IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

vs. Case No. 14-CV-139-RTR

FRANCIS SCHMITZ, in his official and
personal capacities, et al.,

Defendants.

DEFENDANTS CHISHOLM, LANDGRAF, AND ROBLES' OBJECTION TO PLAINTIFFS' PROPOSED ORDER GRANTING IN PART INTERVENORS' MOTION TO UNSEAL

Defendants John Chisholm, Bruce Landgraf, and David Robles ("the Milwaukee County prosecutors"), by their attorneys, hereby object to plaintiffs' proposed order granting in part intervenors' motion to seal.

OBJECTION

Plaintiffs filed a baseless lawsuit that features as a central component the contention that they were deprived of the ability to defend themselves because of malevolent John Doe secrecy orders. It is beyond irony that 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,[1] plaintiffs and their counsel ask the Court to be complicit in preventing a public airing of the evidence.

The documents that plaintiffs would keep from the public are the precise documents that the Special Prosecutor presented to the John Doe judge to obtain the judge's guidance in that proceeding as provided for in Wis. Stat. § 968.26. Moreover, they are the most important documents that the defendants here, having been sued by plaintiffs, selected to demonstrate their good faith and lack of merit to plaintiffs' claim of political retaliation. The plaintiffs' selection of documents could not have been more surgical in preventing the public from understanding this lawsuit, nor could their motivation for doing so be more transparent. The order as proposed by plaintiffs is not justified by principles of law, it is neither fair to the public nor balanced for the parties, and the Milwaukee County prosecutors object to it.

ARGUMENT

The plaintiffs cannot justify the qualified disclosure they request. First, outside of certain well-defined categories, documents in the court record are presumptively open to the public. This

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[1] *See, e.g.*, *What's next for now-defunct John Doe probe?*, Watchdog.org (internet blog), May 7, 2014, http://watchdog.org/143249/john-doe-appeals-taxpayers ("For almost three years, the political left in Wisconsin, led by elected prosecutors, has been unsuccessfully trying to silence conservative voices because of their successes. Since the left can't win at the ballot box, they secretly resort to the illegal use of government power — 'dark power' — to go after those who do not agree with them," [plaintiffs' attorney] Rivkin said in a statement."); *Federal judge orders John Doe probe shut down again*, Watchdog.org (internet blog), May 8, 2014, http://watchdog.org/143509/judge-federal-frivolous ("To me this prosecutorial investigation has never been about indicting anybody, although they (the prosecutors) would love to indict conservatives and would do so gladly if there were any basis to it," [plaintiffs' attorney] Rivkin said. "But the whole purpose of the investigation has been to stifle speech by putting people on notice, by sending subpoenas, by making it impossible for them to go raise money and to spend money."); George Will, Opinion, *Wis. prosecutors abuse the law for partisan ends*, Wash. Post, May 9, 2014, http://www.washingtonpost.com/opinions/george-will-wisconsin-prosecutors-abuse-the-law-for-partisan-ends/2014/05/09/1d8ed3d6-d6cf-11e3-8a78-8fe50322a72c_story.html ("The identities of the targets are kept secret, and the targets are silenced by gag orders, thereby preventing public discussion of the process. Thus John Doe investigations are effective government instruments of disruption and intimidation.").

includes documents used by the Milwaukee County defendants to support their legal defenses and to oppose plaintiffs' motion for a preliminary injunction. Second, the plaintiffs' First Amendment interests in the court filings, to the extent that they have any, are not sufficient to deny the public access to them. The Milwaukee County prosecutors address each of these arguments in turn below.

A. The Public Has a Right to Unfettered Access to the Court's Record.

As the intervenors have pointed out, "[t]he public's right of access to court proceedings and documents is well-established." *Grove Fresh Distribs. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (citation omitted); *Smith v. United States Dist. Court for Southern Dist.*, 956 F.2d 647, 649–650 (7th Cir. 1992). As the Seventh Circuit recognized:

> The appropriateness of making court files accessible is accentuated in cases where the government is a party: 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.

Smith, 956 F.2d at 650. The public's right is grounded in the First Amendment and covers all documents in the record, including "materials on which a court relies in determining the litigants' substantive rights." *Smith*, 956 F.2d at 648, 650. This is so because "what transpires in the courtroom is public property." *Id.* at 650.

The documents that plaintiffs seek to block from public disclosure are documents which pertain to determining (1) whether the Milwaukee County prosecutors were entitled to certain legal defenses and (2) whether the plaintiffs were entitled to a preliminary injunction against the Milwaukee County prosecutors. In both of these circumstances, the Milwaukee County prosecutors filed the documents to substantiate their rights in this proceeding. *Smith*, 956 F.2d at

650. The Court used these documents in adjudicating those issues. Therefore, the public's right to more fully understand the conduct of the Milwaukee County prosecutors coalesces with the public's right to appraise the Court's review of such conduct. *Id.* The Milwaukee County prosecutors, unlike plaintiffs, fully support the public's interests in this respect.

The plaintiffs even cite cases which compel this conclusion. They cite a portion of *In re Continental Illinois Sec. Litigation*, 732 F.2d 1302, 1309 (7th Cir. 1984) which states that "the presumption of access applies to the hearings held and evidence introduced in connection with [the litigant's] motion to terminate." (Pls.' Resp. at 8-9, 5/14/14, dkt. doc. no. 218.) This is *precisely* the circumstance here. The Milwaukee County defendants submitted the documents in support of a *motion to dismiss* and in opposition to a *motion for a preliminary injunction*. This is not pretrial discovery. The motion to dismiss reflects defendants' legal basis for terminating the lawsuit. The motion for a preliminary injunction reflects plaintiffs' request to prevail on injunctive relief pending a final determination—a request which this Court granted because it believes that plaintiffs will succeed on the merits.

B. The Plaintiffs' Arguments to Continue to Keep the Public in the Dark are Unconvincing.

As intervenors also noted, in order to overcome the public's First Amendment rights to full access to the Court's record, the plaintiffs must show that nondisclosure is "essential to preserve higher values" and "narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984); *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 607 (1982). The plaintiffs attempt to satisfy strict scrutiny review by making three arguments. None of the arguments are remotely persuasive.

First, they argue that, because the documents were "properly submitted to the court under seal," the intervenors have failed to identify "the public interest in their specific disclosure." (Pls.' Resp. at 9-10, 5/14/14, dkt. doc. no. 218.) This argument completely misses the point. The question is not whether the documents *have* been sealed, it is whether they *should* be sealed. The intervenors contend that the documents are not properly under seal, and the parties agree that the record should be unsealed. Defendant Judge Peterson concurred that the order for secrecy he originally placed on the documents no longer needed to be enforced. The plaintiffs, after repeatedly maligning the secret nature of John Doe proceedings, (*see, e.g.*, Compl. ¶¶ 63, 72, 129-30, 157, 223, 2/10/14, dkt. doc. no. 1), now ask this Court to base its ruling on it. The intervenors are under no obligation to give specific reasons why the documents should remain sealed. Rather, the plaintiffs have the steep burden to shoulder in keeping those documents sealed.

Second, the plaintiffs state that their First Amendment rights defeat the public's First Amendment rights. (Pls.' Resp. at 5-7, 10-11, 5/14/14, dkt. doc. no. 218.) The plaintiffs vaguely allege that they have some First Amendment right in keeping the public from knowing what documents supported defendants' motions to dismiss and opposed plaintiffs' motion for a preliminary injunction. They cite to several cases where courts scrutinized states and administrative agencies for compelling the public disclosure of political organizations' membership information. (Id. at 6-7 (citing *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010))). The First Amendment right alluded to in those cases is not implicated in

this case whatsoever. Neither the defendants nor any government entity is seeking to compel the public production of anything. The plaintiffs brought serious allegations against the Milwaukee County prosecutors, and the Milwaukee County prosecutors have responded by defending themselves. It is now the public's First Amendment right to view the documents defendants used that is at stake.

Finally, the plaintiffs argue that other irrelevant legal authorities overcome the public's right to know. (Pls.' Resp. at 11-12, 5/14/14, dkt. doc. no. 218.) They cite the Wisconsin Government Accountability Board's rules prohibiting disclosure of materials, Wis. Stat. § 12.13(5). However, the nondisclosure rule applies only "prior to presentation of the information or record in a court of law." Also, the plaintiffs are not the GAB, and they are certainly not aligned with the GAB's interests. Like their citation to the GAB rule, the plaintiffs' appeal to general personal interests in financial information is unsound. All parties agree that certain private information, such as addresses, telephone numbers, email addresses, and banking information (e.g. routing numbers) may remain redacted. The substantive filings, however, do not benefit from any general privacy right. Lastly, the plaintiffs argue that sealed affidavits for search warrants are not presumptively open to public view. Again, like the secrecy order generally, all parties, including Judge Peterson, agree that the order need no longer apply. Therefore, there is no longer a basis for any search warrant affidavits to remain sealed. None of these scraps of legal citations are sufficient to overcome the public's substantial interest in reviewing the documents filed with this Court.

CONCLUSION

Based on the foregoing argument, the Milwaukee County prosecutors respectfully request that the Court decline to sign the plaintiffs' proposed order and instead order the entire record unsealed.

Dated this 15th day of May, 2014.

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