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LAURNA A. JOZWIAK  
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JACOB A. MANIAN  
MICHAEL G. KOUTNIK

July 22, 2014

**HAND DELIVERED**

Honorable Lee S. Dreyfus  
Waukesha County Courthouse  
515 West Moreland Boulevard  
Waukesha, WI 53186

OF COUNSEL -  
KENNETH P. BARCZAK  
+ ALSO ADMITTED TO PRACTICE IN ILLINOIS

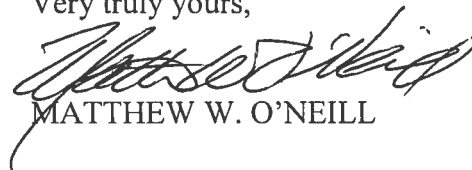
RE: Wisconsin Club for Growth, Inc., et al. v. Wisconsin  
Government Accountability Board, et al.  
Case No. 14-CV-1139

Dear Judge Dreyfus:

Enclosed for filing is Plaintiff's Response to Defendants' Motion for Protective Order, which includes as Exhibit A a Joint Proposed Protective Order that both parties have agreed to.

Consistent with the initial Order signed by the Court on July 10, 2014, we are filing the original, unredacted Response under seal, and are filing a redacted form of the Response with the Court.

Very truly yours,



MATTHEW W. O'NEILL

MWO:ljc  
Enclosures  
CC: Attorney Paul W. Schwarzenbart  
(by email and regular mail)  
Attorney Dane C. Martin  
Attorney Edward D. Greim

**ERIC O'KEEFE, and  
WISCONSIN CLUB FOR GROWTH,  
INC., individually and on behalf of others  
similarly situated,**

**Plaintiffs,**

**Civil Case No. 14CV01139**

**v.**

**Case Code 30701**

**WISCONSIN GOVERNMENT  
ACCOUNTABILITY BOARD, and**

**KEVIN J. KENNEDY, in his official  
capacity,**

**Defendants.**

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**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER**

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Through their Motion for Protective Order, Defendants Wisconsin Government Accountability Board ("GAB") and Kevin J. Kennedy (collectively, "Defendants") request that the Court enter a protective order that governs the disclosure and use of certain information and items that may be secret or confidential under Wis. Stat. § 5.05(5s), Wis. Stat. § 12.13(5), or the John Doe Secrecy Orders. Although Plaintiffs disagree with Defendants' characterizations of these provisions, Plaintiffs agree that entry of a protective order is appropriate to ensure that, when they are properly invoked, secrecy and confidentiality are observed on a fair, legal, and consistent basis. The protective order should also satisfy due process by protecting Plaintiffs' legitimate interest in litigating their case and obtaining reasonable discovery. As described below, and as shown in the attached joint proposed protective order, it is possible to balance each of these interests in a workable framework that does not confer carte blanche authority over the litigation to any one party.

## I. Factual and Procedural Background

On May 30, 2014, Plaintiffs Eric O’Keefe and the Wisconsin Club for Growth (the “Club”) filed a Complaint alleging that Defendants exceeded their statutory authority by utilizing a John Doe – a device reserved for prosecutors and judges – to pursue a far-reaching investigation into the political speech activities of nearly every conservative-leaning organization in Wisconsin. Compl. at ¶ 1. Plaintiffs allege that Defendants abandoned the procedural mandates and protections of their enabling statute in an effort to utilize the additional authority, secrecy, and flexibility available to prosecutors and judges in John Doe proceedings. *Id.* at ¶ 41. Plaintiffs seek declaratory and injunctive relief requiring Defendants to halt their unauthorized activity and conduct only those activities for which it receives taxpayer funds. *Id.* at ¶ 101. Furthermore, as targets of Defendants’ unauthorized activity, Plaintiffs also seek declarative and injunctive relief to enjoin Defendants from continuing to avoid their duties and obligations under the enabling statute by participating in the John Doe proceeding. *Id.* at ¶ 107.

Not surprisingly, the facts and circumstances of this case are closely related to the John Doe proceeding in the Circuit Court of Milwaukee County styled *In re Matter of John Doe Proceeding*, 12JD000023, 13JD000001, 13JD000006, 13JD000009, and 13JD000011 (the “John Doe”), and various other proceedings related to the Doe. The John Doe commenced on September 5, 2012 for the ostensible purpose of investigating alleged criminal campaign finance violations involving campaign coordination. The John Doe was subject to an expansive Secrecy Order, and even the existence of the Doe remained unknown to Plaintiffs until October 3, 2013, when search warrants were executed through pre-dawn raids by armed officers and Mr. O’Keefe and the Club received expansive subpoenas seeking information about their political activities. The John Doe came to a halt three months later, on January 10, 2014, when Judge Gregory A.

Peterson quashed the subpoenas after determining that the alleged theory of criminal liability was without merit; the alleged activity is not crime in Wisconsin.

Since January of 2014, a considerable amount of information has been disclosed about the John Doe proceeding and, as pertinent to this case, the GAB's role in that proceeding. Nearly all of this information has been disclosed by Special Prosecutor Francis Schmitz and Dean Nickel in the course of a civil rights action filed by Mr. O'Keefe and the Club regarding the deprivation of their rights under the United States Constitution. *See O'Keefe, et al. v. Schmitz et al.*, Case No. 2:14-cv-00139 (E.D. Wis. Feb. 10, 2014) (the "Civil Rights Action"). Both Mr. Schmitz and Mr. Nickel are employed by the GAB as special investigators in the John Doe proceeding. In that capacity, Mr. Schmitz and Mr. Nickel have not only disclosed information about the nature and extent of the John Doe proceeding, including when it began, the identity of its parties and targets, and the timeline of events that gave rise to the proceeding, they have also disclosed a substantial amount of information regarding the GAB's investigation and involvement in the Doe.

Although much of the information originally was disclosed only to Mr. O'Keefe and the Club pursuant to a protective order in the Civil Rights Action, Mr. Schmitz and Mr. Nickel have supported efforts by media entities to unseal the record in the Civil Rights Action and their appeal in the Seventh Circuit. *See Order Denying Motion to Seal*, No. 14-2023 (7th Cir. June 19, 2014). Acting as the GAB's agent, Mr. Schmitz has specifically stated 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." *See Defendant Francis Schmitz' Motion to Withdraw Motion for a Protective Order and Response to Intervenors' Motion to Unseal*, Case No. 14-cv-00139 (E.D. WI May 1, 2014) (Doc. #211). Mr. Nickel

echoed this conclusion, stating 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.” *See* Defendant Dean Nickel’s Response to the Motion to Intervene and Unseal, Case No. 14-cv-00139 (E.D. WI May 1, 2014) (Doc. #210). Judge Randa granted the motion to unseal on June 19, 2014, subject to certain restrictions to protect the targets of the John Doe proceeding. *See* Decision and Order, No. 14-cv-00139 (E.D. WI June 19, 2014) (Doc. #243). Thus, in addition to the unopposed disclosure of documents by the Seventh Circuit, many more documents about the GAB investigation will be disclosed to the public in short order. Far more than the “procedural” documents likely to be relevant in this case, the materials the GAB’s agents supported disclosing in the federal case were substantive and went to the very core of the GAB’s and prosecutors’ investigation.

Beyond the disclosures that have already occurred, the use and disclosure of the John Doe materials has been specifically authorized by amendments to the Secrecy Order. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The Secrecy Order, therefore, does not prohibit

disclosure to the Plaintiffs in this case, and (as modified at the instigation of the GAB's agents) it even contemplates the disclosure of all John Doe materials to the public.

## **II. The Joint Proposed Protective Order Properly Balances the Interests of Both Parties**

Upon receiving Defendants' Notice of Motion for Protective Order on July 9, 2014,<sup>1</sup> Plaintiffs drafted and sent Defendants a proposed protective order that provided a workable framework for addressing Plaintiffs' legitimate interest in litigating this case and Defendants' asserted interest in confidentiality and secrecy. After conferring by telephone and exchanging revised drafts, the parties reached agreement on a proposed framework for handling information, documents, and things that have or will be produced, filed, or served during the course of this case. The joint proposed protective order is attached hereto as **EXHIBIT A**.

The joint proposed protective order establishes a workable procedure by which the producing party can designate information and items as confidential or secret. *See* Joint Proposed Protective Order at ¶ 7. Once the information or item is designated as confidential, the information or item "must be maintained in the strictest confidence" and is subject to limited access as defined in the order. *Id.* at ¶ 10. If the receiving party disagrees with the producing party's designation of confidentiality, the parties must make a good faith effort to resolve the dispute informally. *Id.* at ¶ 8. If, despite a good faith effort, the issue cannot be resolved, the challenging party may seek a determination from the Court regarding the proper designation. *Id.*

The joint proposed protective order achieves an optimal balance between Defendants' concerns about confidentiality and secrecy, the public interest in the even-handed and reasoned application of the confidentiality provisions, and Plaintiffs' strong due process interest in

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<sup>1</sup> On July 14, 2014, Plaintiffs received a redacted answer, as well as redacted copies of Defendants' responses to Plaintiffs' requests for admission, interrogatories, and document requests.

litigating their case and pursuing reasonable discovery. As stated by the Wisconsin Supreme Court:

The right to discovery is an essential element of our adversary system. In order for our adversary system to effectively ensure the ability of litigants to uncover the truth, and to seek and be accorded justice, it is our responsibility to render decisions that do not harm to the fundamental and important right of litigants to access our courts.

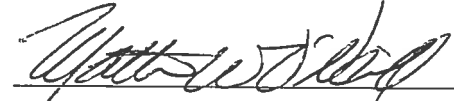
*Sands v. Whitnall Sch. Dist.*, 312 Wis. 2d 1, 15 (2008). Without the procedure set forth by the proposed protective order for the fair and sensible resolution of discovery disputes, Plaintiffs' ability to litigate their case effectively would be frustrated, if not entirely foreclosed. Such a result would run contrary to the fundamental purpose of discovery and our trial system. *See id.* (“[T]he purpose of discovery is identical to the purpose of our trial system—the ascertainment of truth.”). And ironically, the very provisions on confidentiality that were intended to protect the public and the subjects of GAB investigations would become a shield for protecting the GAB in civil litigation.

The parties' willingness to reach a compromise and fashion an acceptable Protective Order represents a fair and workable compromise that protects Defendants' interest in confidentiality and secrecy while ensuring that Plaintiffs can fully litigate their case. Furthermore, the framework in the joint proposed protective order is consistent with the treatment of information and materials in the Civil Rights Action, which was fully disclosed to the plaintiffs, but filed under seal and released to the public only after full and fair deliberations between the parties and the courts. Accordingly, Plaintiffs respectfully request that the Court enter the joint proposed protective order as agreed upon by the parties.

Dated: July 22, 2014

Respectfully submitted,

**FOX, O'NEILL & SHANNON, S.C.**



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*(pro hac vice admission pending)*

***Counsel for Eric O'Keefe and Wisconsin Club  
for Growth, Inc.***



Certificate of Service

The undersigned attorney hereby certifies that on July 22, 2014, a complete copy of the foregoing was served via E-Mail and First Class U.S. Mail, postage prepaid, and to the following counsel of record:

*Counsel for Defendants*

Paul W. Schwarzenbart

Thomas H. Brush

LEE, KILKELLY, PAULSON & YOUNGER, S.C.

One West Main Street, 7th Floor

Madison, Wisconsin 53703

  
Matthew O'Neill

# **Exhibit A**

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## **Joint Proposed Protective Order**

**ERIC O'KEEFE, and  
WISCONSIN CLUB FOR GROWTH,  
INC., individually and on behalf of others  
similarly situated,**

**Plaintiffs,**

**Civil Case No. 14CV01139**

**v.**

**Case Code 30701**

**WISCONSIN GOVERNMENT  
ACCOUNTABILITY BOARD, and**

**KEVIN J. KENNEDY, in his official  
capacity,**

**Defendants.**

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**JOINT PROPOSED PROTECTIVE ORDER**

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This matter was scheduled hearing before the Court for hearing on July 24, 2014 on Defendants' Motion for a Protective Order. Plaintiffs responded to Defendants' Motion and the parties reached agreement on a proposed protective order. The Court, having reviewed and considered the arguments of counsel and the parties' proposed order, and for good cause shown **HEREBY ORDERS AS FOLLOWS:**

1. Pursuant to Wis. Stat. § 804.01(3), the following paragraphs will govern the pre-trial disclosure and use by the parties of all documents, electronically stored information ("ESI"), and other information disclosed, filed, or served during the course of litigation in this case.

2. This Protective Order applies to all information, documents, and things that have been produced, filed, or served, or will be produced, filed, or served, during the course of this case.

**I. The Potentially Applicable Secrecy and Confidentiality Provisions**

3. The discovery sought in this case and pleadings and other papers the parties may file implicate various secrecy and confidentiality provisions. The Court finds that Defendants' responses to discovery requests and the service of certain pleadings may constitute the disclosure of "information related to an investigation or prosecution under chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 or any other law specified in s. 978.05 (1) or (2)" within the meaning of Wis. Stat. § 12.13(5) or may implicate Secrecy Orders in a certain John Doe proceeding identified in the pleadings. The Court finds good cause for a protective order allowing for the limited disclosure of such information subject to the terms of this order.

4. The John Doe Secrecy Order issued by Judge Peterson in *In re Matter of John Doe Proceeding*, Nos. 12JD000023, 13JD000001, 13JD000006, 13JD000009, and 13JD000011 (the "John Doe"), broadly prohibits the use and disclosure of information and documents from the John Doe proceeding. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The order, therefore, authorizes Defendants to disseminate John Doe materials to the Court and the parties in this case, including as necessary to respond to discovery requests or to file and serve pleadings and other papers, subject to this Order.

## II. The Method and Manner of Designations

5. The following procedure shall be used by the parties to designate materials as confidential and, therefore, subject to restrictions on disclosure and use.

6. Designations as Confidential. Except as otherwise provided in this Order, or as otherwise stipulated or ordered, any party may designate an item or information as subject to protection by clearly designating such item or information as confidential pursuant to this Order before it is disclosed or produced. Designations of confidentiality may be made on information (regardless of how generated, stored, or maintained), testimony, or tangible things produced during discovery in this action or disclosed in filings or pleadings in this action, as described in this Order or as otherwise entitled to protection under Wis. Stat. § 804.01(3). A designation of confidentiality shall not affect the right of a party to access such information or material as provided for in this Order.

7. All designations must be made in good faith and must state under the designation whether the confidentiality arises from “§ 12.13(5),” “§ 5.05(5s) and § 12.13(5),” or the “Secrecy Order.” The designations will further be made in accordance with the following instructions:

- (a) **Documents.** Documents will be designated as confidential by placing or affixing the word “CONFIDENTIAL” on the face of each page of the document so designated or in a similarly conspicuous location for non-document materials;
- (b) **Written Discovery.** Written discovery responses will be designated as confidential by imprinting the word “CONFIDENTIAL” next to or above any response to a discovery request or on each page of the response;
- (c) **Deposition Transcripts.** Deposition transcripts or recordings of depositions shall be treated as confidential for thirty (30) days after receipt of the transcript or the recording. Within thirty (30) days after receipt of the transcript or the recording, any party may designate the transcript or record, or any portion thereof, as

“CONFIDENTIAL” by notifying all parties, in writing, of the specific pages and lines of the transcript or recording that should be treated as confidential; and

- (d) **ESI.** ESI will be designated as confidential by imprinting the word “CONFIDENTIAL” on any disk or storage medium, or on the face of each page of a document so designated, or by designating the production as “CONFIDENTIAL” in the transmittal cover letter.

8. Procedure to Challenge Designations. The designation of confidentiality by a party, or the limitations on access to be accorded such information under this Order, may be challenged by providing written notice of the disagreement to the producing party that specifically identifies the information or restriction in dispute. The parties will make a good faith effort to resolve the dispute informally. If, despite a good faith effort, the dispute cannot be resolved informally by the parties, the party contesting the designation or restriction may seek a determination from the Court with respect to the propriety of the designation. The party asserting the designation of confidentiality carries the burden of demonstrating that the designation is appropriate.

### **III. The Handling and Treatment of Confidential Information or Items**

9. All documents or items filed with this Court that have been designed by any party as “CONFIDENTIAL” according to this Order, and all pleadings and memoranda purporting to reproduce or paraphrase such protected information, shall be filed in accordance with the Court’s procedure for filing documents under seal. Any request for filing documents or any portion thereof under seal should be limited to the smallest portion of the document that requires sealing. Any documents filed under seal must have any information designated as “CONFIDENTIAL” redacted and filed publically within seven (7) days after originally filed under seal.

10. All information or items designated as confidential under this Order must be maintained in the strictest confidence by all parties and their counsel to whom disclosure is

made. Information or items designated as confidential will be restricted solely to the following persons unless and until this Court rules that the protected information should be disclosed beyond the limits permitted by this Order.

- (a) **The Parties and their Attorneys.** Confidential information or items may be shared with the parties and officers, members, or persons employed directly by the parties, and the attorneys for the parties and persons directly employed by such attorneys. Such individuals are bound by the terms of this Order; and
- (b) **Court Reporters, Personnel, and Staff.** Confidential information and items may be disclosed to Court reporters, personnel, and staff, including any stenographers and videographers used at any deposition or Court proceeding.
- (c) **Other Disclosures.** In the event a party receives from its opposing party information or records that are confidential under § 12.13(5) or § 5.05(5s) and § 12.13(5) and plans to disclose the information or records to other persons, such as experts or consultants, if any, or non-party deponents or witnesses, or otherwise, the parties may consent to such disclosure by agreement confirmed in writing. If the parties are unable to agree, the parties shall follow the procedure in para. 8 for challenging the designations or for challenging the assertion of continued confidentiality.

#### **IV. Consequences of Producing Information and Records**

11. No person or entity that produces, files, or serves materials in accordance with the procedures described in this Order will have engaged in the unauthorized release or records of investigatory information within the meaning of Wis. Stat. §§ 12.13(5) and 12.60(1)(bm).

12. No person or entity that produces, files, or serves materials from the John Doe in accordance with the procedures described in this Order will have violated the terms of the John Doe Secrecy Order or can be held in contempt for violation of the John Doe Secrecy Order on such grounds.

13. Entry of this Order is without prejudice to any motion filed by a party for relief from or modification of the provisions hereof or to any other motion relating to the production, exchange, or use of any document or ESI, or other information in the course of this action.

Similarly, no party waives any right to object on any ground to the introduction on or use as evidence any information or item marked as confidential under this Order.

**V. Previously Filed Documents**

14. All documents and responses filed by defendants UNDER SEAL on July 14, 2014 shall be treated as confidential, subject to the terms of this Order and shall remain UNDER SEAL and unavailable to the public and non-parties.

Dated this \_\_\_\_ day of July, 2014.

BY THE COURT:

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Lee S. Dreyfus, Jr.  
Circuit Judge