provide otherwise," certain persons "must not disclose a matter occurring

before the grand jury"; the statute then provides "exceptions" to this rule. Fed. R. Crim. P. 6(e)(2-3).

The Wisconsin Supreme Court has confirmed this distinction, holding that John Doe proceedings are "presumptively open" under Wisconsin law. *State v. Unnamed Defendant*, 150 Wis. 2d 352, 359 (1989). The Unnamed Intervenors and Schmitz conveniently ignore this. They also cannot reconcile their erroneous theory with the Wisconsin Supreme Court's finding that "[n]o 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).[3] To be sure, John Doe proceedings *may*, under certain circumstances, be closed to the public, but that is no different from any other type of proceeding. *Id.* at 359. Indeed, if John Doe proceedings were truly comparable to grand jury proceedings, then Wisconsin law would not provide separately for *both* grand jury proceedings, Wis. Stat. §§ 968.40-53, *and* for John Doe proceedings, Wis. Stat. § 968.26.

Unnamed Intervenors rely heavily on *In re John Doe Proceeding*, 260 Wis.2d 653 (2003), claiming it holds that "John Doe proceedings are *not* subject to the general presumption that all public records shall be open to the public." UI Br. 26-27. To the contrary, that case holds that "when documents are submitted under seal in connection with a petition for supervisory writ that stems from a secret John Doe proceeding, the court of appeals must conduct an *in camera* review of those documents [applying certain criteria] prior to issuing an order that

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[3] Unnamed Intervenors argue that *Thorson* "assumed 'that [John Doe and grand jury proceedings] are on such parity.'" UI Br. 28 n.5. However, after stating that these proceedings are *not* the same, the court simply noted that even "assuming *without deciding* that they are on such parity, we do not find that the (John Doe) testimony involved is inadmissible." 202 Wis. at 156 (emphasis added).

continues the sealing of such documents." *Id.* at 264. Indeed, the court "reaffirm[ed] the general presumption" of openness under the state public records law and recognized that this *state* interest in openness must be balanced against the need for secrecy. *Id.* at 279. The court found that the state open records law would not preclude sealing, since it was limited by its statutory language, which permitted exceptions "as otherwise provided by law," and the John Doe statute's secrecy provision fell within that category. *Id.* at 279 (citing Wis. Stat. § 19.35(1)).

Unnamed Intervenors' reliance on *In re Wisconsin Family Counseling Services, Inc. v. State*, 95 Wis. 2d 670 (Ct. App. 1980), is similarly misplaced, given the Wisconsin Supreme Court's finding that John Doe judges have *not* functioned as one-man grand juries with respect to the public's right of access. *Unnamed Defendant*, 150 Wis. 2d at 359; *see also* Coalition Br. at 22-28.

Unnamed Intervenors claim that they were able to find only two cases involving John Doe proceedings that "may not have been the subject of a secrecy order." UI Br. at 12, n.1. But that is immaterial. "Whether a 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." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 n.13 (1982); *see also Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 503 (1st Cir. 1989) ("[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.'"). Moreover, Unnamed Intervenors' methodology is flawed. They ignore that a John Doe proceeding would not ordinarily warrant the filing of a published judicial opinion, since it is a type of criminal hearing

ending with a probable cause determination and issuance of a complaint. *See* Coalition Br. 22-24. Further, where proceedings are conducted in the open, the court would have no need to mention this fact in an opinion, since secrecy was not at issue.

## III. APPELLEES HAVE FAILED TO DEMONSTRATE SUFFICIENT NEED TO MAINTAIN SECRECY IN *THIS* CASE

To justify continued sealing of the documents, appellees were required to show that suppression is "essential to preserve higher values and is narrowly tailored to serve that interest," *Press-Enterprise I*, 464 U.S. at 510, and that the interests favoring suppression outweigh the "strong presumption" of access, *United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982). Appellees failed to meet their burden.

### A. Schmitz's Claim That The "Integrity" Of The Investigation Warrants Sealing Is Vague And Unsupported

Defendant Schmitz asserts that continued sealing is necessary to maintain the "integrity" of the John Doe proceedings if the prosecutors "are allowed to proceed pending rulings in state and federal court." Schmitz Br. 13. Schmitz fails to offer any facts or reasoning in support of this vague claim. Requests for sealing "that simply assert a conclusion without the required reasoning . . . have no prospect of success." *Baxter*, 297 F.3d at 548. This Court will "deny outright any motion . . . that does not analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations." *Id.*; Seventh Circuit Handbook at 115 (same). "[I]t is not enough simply to assert th[e] general principle" that an investigation is at stake "without providing specific underlying reasons," based on "specific facts and circumstances," that would demonstrate how "the integrity of the investigation reasonably could be affected." *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 579 (4th Cir. 2004).

Schmitz's claim that secrecy is required to preserve the integrity of the investigation rings hollow because he did not object to unsealing in the district court. In fact, he withdrew his

motion for a protective order and conceded that the John Doe investigations had become "so widely known that maintaining the integrity of the investigation may no longer justify maintaining secrecy." R. 211 at 3. Far from asserting a compelling need for secrecy to protect the integrity of the investigation, Schmitz saw no need for secrecy at all, noting only that uncharged individuals mentioned in the documents may have possible privacy interests, but leaving the matter to the district court's discretion. *Id.* None of the other members of the prosecution team have argued that sealing is necessary–either in the district court or in this Court.

Nor does John Doe Judge Gregory Peterson take the position that sealing this federal lawsuit is necessary to protect the integrity of the state proceedings. R. 214; R. 117-7. To the contrary, in an order that was unsealed by this Court after the Coalition filed its opening brief, Judge Peterson expressly authorized the defendants to use the sealed material in their defense in this federal civil suit and to disclose it publicly as "required in the course of [this] lawsuit" and as permitted by the district court. R. 117-7.

Unnamed Intervenors also rely on Schmitz's "integrity" argument and attempt to downplay Judge Peterson's decision not to oppose unsealing. UI Br. 15. They conspicuously ignore his order addressing the use and public disclosure of the John Doe materials. First, Unnamed Intervenors argue that Judge Peterson did not have "the benefit of briefing on the subject." UI Br. 16. But he *did* have the benefit of briefing; he filed his statement after the Coalition filed its 24-page brief on the subject. R.173. Next, they claim he did not take a position on sealing because he did not want to impugn his "neutrality" if the John Doe proceedings continued. UI Br. 15-16. They cite portions of Judge Peterson's Answer in this case, where he declined to take a position on the constitutionality of the John Doe proceedings.

*Id.* They also cite a letter from his attorney to the Clerk of the Wisconsin Court of Appeals, in which the attorney stated that, "a John Doe judge's advocacy in support of the judge's decision on 'the merits' of statutory and constitutional issues may create an appearance of impropriety . . . ." Supp. App. 6-7.

Yet in neither the Answer nor the letter did Judge Peterson decline to take a position on the ancillary issue of sealing. To the contrary, in the letter, his attorney responded to the appellate court's question as to which documents should remain under seal by stating that he "supports the position of the Special Prosecutor," although he did not state what that position was. *Id*. If Judge Peterson had wanted to oppose unsealing in the district court, he could have—and would have—done so. Indeed, he expressly authorized the use and public disclosure of the sealed materials as required by the lawsuit and permitted by the district court. R. 117-7.

Schmitz's "integrity" argument is further undermined by the fact 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 (defendant Nickel 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"). Schmitz has even acknowledged this himself. D.E. 211 at 3 (Schmitz 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"). Since much of the information has already been "announced to the world" or may be "surmised from what is already in the public record," it does not pose the kind of serious threat to the effectiveness of the John Doe proceeding that might justify sealing. *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 579 (4th Cir. 2004); *Wash. Post v. Robinson*, 935 F.2d 282, 292 (D.C. Cir. 1991).

### B. Unnamed Intervenors' Purported Privacy And Reputational Interests Do Not Override The Compelling Need For Public Access

Unnamed Intervenors argue that their general privacy and reputational interests warrant the secrecy afforded to grand jury materials. UI Br. 17. Schmitz also urges the Court to maintain sealing on this basis. Schmitz Br. 13. But Unnamed Intervenors do not even attempt to explain why they would be harmed if it became publicly known that they were the targets of what the district court determined was an unlawful investigation. In any event, this Court has repeatedly "disapproved any general 'privacy' rationale for keeping documents confidential." *See Foster*, 564 F.3d at 854. "[A] person's desire for confidentiality is not honored in litigation." *Gotham Holdings, LP v. Health Grades, Inc.,* 580 F.3d 664, 665 (7th Cir. 2009); *see also Baxter*, 297 F.3d at 547; *Union Oil Co. v. Leavell*, 220 F.3d 562, 567-68 (7th Cir. 2000) ("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."). And where, as here, "the rights of the litigants come into conflict with the rights of the media and public at large, the trial judge's responsibilities are heightened. In such instances, the litigants' purported interest in confidentiality must be scrutinized heavily." *Grove Fresh*, 24 F.3d at 899.

Unnamed Intervenors also claim they should be permitted to litigate this appeal anonymously. But an order permitting litigants to participate in federal judicial proceedings anonymously is "exceptional" and rare and can only be justified where there is a compelling need, such as to protect "the privacy of children, rape victims, and other particularly vulnerable parties or witnesses." *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 872 (7th Cir. 1997). Even in such extreme cases, the litigant seeking anonymity must produce some evidence showing a threat of harm. *Mueller v. Raemisch*, 740 F.3d 1128, 1136 (7th Cir. 2014); *see also Goesel v. Boley Int'l (H.K.) Ltd.*, 738 F.3d 831, 833 (7th Cir. 2013) (Posner, J., in

chambers). As this Court has recognized, "transparency enables interested members of the public to know who's using the courts, to understand judicial decisions, and to monitor the judiciary's performance of its duties." *City of Greenville*, 2014 WL 4092255 at *1 (internal citations and alterations omitted).

Unnamed Intervenors, however, cite only a vague "privacy interest" and have failed to produce any evidence. UI Br. 48. Indeed, their extraordinary request to litigate anonymously—such that the Coalition and its attorneys do not even know who they are litigating against in the district court or this Court—is further undermined by the fact that the "targets" of the investigation are, at least as a general matter, widely known or relatively easy to identify. As the district court stated: "The subpoenas' list of advocacy groups indicates that all or nearly all right-of-center groups and individuals in Wisconsin who engaged in issue advocacy from 2010 to the present are targets of the investigation." R. 181 at 7-8 (preliminary injunction order). Unnamed Intervenors have not come close to carrying their heavy burden.

Finally, even if Unnamed Intervenors did have a sufficiently compelling interest in privacy—which they do not—this would, at most, only require the redaction of their names and other personal identifying information, not the sealing in toto of hundreds of pages of judicial records, as they have suggested. *Grove Fresh*, 24 F.3d at 897 (presumption of access may only be "rebutt[ed]" "upon demonstration that suppression is essential to preserve higher values and is *narrowly tailored* to serve that interest") (citation and quotation marks omitted) (emphasis added).

### C. No Associational Privilege Applies Here, And It Would Not Trump The Public's Right Of Access In Any Event

Plaintiffs and Unnamed Intervenors urge the Court to keep these documents sealed, claiming a First Amendment privilege to "privacy of association and belief" that protects

"political affiliations and internal strategies and tactics" and overrides the public's right of access. Pl. Br. 1, 11-12, 23-24, D.E. 73; *see also* UI Br. 35-36. They also contend that disclosure would have a "chilling effect" on their ability to organize and participate in contentious public debates. Pl. Br. 1; UI Br. 7, 36. The district court accepted these arguments without making any factual findings or providing any analysis. D. Ct. Order at 13, R. 243 (citing *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir. 2010); *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003)).

Plaintiffs' "associational privilege" arguments were considered and rejected in *National Organization for Marriage*, 649 F.3d at 71 n.51. There, the plaintiff opposed the unsealing of certain judicial records, claiming disclosure would burden the organization's protected political activities and invade the privacy of its third-party service providers and contractors and risk subjecting them to harassment. *Id.* at 70-71. The plaintiff relied on *AFL-CIO* and *Perry* to justify sealing, just as plaintiffs do here. *Id.* at 71, n.5. The First Circuit deemed those cases inapposite, explaining that they "involved the possible *compelled disclosure* of information to which there was no presumptive right of public access; here, in contrast, the documents were voluntarily included in the record filed with the district court, and thus subject to a presumption of public access." *Id.* (emphasis added); *see also AFL-CIO*, 333 F.3d 168 (prohibiting regulation that compelled disclosure of union's internal planning materials compiled during government investigation); *Perry*, 591 F.3d 1147 (involving challenge to compelled disclosure of internal documents pursuant to court order enforcing a discovery request). The First Circuit concluded that the demanding test for disclosure still governed the analysis, explaining that while the presumption of access "is not inviolate," it is "nonetheless strong and sturdy, and thus only the most compelling reasons can justify non-disclosure of judicial records." *Nat'l Org. for*

*Marriage*, 649 F.3d at 70 (internal citations and alterations omitted). For the same reasons, *Perry* and *AFL-CIO* are inapplicable here, and the traditional presumption of access applies. The Coalition is not seeking to compel production of anything but merely to unseal judicial records that are a critical part of the record below and on appeal.

Even if *Perry* governed here—and it does not—plaintiffs overstate its holding. Pl. Br. 16-17, 23-24. While preventing compelled disclosure of certain documents during discovery, the Ninth Circuit repeatedly "emphasize[d]" the "limited" nature of its ruling, which covered only the "*private, internal* campaign communications concerning the *formulation of campaign strategy and messages*" by a "core group of *persons* engaged in the formulation of [such] campaign strategy and messages." *Perry*, 591 F.3d at 1165 n.12 (emphasis in original). While the documents at issue remain sealed to the Coalition, the widespread reporting on R. 114, which included substantial portions of the documents under seal, indicate that they include far more than the limited information envisioned by the *Perry* court.[4]

More importantly, *plaintiffs* initiated this litigation, thereby availing themselves of this public forum and the well-established presumption of public access that accompanies it. Having invoked the jurisdiction of the federal courts and set this litigation in motion, plaintiffs may not demand that the documents filed in the lawsuit they initiated be kept sealed. It is well-known that a person's "desire for confidentiality is not honored in litigation." *Gotham Holdings*, 580

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[4] *See, e.g.*, Todd Richmond & M.L. Johnson, *Documents Allege Scott Walker Pressured Groups to Donate to Campaign*, A.P., Aug. 22, 2014 (discussing R. 114, and information cited therein from R. 117, Exs. B, C, & D); Patrick Marley, et al., *Walker Wanted Funds Funneled to Wisconsin Club for Growth,* Milwaukee J. Sentinel, Aug. 22, 2014; Adam Nagourney & Michael Barbaro, *Emails Show Bigger Fund-Raising Role for Wisconsin Leader*, N.Y. Times, Aug. 22, 2014; Wash. Post, *Emails Show Walker Recall Election Campaign Push*, Aug. 22, 2014.

F.3d at 665. Indeed, "litigants who enjoy publicly subsidized dispute resolution should expect public oversight." *City of Greenville*, 2014 WL 4092255, at *1 (citing *Union Oil*, 220 F.3d at 568).

Plaintiffs' contention that this suit is analogous to a case vindicating "trade secrets" is misplaced. They filed this lawsuit to enjoin the government's allegedly unlawful conduct and for the return of certain unidentified "materials," Compl. 61; they did *not* sue to keep any documents secret. To the contrary, they have repeatedly emphasized the importance of public access to the record in this case and repeatedly objected to the John Doe secrecy order and the "lack of public scrutiny." Compl. ¶¶ 72, 162, R. 1. Indeed, plaintiff Eric O'Keefe has advocated for unsealing in the press, stating that "he wants the public to know what is going on." *Wisconsin Political Speech Raid*, Wall St. J., Nov. 18, 2013. He also publicly said that the "secret" John Doe investigation and "gag order on conservative activists is intended to stop their political successes in Wisconsin . . . The state cannot be allowed to silence political speech it does not like." Patrick Marley, *John Doe Prosecutors Fire Back at Club for Growth in Court*, Milwaukee J. Sentinel, May 16, 2014. This lawsuit has already garnered intense public attention in Wisconsin and nationally—attention generated in large part by plaintiffs, who have aggressively pursued media coverage and sought to highlight the actions of the prosecutors and other government officials. *See id.*, *see also, e.g.*, Brendan Fischer, *After Railing Against John Doe Secrecy, WI Club for Growth Fights to Keep Docs Secret*, Ctr. for Media & Democracy, PR Watch, May 19, 2014 ("O'Keefe . . . launched a full-out media offensive, avowing that he and others under investigation had done nothing wrong, and attacking the John Doe's secrecy as evidence of prosecutors' malevolence.").

Indeed, there is no absolute First Amendment right to participate in democracy under a veil of secrecy. To the contrary, in *Doe v. Reed*, the Supreme Court rejected a facial challenge to a public records law that required disclosure of petition-signers' names. 561 U.S. 186,198-200 (2010). The Court explained that "[p]ublic disclosure . . . promotes transparency and accountability in the electoral process" and concluded that the plaintiffs' privacy claims did not outweigh this "important interest," where the plaintiffs had failed to prove a risk of threats, harassment, or reprisals. *Id*. As Justice Scalia observed,

> 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.

*Id.* at 228 (Scalia, J., concurring).

Likewise, in *Citizens United v. FEC*, the Supreme Court rejected the 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." 558 U.S. 310, 370 (2010). "The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 371.

To justify sealing judicial records where associational privacy interests may be implicated, plaintiffs must identify "specific information that, if made public, would damage or chill [their] political advocacy efforts," and they must "make a *compelling* case" that "specific" individuals have "reasonable privacy concerns relating to the disclosure of their [] relationship with [plaintiffs]." *Nat'l Org. for Marriage*, 649 F.3d at 71-72 (emphasis added).

Plaintiffs' proffered evidence does not establish a threat of harm sufficient to overcome the presumption of openness. Plaintiffs cite news articles about protests associated with the passage of a controversial bill, "Act 10," but that occurred over three years ago and does not reveal any specific information that, if revealed, would damage plaintiffs' advocacy efforts. Pl. Br. 15-16 (citing R. 7, Exs. A (6-7, 11), D.E. 19). They also rely on an affidavit from one of their donors, Frederick M. Young, Jr., *id.* (citing R. 7, Ex. D ¶¶ 17-21, D.E. 19-8), who states that he is "concerned that [his] association with [Wisconsin Club for Growth] could expose [him] and [his] family to reprisals." R. 7, Ex. D ¶ 21. But even if Young's concerns justified sealing, at most this would warrant the sealing of his name and personal information, and the Court has already rejected this possibility by unsealing his affidavit and thereby revealing his association with plaintiffs. D.E. 40. In any event, he bases his concern on events that occurred in the 2011-12 time period, which do not reveal anything about the risks of disclosure *now*. *Id.* at ¶ 17-21.

The only recent evidence cited by plaintiffs in the public record is a single article and a blog post. Pl. Br. 15-16. The article, published in January 2014, in *The Capital Times: Your Progressive Voice*, appears to summarize the online "comment board" from its readers about the opening of a grocery store. *Id.* at 15 (citing R. 7, Ex. A(11)). The only conceivable "threat of retribution" mentioned is that one "commenter" "vowed to boycott the new [grocery store]"—because its owners had supported Governor Walker's campaign—simply "adding it to the list of state businesses the reader avoids for political reasons." *Id.* The blog post discusses O'Keefe's activities. Pl. Br. 15-16 (citing R. 218 at 7 n.2). But one blog post and one online "comment" on a self-described "progressive" website hardly constitute the "compelling case" necessary to justify the extreme measure requested—the sealing of hundreds of pages of court records that are critical to the merits of a high-profile case alleging prosecutorial abuse and retaliation.

Plaintiffs also rely on O'Keefe's statements that unnamed "donors and supporters" told him "that they remain concerned about disclosure of their identities and the disclosure of internal political communications and strategy" and that "[e]ven after the 2012 election cycle, harassment and recriminations against individuals and entities who were publicly identified as espousing conservative views continued—as, for example, many of the websites organizing boycotts remain active." Pl. Br. 16 (citing O'Keefe Decl. ¶ 38, R. 7, Ex. B). Such vague hearsay, which fails to identify any specific individuals who will be harmed by the disclosure of *these* documents, does not satisfy the demanding standard for sealing judicial records. *See, e.g.*, *Nat'l Org. for Marriage*, 649 F.3d at 71 (privacy interests did not warrant sealing court record where plaintiff failed to make "compelling case" that disclosure would harm "specific" people identified in sealed documents).

Plaintiffs have failed to show a compelling need for secrecy or that their approach is narrowly tailored. Indeed, they have not addressed why limited redactions of particularly sensitive information would not suffice. "Here, as in so many other instances, justice is better served by sunshine than by darkness." *F.T.C. v. Standard Fin. Mgmt. Corp*., 830 F.2d 404, 413 (1st Cir. 1987) (rejecting plaintiffs' claims of privacy and affirming unsealing of documents).

## CONCLUSION

"The right of access to public documents is fundamental to a democratic state and critical to our type of government in which the citizenry is the final judge of the proper conduct of public business." *United States v. Peters*, 754 F.2d 753, 763 (7th Cir. 1985) (internal citations and quotation marks omitted). For the foregoing reasons, the district court's order denying the Coalition's motion to unseal and granting Unnamed Intervenors' motion to maintain sealing should be reversed.

Respectfully submitted this 7th day of September 2014.

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# ADDENDUM

**DOCUMENTS CURRENTLY UNDER SEAL**

**Consolidated Civ. No. 14-1822 & 14-2585**

1. **Stelter Affidavit of August 10, 2012** (R. 53 Ex. J, R. 117 Ex. B).
Includes: (1) petition to commence John Doe proceeding and (2) supporting affidavit. Relied on by John Doe Judge Kluka in finding reasonable basis that a crime had occurred.

2. **Stelter Affidavit of September 11, 2012** (R. 110 Ex. D).
Affidavit supporting request for subpoenas in Milwaukee County John Doe proceeding. Relied on by John Doe Judge Kluka in finding reasonable basis that a crime had occurred.

3. **Stelter Affidavit of December 10, 2012** (R. 117 Ex. C, R. 110 Exs. A, C).
Includes: (1) resolution of Wisconsin's Government Accountability Board and (2) affidavit supporting request for search warrants and subpoenas in Milwaukee County John Doe proceeding. Relied on by John Doe Judge Kluka in finding reasonable basis that a crime had occurred.

4. **Nickel Affidavit of September 28, 2013** (R. 110 Ex. F, R. 117 Ex. D).
Affidavit supporting request for search warrants in all five John Doe proceedings. Relied on by John Doe Judge Kluka in finding reasonable basis that a crime had occurred.

5. **Defendant Schmitz's Petition for Supervisory Writ and Writ of Mandamus** (R. 53 Ex. F).
Defendant Schmitz's February 21, 2014 petition to Wisconsin Court of Appeals.

6. **Defendant Schmitz's Response to Petition for Leave To Commence Original Action** (R. 110 Ex. E).
Defendant Schmitz's February 25, 2014 response to unnamed intervenors' petition for leave to commence original action in Wisconsin Supreme Court.

7. **Defendants Chisholm, Landgraf, and Robles' Supplemental Response Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction** (R. 109)
Portions of document consist of same materials contained in affidavits described above.

8. **Defendant Schmitz's Supplemental Opposition to Plaintiffs' Motion for Preliminary Injunction** (R. 114)
Portions of document consist of same materials contained in affidavits described above.

9-13. **R. 53, Exs. D, E, G, H, V**
Exhibits submitted in support of motion to dismiss filed by defendants John Chisholm, Bruce Landgraf, and David Robles.

**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 6,872 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: September 7, 2014

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 7, 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. All participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

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