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IN THE SUPREME COURT OF WISCONSIN

Case Nos. 2013AP2504-2508-W
Case Nos. 2014AP296-OA
Case Nos. 2014AP417-421-W

Case Nos. 2013AP2504 - 2508-W

STATE OF WISCONSIN ex rel. THREE UNNAMED PETITIONERS,
Petitioner,

v.

THE HONORABLE GREGORY A. PETERSON, John Doe Judge,
THE HONORABLE GREGORY POTTER, Chief Judge, and
FRANCIS D. SCHMITZ, Special Prosecutor
Respondents,

L.C.#s 2013JD11, 2013JD9, 2013JD6, 2013JD1, 2012JD23

UNNAMED MOVANT NO. 2, 7, AND 8's MEMORANDUM IN OPPOSITION TO INTERVENORS' MOTION TO AMEND THE SECRECY ORDERS

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Case Nos. 2014AP296-OA

STATE OF WISCONSIN ex rel. TWO UNNAMED PETITIONERS,
Petitioner,

v.

THE HONORABLE GREGORY A. PETERSON, John Doe Judge, and FRANCIS D. SCHMITZ, Special Prosecutor
Respondents,

L.C.#s 2012JD23, 2013JD1, 2013JD6, 2013JD9, 2013JD11

Case Nos. 2014AP417 - 421-W

STATE OF WISCONSIN ex rel. FRANCIS D. SCHMITZ, Special Prosecutor,
Petitioner,

v.

THE HONORABLE GREGORY A. PETERSON, John Doe Judge,
Respondent,
and

EIGHT UNNAMED MOVANTS,
Interested Parties.

L.C.#s 2013JD11, 2013JD9, 2013JD6, 2013JD1, 2012JD23

Privately-funded prosecutors from a large, international law firm should not be allowed to comb through and publicly file and cite secret John Doe filings, including documents unlawfully seized—and still being held—by the office of Milwaukee County District Attorney John Chisholm. Mr. Chisholm and the other two district attorney Intervenors claim to have already retained the law firm of Reed Smith LLP, which has assigned appellate attorneys scattered across the country in Los Angeles, San Francisco, and Pittsburgh, to work for free on the matter, purportedly on behalf of the state of Wisconsin. The

Intervenors' motion should be denied, because in four discrete respects, their plans and purposes are unlawful, unnecessary, and contrary to the longstanding public policy of this state.

First, as a threshold matter, only Attorney General Schimel has authority to prosecute criminal appeals, and no one has lawfully transferred that authority—if such a transfer were even possible—to District Attorney Chisholm, or from him to the privately-funded prosecutors at Reed Smith. Second, Wisconsin law prohibits private counsel from assisting the district attorneys in a criminal prosecution on behalf of the state under these facts. Third, by soliciting and accepting free legal services, District Attorney Chisholm violates Wisconsin ethics law. Finally, even if the Intervenors' means or ends were lawful, their requested "limited" relaxation of the secrecy orders is in fact unbounded, and is far greater than necessary for the filing of a 9,000-word petition for certiorari.

The burden was on Intervenors to demonstrate a need to loosen the John Doe Secrecy Order. The Unnamed Movants now know that during John Doe II, District Attorney Chisholm's staff and the Special Prosecutor were able to accomplish this loosening with ease by filing *ex parte* motions before the John Doe Judge—once, even after their access to documents had just been argued and decided in adversarial motion practice with the Unnamed Movants. Indeed, Intervenors' "Exhibit A" is just such an *ex parte* order. Now, however, Intervenors' seizure (and subsequent handling of) millions of private records from many dozens of email accounts and custodians from across the United States is a matter of record. Knowing this background, this Court should closely review Intervenors' allegedly "limited" proposal, which, upon scrutiny, would not actually place any limits on what filings and unlawfully seized materials could be shared with, perused, and publicly filed by their privately-funded prosecutors over the next several months. Thus, far from providing reassurance that their conduct has changed, the Intervenors' motion raises more legal and ethical questions than it answers. To be sure, this Court does not now need to definitively decide the legality or propriety of the Intervenors' conduct or goals. Even though those actions raise grave concerns, for present purposes, this Court can and should simply decide that the Intervenors have failed to show that they need to spread secret John Doe information to privately-funded prosecutors in other states and venues.

I. District Attorney Chisholm Lacks Authority to File a Petition for Certiorari, and Cannot Appoint Privately Funded Prosecutors to Do What He Cannot.

A. Only the Attorney General May Represent the Sovereign

Only the Wisconsin Department of Justice—overseen by the Attorney General—may now prosecute the remainder of this proceeding. This includes making a decision for the sovereign, the State of Wisconsin, about whether to petition the United States Supreme Court for a writ of certiorari to overturn the decisions of the Wisconsin Supreme Court regarding Wisconsin law. The legislature has vested this particularly important exercise of sovereign authority in the chief legal officer of the state, the Attorney General, and not with individual district attorneys:

> The department of justice **shall**:
>
> > **(1) Represent state in appeals and on remand.** Except as provided in ss. 5.05(2m)(a) and 978.05(5), **appear for the state and prosecute or defend all actions and proceedings, civil or criminal, in the court of appeals and the supreme court, in which the state is interested or a party,** and attend to and prosecute or defend all civil cases sent or remanded to any circuit court in which the state is a party. Nothing in this subsection deprives or relieves the attorney general or the department of justice of any authority or duty under this chapter.

Wis. Stat. § 165.25 (emphasis added).

Neither cited exception applies here.[1] The second exception, however, is particularly illuminating, because it is a cross-reference to

[1] The first of the exceptions is Wis. Stat. § 5.05(2m)(a), recently amended by the legislature. It continues to include special provisions for the prosecution of campaign finance crimes that are first investigated by the Government Accountability Board (the "GAB," soon to be the Elections Commission), and then found by the GAB (or Commission) to be supported by probable cause, and finally, referred by the GAB to a prosecutor. This must generally be the district attorney for the target's home county,

the statute in which the legislature specified the duties of district attorneys. *See* Wis. Stat. § 978.05(5). This specific subsection draws a careful line between the duties of the attorney general and the district attorneys in "criminal cases" once they reach the appellate courts, whether "brought by appeal or writ of error..." *Id.* It confirms that the district attorney's appellate authority is limited to acting "under the supervision and direction of the attorney general," but even this subordinate role is only available to the district attorney "upon the request" of the attorney general. The complete subsection (5) reads as follows:

> CRIMINAL APPEALS. Upon the request and under the supervision and direction of the attorney general, brief and argue all criminal cases brought by appeal or writ of error or certified from a county within his or her prosecutorial unit to the court of appeals or supreme court. The district attorney for the prosecutorial unit in which the case was filed shall represent the state in any appeal or other proceeding if the case is decided by a single court of appeals judge, as specified in s. 752.31 (3).

Wis. Stat. § 978.05(5).

The remainder of the text clarifies just how limited the "exception" is. The only cases in which the district attorney may continue to represent the state on appeal *without* the request, supervision, and direction of the attorney general are specific matters that can be decided by a single court of appeals judge. Absent this carve-out of the attorney general's authority to control appeals, the sovereign's fortunes in creating and testing precedent rest in the hands of the attorney general. This is no idle formality, and in Wisconsin, the expectation that the attorney general will exercise this control is strong. *See, e.g., State v. Parent*, 298 Wis.2d 63, 91 2006 WI 132 ¶ 49

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but may also be a special prosecutor or the attorney general. *See generally* Wis. Stat. § 5.05(2m)(c)(11) and (14) through (16). It does not apply here for at least two reasons: (i) the GAB has adamantly claimed in this Court that it was a "third party," and elsewhere claims that it ran its own investigation, never voted to find probable cause, and never made a referral to a prosecutor; and (ii) the statute does not address control of appeals, and therefore does not carve campaign finance appeals from the Attorney General's appellate duties. The second exception, Section 978.05(5) is also not applicable, but as outlined above, its terms prove the rule.

(allowing attorney general access to a sensitive case report, even though the relevant statute only referenced district attorney access, "because in criminal appeals, the attorney general is often the State's successor to the district attorney.").

This case can present no exception to the general rule of attorney general supremacy, despite the unusual and circuitous methods the Intervenors have deployed in order to control representation of the sovereign up to this point. First, District Attorney Chisholm was the only prosecutor in John Doe II for almost a year. Next, the two other Intervenors shared his responsibility for a matter of weeks while paperwork was arranged for the first John Doe Judge to appoint the special prosecutor chosen by Intervenors. That special prosecutor, Francis Schmitz, was appointed and represented the State of Wisconsin from the summer of 2013 until, in the fall of 2015, this Court had an opportunity to examine the method of his appointment in the context of a pending question regarding his continuing authority to act. After examining the purported legal basis for the special prosecutor's appointment, this Court concluded it was invalid.

Because it was apparent that at least some of the principals who had engineered the special prosecutor's appointment—including the current Intervenors—desired to file a petition for certiorari in the United States Supreme Court, this Court allowed them to intervene. At no point, however, did this Court determine whether intervention alone would be sufficient to allow the Intervenors to do what they now purport to do: represent the sovereign—the State of Wisconsin—before this Court and, the Intervenors hope, before the United States Supreme Court. Now that the Intervenors are once again attempting to vest prosecutorial authority in private attorneys, this time without a court order, it is necessary to examine the source of the Intervenors' power to act at all. As discussed above, the law is clear that the Intervenors do not have power to act for the sovereign at this stage of the proceedings. The legislature reserved authority to control appellate litigation for the state's chief legal officer, the attorney general. If any official act of appellate litigation is to be accomplished, it must be under the direction and supervision of the attorney general.[2]

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[2] To be clear, Unnamed Movant No. 2 does not argue that no one can now represent the State of Wisconsin or that the State lacks the capacity to file a petition for

B. District Attorney Chisholm Lacks Authority to Appoint Private Counsel to Assist as Prosecutors for the Sovereign

District Attorney Chisholm has nonetheless hired private attorneys to perform functions of the sovereign and assist in a criminal prosecution. Can there be some legal justification for this act? The most relevant statute, Wis. Stat. § 978.05(5), compels an answer of "no." First, there is no indication that Attorney General Schimel has "requested" District Attorney Chisholm to take any steps in this case. *Id.* Nor have District Attorney Chisholm or Attorney General Schimel reported that Chisholm's actions to prepare for certiorari and hire an international law firm to represent the State of Wisconsin were taken at Schimel's "direction" and under his "supervision." *Id.* District Attorney Chisholm's appointment of law firm-funded or privately-funded associates was simply not authorized by the Wisconsin Attorney General.

Alternatively, the District Attorney may claim that for some reason the Attorney General cannot or will not exercise his control over these proceedings, or is disqualified from so doing. But if that is the case, the remedy is not for the District Attorney to seize the wheel of the ship of state or engage privately-funded counsel to assist in the prosecution. Instead, if the sovereign is to act, the Governor may appoint special counsel under Wis. Stat. § 14.11(2)(a) to "assist" or "act instead of the attorney general," among other things. The District Attorney lacks this special appointment authority.[3]

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certiorari; it simply argues that whomever does so must have the requisite legal authority.

[3] The District Attorney may claim that he can repair the situation by belatedly appointing the three law firm associates named in his motion as "public service special prosecutors" under Wis. Stat. § 978.045(3). This tactic must fail. First, such an appointment could only succeed in bestowing the capacity to "perform the duties and [have] the powers of the district attorney while acting under such an appointment." *Id.* The District Attorney cannot clothe these three private attorneys with appellate powers that he himself does not possess under Wis. Stat. § 978.05(5). Second, this unusual appointment comes with its own unique requirements, including that the three associates "not engage in the private practice of law" at their

II. The District Attorneys May Not Engage Private Counsel to Represent Them In This Prosecution

The Intervenors request that this Court authorize them to share an undefined subset of secret John Doe documents with a private entity—an international law firm, Reed Smith LLP— which will fund and prosecute Mr. Chisholm's petition for certiorari.[4] The Intervenors state that Reed Smith will serve as "outside appellate counsel" to represent the prosecution team "for the limited purpose of preparing the petition for certiorari and any merits briefing that may follow and presenting oral argument in the United States Supreme Court." Motion at 2. The Intervenors do not disclose how or whether any third party will compensate Reed Smith for its services—they simply report that the firm's services will be provided at no cost to the state. *Id.*[5] Regardless of whether Reed Smith will itself be reimbursed, the proposed arrangement involves the private funding of a prosecution: either Reed Smith will self-fund the prosecution by paying its three associates and paralegal to provide free representation to the district attorneys, or an undisclosed third-party funder will compensate the private lawyers for their assistance to the district attorneys. Either way, this plan is impermissible, as Wisconsin law contains statutory, common law, and ethical prohibitions on private assistance to district attorneys in criminal prosecutions.

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firm during the appointment if it is full-time. *Id.* Additionally, they may not receive salary or fringe benefits from the firm after four months have elapsed. *Id.* Finally, they may not communicate with anyone else at the firm about the engagement. *Id.* Other issues outlined in sections II and III, below, remain. This includes whether there is a legal conflict or due process violation if the firm itself, which will fund the prosecution, or other activist entities which may reimburse the firm, have their own political or ideological interests in advancing the prosecution's theories about issue advertisements or judicial elections and recusals.

[4] This Court's December 2, 2015 order and opinion denying reconsideration concluded that the former special prosecutor "would no longer be able to represent the prosecution as special prosecutor. Accordingly, one or more of the district attorneys could seek to intervene in these actions, which would allow for the prosecution to be represented in future proceedings." Order at ¶ 19.

[5] This presents echoes of the Intervenors' August 2013 letter urging Judge Kluka to appoint Special Prosecutor Francis Schmitz, and the accompanying proposed order they drafted for Judge Kluka in which it was presented (and then so ordered) that Schmitz would be paid by the Department of Administration. In fact, and as Intervenors had already planned, Schmitz was paid by the Government Accountability Board.

First, Wis. Stat. § 757.22(3) bars privately funded attorneys from assisting in criminal prosecutions, with the exception of law partners of district attorneys, who "may, at the request of the district attorney, without fee or compensation therefor, assist the district attorney in the prosecution of any case on the part of the state." *See also Kraimer v. State*, 117 Wis. 350, 93 N.W. 1097, 1098 (1903) (discussing the statutory exception). Any attorney who violates that provision "may be fined not to exceed $100 for each such offense." Wis. Stat. § 757.22(5).

Second, in addition to the statutory ban, Wisconsin courts have prohibited private assistance to district attorneys in criminal cases since 1888. In *Biemel v. State,* the Supreme Court declared that "public policy, and the fair, just, and impartial administration of the criminal law of this state, make it the duty of the courts to exclude the paid attorneys of private persons from appearing as prosecutors." *Biemel v. State*, 37 N.W. 244, 245 (Wis. 1888). The *Biemel* Court explained the policy rationale behind its ruling:

> We think it is quite clear from the reading of our statutes on the subject, as well as upon public policy, that an attorney employed and paid by private parties should not be permitted either by the courts or by the prosecuting attorney to assist in the trial of such criminal cases. The laws have clearly provided that the district attorney, who is the officer provided by the laws of the state to initiate and carry on such trials, shall be unprejudiced and unpaid except by the state, and that he shall have no private interest in such prosecution. He is an officer of the state, provided at the expense of the state for the purpose of seeing that the criminal laws of the state are honestly and impartially administered, unprejudiced by any motives of private gain, and holding a position analogous to that of the judge who presides at the trial.

Biemel, 37 N.W. at 247 (Wis. 1888). In *State v. Peterson*, 218 N.W. 367 (Wis. 1928), a case decided forty years after *Biemel*, the Wisconsin Supreme Court reiterated the ban on private prosecutors. According to the *Peterson* court:

> In an early day in England private parties prosecuted criminal wrongs . . . Our scheme of government has changed all this. It is now deemed the better public policy to provide for the public prosecution of public wrongs without any interference on the part of private parties, although they may have been injured in a private capacity different from the general public injury that accrues to society when a crime is committed. So under our system we have private prosecution for private wrongs and public prosecution for public wrongs.

Id. at 369. Wisconsin courts have repeatedly reaffirmed the ban on the use of private prosecutors as first articulated in *Biemel. See, e.g., Rock v. Ekern*, 156 N.W. 197, 198 (Wis. 1916) ("employment and payment of private counsel to assist the district attorney in the prosecution of persons for crime by private parties is against the public policy of this state."); *In re Ryan R.W.*, 2004 WI App 37, ¶ 16, 269 Wis. 2d 891, 675 N.W.2d 811 (the *Biemel* policy rationale applies equally to all of district attorney prosecution duties established under Wis. Stat. § 978.05); *see also In re Jessica J.L.*, 223 Wis. 2d 622, 628, 589 N.W.2d 660, 663 (Ct. App. 1998) (only a district attorney or a duly appointed special prosecutor may participate in a prosecution).

Justice Abrahamson, dissenting from a 2002 opinion of this Court regarding suppression of statements made to a non-lawyer in a John Doe proceeding, cited *Biemel, Peterson*, and other Wisconsin cases that "stand for the proposition that when someone other than a district attorney (or a person authorized by statute) exercises the functions of a district attorney, the criminal proceedings are void." *State v. Noble*, 2002 WI 64, ¶ 46, 253 Wis. 2d 206, 235, 646 N.W.2d 38, 52 (Abrahamson, J., dissenting) (*citing State v. Russell*, 83 Wis. 330, 334, 53 N.W. 441 (1892), *State v. Hooper*, 101 Wis.2d 517, 531 n. 9, 305 N.W.2d 110 (1981); *County of Kenosha v. C & S Mgmt., Inc.*, 223 Wis.2d 373, 400, 588 N.W.2d 236 (1999)). The reason for these holdings is clear: as Justice Abrahamson noted, Wisconsin courts have repeatedly affirmed that the "district attorney is a constitutional officer in Wisconsin, a 'quasi-judicial officer,' an attorney with special responsibilities and powers, and no attorney or non-attorney can substitute for the district attorney unless authorized by statute." *Id.*

Here, there is no statutory authorization for the private law firm of Reed Smith to do the work of the district attorney Intervenors in future proceedings. The limited statutory exception at Wis. Stat. 757.22(3) for privately funded attorneys to assist in criminal prosecutions only applies to law partners of district attorneys. In an advisory opinion, the Attorney General's Office affirmed that in the absence of facts contemplated by the statutory exception, Wisconsin law prohibits attorneys paid from private sources from assisting district attorneys. *See* OAG-07-78 (Feb. 2, 1978) (while the statutory exception allows a district attorney to be assisted by his law partner in prosecuting a state case, "the general rule...prohibits attorneys paid from private sources from assisting the district attorney in the prosecution of a criminal case") (*citing Peterson*, 195 Wis. 351). And, as discussed *supra* at n.2, the "public interest special prosecutor" provision at § 978.045(3) is not the arrangement sought by the district attorneys here.[6] That statute has a special set of requirements that prohibit private lawyers from receiving a salary or benefits from their law firm after four months, and if the private lawyers are paid during that time, the special prosecutor may not consult *with any attorney in, or employee, of* the firm about the criminal case. The district attorneys have proposed an altogether different arrangement, and one that is prohibited by more than a century of Wisconsin law.

There is an additional concern. According to the district attorneys, Reed Smith has agreed to represent them "in view of the important issues of public concern presented in the above-captioned cases..." Motion at 2. Though the firm's precise special interest in this case is unstated by the district attorneys, it is clear the Reed Smith attorneys "agreed" to assist because they or their firm have an interest in the "issues" presented by this case.[7] This special interest is exactly

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[6] The public interest special prosecutor position is often used to appoint law students under this Court's student practice rule or local Wisconsin practitioners who desire courtroom experience. *See* 9 Wis. Prac., Criminal Practice & Procedure § 6:2 at n.2 (2d ed.) ("In practice, most public service special prosecutors are attorneys who donate their time and talent not only as a public service, but to gain courtroom experience as well.").

[7] Unnamed Movants are left to speculate about "the important issues of public concern" that convinced the Reed Smith firm to agree to donate its time on behalf of the prosecutors. But it seems beyond coincidence that the firm represented the plaintiff and petitioner in *Caperton v. AT Massey Coal Co, Inc*, 556 US 868; 129 S Ct 2252 (2009), a case the former special prosecutor (and third-party interest groups) have repeatedly relied upon in requesting certain justices recuse themselves. *See*

why Wisconsin courts have prohibited private lawyers (*especially* those who admit to an interest in the "important issues" presented by a particular criminal prosecution) from assisting district attorneys in prosecutions for nearly 130 years. "The prosecuting officer represents the public interests, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simply justice; and he has no right to sacrifice this to the pride of professional success." *Biemel*, 37 N.W. 244, 247 (1888) (internal quotations omitted).[8]

The United States Supreme Court has similarly held, declaring that "it is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion, for liberty itself may be at stake in such matters . . . appointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general." *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 811, 107 S. Ct. 2124, 2139-2140 (1987) (reversing convictions where private attorneys who possessed a special interest in the case were appointed as special prosecutors).

Because no statutory exception applies and no attorney can substitute for the district attorney unless authorized by statute, the

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http://www.scotusblog.com/wp-content/uploads/2008/10/08-22_pet.pdf (listing Reed Smith as counsel for petitioner Caperton in his successful petition for certiorari on the issue of judicial recusal). In recent months, several interest groups have publicly commented that, in their view, *Caperton* provides a credible basis for the prosecution team to seek certiorari review. *See, e.g.,* "Prosecutors Set to Appeal Scott Walker "John Doe" Case to U.S. Supreme Court," *available at* www.prwatch.org/news/2015/12/13006/JohnDoe SupremeCourt Walker (Center for Media & Democracy states *Caperton* is a basis for appeal); *see also* "Why John Doe Prosecutor Should Appeal to the U.S. Supreme Court, " *available at* http://www.wisdc.org/op072915.php (Wisconsin Democracy Campaign discussing appeal based on *Caperton*); *see also* "Prosecutors could appeal to federal court on justices' failure to recuse," *available at* http://lacrossetribune.com/news/state-and-regional/prosecutors-could-appeal-to-federal-court-on-justices-failure-to/article_b10b780e-aa25-55ce-b81f-cc04c2529845.html (quoting an attorney from the Campaign Legal Center regarding certiorari based on *Caperton*).

[8] Even if Reed Smith's interest were not admitted so freely by the district attorneys, the firm's assistance to the district attorneys here would be prohibited, as no statutory exception applies. *See Noble,* 2002 WI 64 at ¶ 46 (Abrahamson, J., dissenting).

motion to modify the secrecy order on the grounds stated is unnecessary and must be denied.

III. The District Attorneys' Acceptance of Private Free Legal Representation Violates Wisconsin's Ethics Law

The requested expansion of the secrecy order to allow the sharing of Doe information is impermissible for yet another reason: it would allow Mr. Chisholm to violate Wisconsin ethics laws. The district attorneys admit that they have solicited (and have likely already received) free legal services from a private law firm. Mr. Chisholm engaged the private firm for the purpose of challenging this Court's decision that the John Doe investigation was unconstitutional. Mr. Chisholm has a uniquely personal stake in the outcome of this dispute. As he noted in his Petition for Limited Intervention, Mr. Chisholm's fear of individual liability motivates his desire to intervene. He and two other Milwaukee County DAs have been sued personally for damages in a civil rights lawsuit arising out of these John Doe proceedings. *Archer v. Chisholm, et al.*, E.D. Wis. Case No. 15-CV-998. In the district attorneys' Supplemental Memorandum in Support of Petition for Limited Intervention, Mr. Chisholm admitted to this Court that he had a personal interest in materials from the John Doe proceedings that he contends are essential to his defense in the civil lawsuit. According to Chisholm and his colleagues, because they have been "[s]ued in their personal capacities and facing allegations of significant professional misconduct, they have a tremendous amount to lose if the evidence is destroyed". *Id.* at 11.

Likewise, and again, in their *personal* capacities, the district attorneys have a tremendous amount to *gain* if the U.S. Supreme Court rules in their favor and reverses this Court. Aside from the legal conflict Chisholm and his cohorts have introduced by purporting to seize the authority of the sovereign in a case in which they are now personally interested, there are grave consequences for officials who accept gratuities in order to advance such personal interests. Under Wisconsin's code of ethics for public officials, no state public official may use his office to accept anything of substantial value for his own private benefit. Wis. Stat. § 19.45(2). The Wisconsin Ethics Board has declared that there are four elements of this provision: (1) No state public official (2) may use his or her office or position (3) to obtain

anything of substantial value (4) for private benefit. 1993 Wis. Op. Eth. Bd. 11, at 2.

All four elements are met here. Mr. Chisholm, as a district attorney, is subject to the code of ethics for state public officials. *See* Wis. Stat. §§ 19.42(13)(c), (14); 20.923(2); 20.923(2)(j); OAG 30-90 (1990). Second, he solicited, and presumably has received, the free legal services due to his position as district attorney. Third, the legal services are substantially valuable, as the Reed Smith attorneys' time is valuable and will save the district attorneys time, money, and effort. Reed Smith's offer to handle the certiorari proceedings at no cost to Mr. Chisholm or the state is a valuable gift that advances Mr. Chisholm's personal interest in securing a result that may limit his own personal liability. Finally, there is no question that Mr. Chisholm will directly and personally benefit from the assistance. If the U.S. Supreme Court grants the petition for certiorari and reverses this Court after reviewing the merits briefing and hearing oral argument from Reed Smith on behalf of the district attorneys, Mr. Chisholm will be directly advantaged in current and future proceedings that challenge the legality of his actions. He and the other district attorneys sued personally for damages arising out of the investigation will personally benefit from what they openly seek: the U.S. Supreme Court's blessing of their conduct and an official pronouncement that the John Doe investigation was constitutional from the start.

Mr. Chisholm asks the Court to expand the secrecy order so that he can receive the benefit of Reed Smith's privately funded attorneys to advance his personal interest, at no cost to himself or the state. This arrangement violates Wisconsin's ethics law.[9] Although the legality of Mr. Chisholm's conduct is a question for another day, at a minimum, Mr. Chisholm and his fellow Intervenors cannot carry their burden of

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[9] In addition to providing Mr. Chisholm with services that will benefit him personally, the proposed free representation would also implicate Wis. Stat. § 19.45(3), which provides in part: "[N]o state public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the state public official's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the state public official." Given the breadth of the Reed Smith firm and the value of its donated service, it could reasonably be expected to influence Mr. Chisholm's judgment if, in the future, Reed Smith represented a client subject to investigation by Mr. Chisholm's office.

demonstrating that the John Doe Secrecy Order should be amended when there is even a close question that such an order would advance ends that are unlawful and at odds with the public policy of this state.

IV. The Requested Expansion of the Secrecy Orders Is Unnecessary, or at Least Far Greater Than Necessary, for the Filing of a Petition for Certiorari

Finally, even if the district attorneys' stated means or ends were lawful, their requested expansion of the secrecy orders is unnecessary. By rule, the Supreme Court's consideration of a petition for certiorari is limited, and litigants are cautioned that "a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10. The certiorari stage is not a time to argue the merits of the case. Nor is it the time to comb through unlawfully seized documents and argue that the John Doe Judge and this Court failed to understand factual nuances. This Court's substantial and publicly available opinions provide sufficient background information for a certiorari petition.

Yet even if one believes that it is necessary even at the certiorari stage to relax the John Doe Secrecy Orders—orders that were entered by Judge Kluka at the insistence of these same district attorneys, that they then strictly enforced against the Unnamed Movants, and that this Court, in turn, has respected for those very reasons—the relief the district attorneys now seek bears no relation to their stated need. Despite the limited nature of what should be included at the early stage of petitioning for certiorari review, the district attorneys seek permission to share an unbounded and undefined set of John Doe documents and materials with their chosen outside counsel. *See* Motion at 1, 3 (requesting authorization to disclose "a limited set of documents and information" and later, "a subset of materials that the secrecy orders protect"). This attempt at reassurance notwithstanding, the district attorneys do not actually limit their request to filings made in the John Doe, procedural orders of the John Doe judges, or even to the list of party names they cite as an example of information they seek to disclose. They instead request a blanket expansion of the secrecy orders to allow three out-of-state members of an international law firm (with more than 1,800 lawyers in 26 offices throughout the U.S., Europe, the Middle East and Asia) to access and disclose millions

of unlawfully seized materials.

The scope of this request is troublingly broad. The district attorneys vaguely refer to the filing of "required documents and information" to be submitted to the Supreme Court, but it is unclear whether they plan to disclose any of the mass of John Doe "evidence"—which this Court has deemed unlawfully seized—at this early stage. What possible need is there to disclose materials seized in the John Doe proceeding in a petition for certiorari that by rule is limited to 9,000 words? There can be no legitimate purpose for such a broad request at the certiorari stage. The district attorneys fail to make an adequate showing to justify the unbounded review and dissemination of Doe materials.

As the sole example of what information protected from disclosure by the secrecy orders the district attorneys now seek to release, intervenors cite the list of party names as required to be filed by the U.S. Supreme Court.[10] Yet compliance with that rule can be achieved without the contents of unlawfully seized conversations being shared with three large-firm lawyers in three separate offices spread across the United States. For example, Unnamed Movants would not oppose this Court's grant of limited permission to the district attorneys to allow the filing of a motion with the Supreme Court under S. Ct. R. 21 to allow the submittal of party names under seal. Amendment of the secrecy order for that limited purpose would achieve compliance with the Supreme Court rule without sacrificing the interests of the Unnamed Movants. But a wholesale expansion of the secrecy order allowing privately-funded counsel access to an undefined tranche of Doe materials and filings, at this early stage, is unwarranted.

Conclusion

For the foregoing reasons, Unnamed Movant No. 2, joined by Unnamed Movant Nos. 7 and 8, respectfully request that this Court deny Intervenors' motion. Additionally, in the event that Attorney General Schimel or some officer with legal authority does file a petition for certiorari in the United States Supreme Court before the impending deadline, it may be necessary to file certain limited

[10] S. Ct. R. 14.1(b) requires a list of all parties to the proceeding to be included in the content of a petition for a writ of certiorari

information that is subject to John Doe Secrecy. This Court may wish to order that any person that obtains legal authority to file a petition for writ of certiorari on behalf of the State of Wisconsin may disclose the identities of the Unnamed Movants to the Supreme Court under that court's procedures for filing under seal. However, in all other respects, the John Doe Secrecy Order should continue to govern all filings made in connection with a petition for writ of certiorari.

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Respectfully submitted,

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