UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
SEALED

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

Plaintiffs - Appellees,

v.

Nos. 14-1822, 14-1888, 14-1899, 14-2006, 14-2012, 14-2023

JOHN T. CHISHOLM, BRUCE J. LANDGRAF, and DAVID ROBLES, et al.,

Defendants-Appellants.

EMERGENCY JOINT MOTION TO INTERVENE AND STAY PENDING MOTION FOR RECONSIDERATION (REDACTED)

Unnamed Intervenor No. 1 and Unnamed Intervenor No. 2 (collectively "Unnamed Intervenors"), by and through their counsel, respectfully move this Court for an order permitting them to intervene in this matter for the limited purpose of seeking to stay the Court's June 16, 2014, Order granting a motion by Defendants-Appellants styled a "Motion to Address Sealed Exhibits." *See* Dkt. # 29 & 44. The Unnamed Intervenors are, to their knowledge, the sole human targets of the Wisconsin John Doe investigation into coordinated issue advocacy that is the subject of this appeal. During the course of the John Doe investigation, the District Attorney Defendants-Appellants who have moved to unseal the record in this Court supported the imposition of a capacious secrecy order, authorized under Wisconsin's John Doe investigation procedure. *See* Wis. Stat. § 968.26(3). Unnamed Intervenors complied in all respects with the order that the prosecutors—at least before they were defendants in this lawsuit—believed

necessary to an effective investigation. Since then two judges—one state, one federal—have ruled that, even assuming the Unnamed Intervenors engaged in coordinated advocacy as alleged, their conduct was not illegal under Wisconsin law, thus vitiating the foundation of the investigation. [REDACTED]

Unnamed Intervenors chose not to join the instant civil rights suit the plaintiffs—an apparent organizational target of the investigation and its executive—filed against the prosecutors and John Doe Judge (in his official capacity only) in charge of the case; Unnamed Intervenors therefore have no access to the sealed materials filed with the district court or with this Court. But Unnamed Intervenors believe it very likely that private materials [REDACTED] are included in the materials they now seek to have unsealed. The Unnamed Intervenors have [REDACTED] asserted their right to maintain the privacy of these materials. Indeed, the Unnamed Intervenors are currently litigating this precise issue before the district court. Brief of Unnamed Intervenors, *O'Keefe v. Schmitz*, No. 2:14-cv-00139-RTR (May 14, 2014) (Dist. Ct. Dkt. # 220); Reply Brief of Unnamed Intervenors, *O'Keefe v. Schmitz*, No. 2:14-cv-00139-RTR (June 6, 2014) (Dist. Ct. Dkt. # 232). The District Attorney Defendants-Appellants, who failed to notify Unnamed Intervenors that they had filed this unsealing motion and presumably failed to inform this Court of the briefing on the contemporaneous litigation in the district court on this very issue, now seek to reveal that which, before being sued, they jealously guarded against public disclosure.

This Motion is based on the discussion below, the pleadings and other documents on file in this matter, and any argument of counsel.

Although the Federal Rules of Appellate Procedure do not specifically permit motions to intervene except in cases "involving review of certain administrative rulings," *see* FED. R. APP. P.

15(d), the Seventh Circuit grants motions to intervene under federal common law. *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 558 (7th Cir. 2014). This Court looks to Federal Rule of Civil Procedure 24 in deciding whether to grant such motions. *Id.* (citing *Automobile Workers v. Scofield*, 382 U.S. 205, 217 n. 10 (1965); *Sierra Club, Inc. v. EPA*, 358 F.3d 516, 517-18 (7th Cir. 2004)). Unnamed Intervenors assert that they satisfy the requirements of Federal Rule of Civil Procedure 24(a), which states that this Court "must" permit them to intervene for the limited purpose of protecting their interests. *See* FED. R. CIV. P. 24(a). Unnamed Intervenors readily satisfy each of the requirements. *See Security Ins. Co. of Hartford v. Shipporeit, Inc.*, 69 F.3d 1377, 1380 (7th Cir. 1995) (intervenor must meet all four requirements of Rule 24(a)).

First, this motion is timely filed because there will be no delay to the proceedings; indeed, there is no need for any delay of this Court's consideration of the merits of this appeal, which may proceed unimpeded with the seal in place. Equally important is the fact that any potential delay that may arise in this appeal is the direct result of the parties' own actions. Unnamed Intervenors [REDACTED]. They have moved to intervene in the district court to maintain the seal of John Doe materials, including those at issue here, and fully briefed these issues in that court. At no point in that briefing before the District Court did any party to this appeal ever mention that there was a motion pending here seeking to release many of the same documents.[1] Nor were Unnamed Intervenors able to view the Defendants'-Appellants' Motion to Address Sealed Exhibits because the motion itself was filed under seal. Yet nothing about its title, which is all that Unnamed Intervenors can see of the Motion, would reasonably alert non-parties that

[1] Briefing before the District Court went from May 14, 2014 through June 6, 2014. Defendants-Appellants filed their motion in this Court on May 15, 2014, 15 days before they filed their response in the district court to Unnamed Intervenors' motion to maintain sealing. *See* Dist. Ct. Dkt # 230 (May 30, 2014). It seems plain that Defendants-Appellants were trying to accomplish before this Court what they were having difficulty doing in the district court. And, by filing their motion before this Court under seal and with a vague title, hiding the true nature of what they apparently sought, it seems that they were hoping to avoid further objection by the Unnamed Intervenors.

the motion sought to unseal or unredact documents. Of course, because the motion is under seal, Unnamed Intervenors are also unaware whether any party informed this Court that there were motions pending in the District Court regarding whether to maintain the seal on these same documents.

Second, Unnamed Intervenors claim "direct, significant, legally protectable interests" in the release of the John Doe materials that is the subject of this action. *Security Ins. Co of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1380 (7th Cir. 1995) (quoting *American Nat'l Bank v. Chicago*, 865 F.2d 144, 146 (7th Cir.1989)). [REDACTED]

John Doe proceedings are, according to Wisconsin courts, best characterized as a "one-man grand jury." *State v. Washington*, 83 Wis. 2d 808, 820 n.7, 266 N.W.2d 597, 603 n.7 (1978); *see also Wisconsin Family Counseling Servs., Inc. v. State*, 95 Wis. 2d 670, 676, 291 N.W.2d 631, 635 (Ct. App. 1980). The materials the District Attorney Defendants-Appellants seek to unseal, then, are indistinguishable from grand jury material, which the Supreme Court had decreed should be guarded zealously. *See Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979). Indeed, this Court has expressly recognized that "[t]he secrecy provision of the Wisconsin [John Doe] statute has been likened to the secrecy attending grand jury testimony." *United States v. Crumble*, 331 F.2d 228, 231 (7th Cir. 1964) (citation omitted).

[REDACTED]

The John Doe proceeding has the same fundamental aim as the federal grand jury, and the secrecy necessary to achieve its protective goal ought receive the same stalwart protection. [REDACTED]

Unnamed Intervenors do not know what is in the record before this Court; they are not parties to this case, have no access to the papers filed under seal in this Court, and have been

barred from accessing the sealed John Doe materials. But given that the government is choosing to proceed despite the fact that two judges have found that there is no legitimate basis in the Wisconsin law for this criminal investigation[REDACTED]

Third, if the Court allows the public disclosure of the investigation materials, Unnamed Intervenors will be left without any ability to protect their interests. This is because, quite simply, once such information is released "'the cat is out of the bag.'" *In re Sealed Case*, 237 F.3d at 664 (quoting *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998)).

Fourth, none of the existing parties adequately can represent Unnamed Intervenors' privacy interests. Nothing demonstrates this more plainly than the fact that none of the parties here ever notified the Unnamed Intervenors that there was a motion pending in this Court to unseal documents that the Unnamed Intervenors were moving to keep under seal in the District Court. Quite simply, the parties here seem to have sought to use this Court to make an end-run around the District Court and the Unnamed Intervenors. [REDACTED]

Therefore, they seek to intervene only for the limited purpose of maintaining the sealing orders of the John Doe proceeding, the District Court, and this Court. *See, e.g., Securities & Exchange Commission v. Heartland Group, Inc.*, No. 01-C-1984, 2003 WL 1089366, at *1 (N.D. Ill. Sept. 24, 2010) (granting intervention as of right for a limited purpose); *Gautreaux v. Pierce*, 548 F. Supp. 1284, 1287 (N.D. Ill. 1982) (granting intervention under Rule 24(a) for a limited purpose).

In the event that the Court determines that Unnamed Intervenors should not be permitted to intervene under Rule 24(a), it should permit them to intervene pursuant to Rule 24(b). *E.g., Reynolds v. LaSalle County*, 607 F. Supp. 482, 483 (N.D. Ill. 1985) (granting motion to intervene under Rule 24(b) after determining that intervenor failed to satisfy Rule 24(a)). Under Rule

24(b), the Court may permit intervention based on a timely motion to anyone who "has a claim or defense that shares with the main action a common question of law or fact." FED. R. CIV. P. 24(b)(1)(B). Thus, timely intervention is proper when a party shows "that there is (1) a common question of law or fact, and (2) independent jurisdiction." *Security Ins. Co. of Hartford v. Shipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995) (citation omitted). As discussed above, this motion is timely. [REDACTED] Therefore, permissive intervention under Rule 24(b) should be granted.

For these reasons, Unnamed Intervenors respectfully request that their Emergency Motion to Intervene be granted, that the Court stay its June 16, 2014, Order permitting the unsealing and unredacting of documents in this appeal, and permit Unnamed Intervenors the opportunity to file a Motion for Reconsideration of its June 16, 2014, Order. They further request, in the event the Court grants this Motion to Intervene and Stay Pending a Motion for Reconsideration, that the Court further unseal *as to them only* Defendants'-Appellants' Motion to Address Sealed Exhibits. *See* Docket # 29. This will permit Unnamed Intervenors the necessary opportunity to review the motion to which they seek to respond.

Respectfully submitted,

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Dated: June 17, 2014

CERTIFICATE OF SERVICE

Unnamed Intervenors, by undersigned counsel, certify that they accomplished service on counsel for all parties by filing this Emergency Joint Motion to Intervene and Stay Pending Motion for Reconsideration through CM/ECF this 17th day of June, 2014. Counsel for all parties are registered electronic filers in this Court. Those served are:

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