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March 27, 2015

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You are hereby notified that the Court has entered the following order:

Nos. 2013AP2504-2508-W Three Unnamed Petitioners v. Peterson
L.C.#s2013JD11, 2013JD9, 2013JD6, 2013JD1 & 2012JD23

2014AP296-OA Two Unnamed Petitioners v. Peterson
L.C.#s2012JC23, 2013JD1, 2013JD6, 2013JD9 & 2013JD11

2014AP417-421-W Schmitz v. Peterson
L.C.#s2013JD11, 2013JD9, 2013JD6, 2013JD1 & 2012JD23

This court has before it the parties' Joint Report on Oral Argument, filed March 11, 2015. The parties filed this report consistent with this court's March 4, 2015 order, which noted the unprecedented substantive, procedural, and logistical issues that the presentation of oral argument in this case presents.

In their Joint Report, the parties disagree on a variety of points. Most fundamentally, the parties disagree as to whether this court should hold oral argument at all. The Unnamed Movants state that, "based on the clarity of the legal issues presented" and the concern that oral argument "may be unworkable in light of the potential difficulties raised by the legitimate

privacy concerns of the parties, uncharged individuals[,] and groups subject to an ongoing investigation," the Unnamed Movants "do not object to submitting the entire case on briefs, and foregoing oral argument altogether." In contrast, the special prosecutor maintains that oral argument will not infringe on privacy concerns at this point and asserts that oral argument is required on all issues. John Doe Judge Gregory Peterson and Chief Judges Gregory Potter, James Daley, James Duvall, and Jeffrey Kremers (collectively, the "respondent judges") anticipate orally arguing the five issues regarding John Doe procedure identified by this court in its December 16, 2014 order.

The parties also disagree as to how oral argument should be conducted, if held. The Unnamed Movants suggest that the courtroom should remain open during oral argument, provided that the Unnamed Movants are referred to only as the unnamed clients of their respective attorneys or by the identifying numbers the Unnamed Movants have used throughout briefing (e.g., Unnamed Movant #1, #2, etc.), and provided that the court employs an objection procedure by which attorneys may object when a Justice or a party refers to confidential information. The special prosecutor also suggests that the courtroom should remain open during oral argument. However, the special prosecutor maintains that there is no need for anonymity "because of the widespread public disclosure of the facts of this investigation over the last year by at least one Movant in national periodicals, on the Internet and in a federal lawsuit." Alternatively, the special prosecutor argues that if anonymity is necessary, then the parties should be referenced in oral argument by a pre-arranged set of pseudonyms. If the court does not approve the use of pseudonyms, then the special prosecutor suggests that the courtroom should be closed during his recitation of the facts, with a video recording and transcript of that portion of the argument to be later released to the public with identifying information removed. The respondent judges do not state a position as to whether the courtroom should be open or closed during oral argument.

As to the broadcast of the oral argument, the Unnamed Movants state in the Joint Report that Wisconsin Eye should broadcast the oral argument on a delay that would permit the court to hear and decide any objection to the disclosure of any confidential information and would then allow Wisconsin Eye to redact any portion of the argument to which the court sustained an objection. However, the Unnamed Movants have subsequently written the court to state that, after further consultation with Wisconsin Eye, this proposal was not technologically feasible, and Wisconsin Eye would need to broadcast the oral argument without a broadcast delay. Thus, there would be no limitation on what would be broadcast. Neither the special prosecutor nor the respondent judges state a specific position regarding the broadcast of the oral argument.

Upon consideration of all of the parties' positions, and bearing in mind the very unique nature of this case, we conclude that it is neither legally nor practically possible to hold oral argument. The prospect of oral argument creates severe tension between important and

conflicting priorities. On the one hand, the court is strongly adverse to the idea of closing the courtroom to the public; our long tradition is to render public decisions based on public arguments, both oral and written. On the other hand, we must uphold the John Doe secrecy orders, from which no party has appealed and which protect a vast amount of information from disclosure, including the John Doe docket and activity records, John Doe filings, process issued by the John Doe judge, and all other matters observed or heard in the John Doe proceeding. There are important reasons justifying the secrecy afforded John Doe materials, including ensuring that evidence and witnesses remain uncorrupted and preventing testimony which may be mistaken or untrue from becoming public. See Wisconsin Family Counseling Services, Inc. v. State, 95 Wis. 2d 670, 677, 291 N.W.2d 631 (Ct. App. 1980). Perhaps inevitably, the briefs received thus far often intertwine non-confidential information with confidential information. Although it is feasible for such confidential information to be redacted from written arguments (and we ordered the parties to do so in our December 16, 2014 order), it is much more difficult to protect the confidentiality of information covered by the secrecy orders during the give-and-take of oral argument. The parties have not provided us with a workable procedure by which to do so.

We therefore will decide this matter on briefs, without oral argument. Pursuant to the redaction process set forth in our December 16, 2014 order and further explained in a separate order issued on today's date, the parties' briefs will, in the near future, become publicly available in redacted form so as to allow as much public access to the parties' arguments as the John Doe secrecy orders permit. In this unique situation, this is the best way we can achieve transparency in the handling of these matters while the underlying John Doe investigation remains pending.

IT IS ORDERED that that this matter shall be removed from the court's April oral argument calendar and submitted to the court on the merits of the parties' written briefs.

ANN WALSH BRADLEY, J., did not participate.

¶1 SHIRLEY S. ABRAHAMSON, C.J. *(dissenting).* Today the court takes the rare, perhaps unprecedented, step of canceling oral argument for three cases, all of which relate to a single John Doe investigation.[1]

[1] Alongside its order canceling oral argument, the court is releasing two other orders in the instant cases. One requires redaction of all information subject to a John Doe secrecy order. The other denies a newspaper's motion to intervene for the purpose of presenting argument on the issue of public access to these proceedings. I discuss the other two orders in my dissents to those orders. However, the issues presented in this trio of orders are interrelated and overlapping. For a full picture of the important public interests at stake, my dissents in all three orders should be read together.

¶2 There is nothing inherently unfair or unconstitutional about deciding a case on briefs, that is, without oral argument. Here, however, the court's order canceling oral argument is not a routine decision to decide a case on briefs—it is part of a broader pattern of excluding the public from the John Doe cases under review.

¶3 The court's order is long on summarizing the parties' positions regarding oral argument but short on setting forth the court's own reasoning for canceling oral argument. The court regurgitates much of the parties' joint report on oral argument before concluding that "it is neither legally nor practically possible to hold argument. . . . The parties have not provided us with a workable procedure. . . ." (Emphasis added.) These two sentences are the entire explanation this court offers to the parties and the public. The court's failure to provide further justification for its highly unusual decision to cancel oral argument is, in my view, alarming.

¶4 The parties' joint response to the court's request for input on the manner in which oral argument should be conducted is admittedly complex and, unfortunately, not very helpful. The unnamed movants express concern that oral argument "may be unworkable in light of the potential difficulties raised by the legitimate privacy concerns of the parties, uncharged individuals[,] and groups subject to an ongoing investigation." The report includes requests for the court to hold oral argument and not to hold oral argument; to open the courtroom and to close the courtroom; and to refer to the parties by their names, by their attorneys' names, by numbers, and by pseudonyms.

¶5 This snarl of competing and conflicting requests is the result of the court's decision to review (prematurely, in my opinion) an ongoing secret John Doe investigation and to consolidate diverse cases with different parties for oral argument and briefing.

¶6 Nevertheless, if federal courts can manage to maintain public oral argument and access to briefs in cases implicating serious national security concerns,[2] then surely this court can manage oral argument in the three John Doe cases before us. "Briefs in the Pentagon Papers case and the hydrogen bomb plans case were [made] available to the press, although sealed appendices discussed in detail the documents for which protection was sought. The court denied a motion to close part of the oral argument in the Pentagon Papers case."[3]

¶7 Although it would not be free from difficulty, oral argument is legally and practically possible in the instant cases. Accordingly, I would hold oral argument as scheduled.

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[2] See Krynicki v. Falk, 983 F.2d 74, 76 (7th Cir. 1992).

[3] Krynicki v. Falk, 983 F.2d 74, 76 (7th Cir. 1992).

¶8 To put the order canceling oral argument in perspective, I begin by examining the practice of public oral argument in this court and the necessity of providing compelling reasons for a departure from that practice. I then recount the scheduling of oral argument in the instant cases. Finally, I consider and debunk potential justifications for the court's decision to cancel oral argument.

I

¶9 This court's practice is to grant oral argument in all cases.[4]

¶10 We have ample time to do so. From September 2013 through August 2014 we issued written opinions in 66 cases. We expect to issue fewer than 55 between September 2014 and August 2015.

¶11 We also have ample reason to do so, as the significance of oral argument is hard to overstate.

¶12 Oral argument is a critical element of courts' information-gathering and decision-making processes. It enables courts to seek clarification from counsel about the issues presented and the parties' arguments.

¶13 Chief Justice Rehnquist summarized the function and importance of oral argument as follows:

> The intangible value of oral argument is, to my mind, considerable. It is and should be valuable to counsel, to judges and to the public. . . . [O]ral argument offers an opportunity for a direct interchange of ideas between court and counsel . . . . Counsel can play a significant role in responding to the concerns of the judges, concerns that counsel won't always be able to anticipate in preparing the briefs.[5]

[4] In lawyer discipline cases, this court grants oral argument only when the parties request it. In all other cases, this court grants oral argument as a matter of course, regardless of whether the parties request it.

[5] William H. Rehnquist, Oral Advocacy: A Disappearing Art, 35 Mercer L. Rev. 1015, 1021 (1984).

¶14 Because our oral arguments are open to the public,[6] oral argument helps ensure that the public's firmly established right to open court proceedings is a reality.[7] Oral argument gives the public an opportunity to hear discussion of cases, subjecting the justices of this court to vital public scrutiny.[8]

¶15 Open court proceedings gives "assurance that the proceedings [are] conducted fairly to all concerned, and . . . discourage perjury, the misconduct of participants, and decision based on secret bias or partiality."[9]

¶16 Open court proceedings encourage confidence in the judiciary because "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[10]

¶17 The court's surprising order canceling all oral argument in the instant cases requires further explanation. "Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat; this requires rigorous justification."[11] The court order's conclusory statement that oral argument would not be legally and practically possible in the instant cases falls far short of providing the rigorous justification required.

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[6] Not only may the public attend oral argument in this court, but audio transmissions of oral argument are available on the court's website and audio-visual recordings of oral argument can be viewed on Wisconsin Eye's website and television channel.

[7] It is a basic tenet of the democratic system that "people have the right to know about operations of their government, including the judicial branch . . . ." State ex rel. Bilder v. Delavan Tp., 112 Wis. 2d 539, 553, 334 N.W.2d 252 (1983). This court has previously stated that "the closure of a courtroom should ensue only when not to do so would defeat the very purpose of the court proceedings or would otherwise substantially impinge on widely held public values . . . ." State ex rel. La Crosse Tribune v. Circuit Court, 115 Wis. 2d 220, 235, 340 N.W.2d 460 (1983). For additional discussion of the public's right of access to judicial records and proceedings, see my dissent to the court's order denying Journal Sentinel, Inc.'s motion to intervene in the instant cases, which is also being released today.

The dissent in the order denying the Journal Sentinel's motion to intervene discusses the right to open judicial proceedings in greater detail.

[8] See Krynicki v. Falk, 983 F.2d 74, 75 (7th Cir. 1992).

[9] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980).

[10] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980).

[11] Krynicki v. Falk, 983 F.2d 74, 75 (7th Cir. 1992).

II

¶18 The court initially planned to hold oral argument in these cases.

¶19 In an order dated December 16, 2014, after the cases had been pending for about a year, the court acted on various petitions that had been filed with regard to several outstanding John Doe proceedings. The court granted: (1) a petition for review of an order of the court of appeals; (2) petitions to bypass the court of appeals in a supervisory writ proceeding filed in the court of appeals; and (3) a petition for leave to commence an original action in this court. The court advised the parties and the public that the three proceedings would be consolidated for purposes of briefing and oral argument.

¶20 On December 19, 2014, the court issued an order advising the parties to keep April 17, 2015, and the afternoon of April 20, 2015, available for oral argument.

¶21 On February 11, 2015, the court issued an order advising the parties that oral argument was indeed scheduled for April 17 and 20.

¶22 The parties' briefs generally agreed that oral argument should be held.

¶23 On March 4, 2015, the court asked the parties to file a joint report providing input on the manner in which oral argument should be conducted.

¶24 In an about-face, the unnamed movants responded to the court's request for input by stating that they would not object to the instant cases being decided on briefs. The unnamed movants nevertheless provided the court with recommendations for how oral argument could be conducted.

¶25 In contrast, the special prosecutor, the John Doe judge, and the four chief circuit court judges continued to request oral argument on all five issues regarding John Doe procedure that were identified by the court in its December 16, 2014 order. The special prosecutor also insisted that oral argument is warranted on all other issues presented.

¶26 The court now cancels oral argument altogether. The order denying oral argument constitutes a surprising departure both from the court's usual practice of hearing oral argument and from its stated intention to hear oral argument in the present cases.

III

¶27 I would stay the course and hold oral argument as scheduled.

¶28 The importance of oral argument to the public's right to open judicial proceedings, which I discussed above, weighs in favor of holding oral argument in the instant cases.[12]

¶29 The complexity and significance of the legal issues presented also weigh in favor of holding oral argument. The parties and the court would benefit from "a direct interchange of ideas."[13]

¶30 Fourteen issues were identified in the court's December 16, 2014 order, and multiple sub-issues. At least 733 pages of briefs have been filed in the instant cases (along with numerous motions), and additional briefs are expected. If any case demands oral argument to help clarify the issues, the parties' positions, and the law, then these cases do.

¶31 A brief description of the substantive legal issues presented illustrates my point.

¶32 The unnamed movants are challenging the constitutionality of the Wisconsin statutes governing campaign finance and campaign conduct and the application of the First Amendment to the Wisconsin statutes and to the conduct of the unnamed movants. The unnamed movants challenge the ability of the State to even inquire into coordination between campaign committees and issue-advocacy groups. The claims presented raise difficult constitutional questions being debated by scholars and courts across the country.

¶33 The Seventh Circuit Court of Appeals recognized the complexity of the issues presented in this litigation when it stated as follows:

> Plaintiffs' claim to constitutional protection for raising funds to engage in issue advocacy coordinated with a politician's campaign committee has not been established "beyond debate." To the contrary, there is a lively debate among judges and academic analysts. . . . No opinion issued by the [United States] Supreme Court, or by any court of appeals, establishes ("clearly" or otherwise) that the First Amendment forbids regulation of coordination between campaign committees and issue-advocacy groups—let alone that the First Amendment forbids even an inquiry into that topic.[14]

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[12] As I explained in note 7, I discuss the public's right to access judicial proceedings at length in my dissent to the court's order denying a motion to intervene filed by Journal Sentinel, Inc., which is also being released today. That discussion applies here and supports my conclusion that oral argument is warranted in the present cases.

[13] William H. Rehnquist, Oral Advocacy: A Disappearing Art, 35 Mercer L. Rev. 1015, 1021 (1984).

[14] O'Keefe v. Chisholm, 769 F.3d 936, 942 (7th Cir. 2014).

¶34 Beyond their complexity, the issues presented in the instant cases are the subject of acute public concern. The public's interest in this litigation is evidenced by the extensive state and national media coverage that the underlying John Doe investigation has garnered and by the large number of entities seeking to file amicus briefs to aid this court's decision-making. Those entities include the Wisconsin Government Accountability Board, the Center for Competitive Politics, Wisconsin Family Action, Citizens for Responsible Government, the Ethics and Public Policy Center, the League of Women Voters of Wisconsin, four former Federal Election Commissioners, and the Wyoming Liberty Group.

¶35 The unnamed movants in the present cases implausibly suggest that oral argument may not be necessary due to "the clarity of the legal issues presented." This claim cannot be made with a straight face, and the court wisely opts not to adopt it. Indeed, the court's redaction order acknowledges that the cases do not present "simple issues with easy answers."

¶36 Rather, it appears the court's rationale for canceling oral argument is its determination that this court is bound by a secrecy order issued by the John Doe judge early on in the John Doe investigation underlying this litigation.

¶37 A John Doe secrecy order does not automatically apply to proceedings in an appellate court. I conclude, for the reasons set forth below, that the specific John Doe secrecy order at issue in the instant cases should not be enforced by this court.

¶38 In my dissent to a separate order this court is simultaneously releasing, requiring extensive redaction of the parties' briefs, I explain that this court has the power and responsibility to determine for itself what parts of the briefs and record before us should be open or closed. I set forth four reasons for my conclusion that this court is not bound by the John Doe secrecy order:

¶39 First, the public has a constitutional, statutory and common law right of access to judicial proceedings and judicial records. This right is largely negated by the court's orders issued today.

¶40 Second, Wis. Stat. § 968.26 and the case law do not support the proposition that this court must comply with the John Doe secrecy order. The three John Doe cases are sui generis. They are not governed by prior case law.

¶41 Third, this court has the inherent power to determine the level of secrecy needed to decide the John Doe cases before it. Indeed, the order on redaction issued today admits to violating the John Doe secrecy order by revealing a confidential portion of the secrecy order. Why does the court breach the John Doe secrecy order? According to the redaction order, the

court is "forced" to do so "so that we can decide the redaction objections raised by the parties and establish the proper secrecy rules that will apply to filings in this court."[15] That is precisely my point. This court must decide the level of secrecy that applies to the instant cases based on the public's rights and this court's needs in deciding the cases.

¶42 Fourth, the justification for secrecy in John Doe proceedings does not support secrecy at this stage in the instant litigation. The cat may already be out of the bag. The special prosecutor asserts that various "secrets" have already been made public.

¶43 Even if the court decides to observe some level of secrecy, dispensing with oral argument altogether is unnecessary. Less restrictive measures than cancelation of oral argument are available to maintain confidentiality.

¶44 There are two distinct sets of issues in the instant litigation; the first pertains to state statutes governing the creation of John Doe proceedings and the second pertains to Wisconsin campaign finance law and related constitutional issues. These two sets of issues present different problems regarding public disclosure. One option the court could consider is separating oral argument on the two sets of issues and imposing partial closures of oral argument for each to the extent necessary. Such bifurcation is not unusual.[16]

¶45 This court's redaction order states that the public will be able to see, in the briefs, "the legal arguments being made by the parties." Why, then, can the public not hear the parties' legal arguments being tested by this court in open oral argument?

¶46 Alternatively, but probably not needed in the present cases, oral argument could be closed to the public but recorded for subsequent transcription. A redacted version of the transcript or video recording could be released to the public as promptly as feasible.[17]

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[15] Footnote 2 of the court's redaction order explains its violation of the John Doe secrecy order as follows:

> The secrecy orders themselves were part of the record in the John Doe proceedings and therefore were maintained as confidential. Notwithstanding this fact, we are forced to include a portion of the text of one of the secrecy orders in this order so that we can decide the redaction objections raised by the parties and establish the proper secrecy rules that will apply to filings in this court.

[16] See, e.g., United States v. Sterling, unpublished disp., No. 11-5028 (4th Cir. 2012); United State v. Abu Ali, 528 F.3d 210, 244, n.13 (4th Cir. 2008); United States v. Moussaoui, unpublished disp., 65 F. App'x 881, 890-91 (4th Cir. 2003).

[17] See United States v. Pelton, 696 F. Supp. 156, 159 (D. Md. 1986).

¶47 My point is this: Just because holding oral argument in the instant cases without breaching confidentiality would present logistical challenges does not mean oral argument should be eliminated.

¶48 In summary: If the court's rationale for canceling oral argument is that the legal issues presented are so clear that oral argument would be pointless, then some may view the court's order as outlandish on its face. If the court's rationale for canceling oral argument is that public oral argument would be logistically complicated on account of the John Doe secrecy order, then the order cannot withstand scrutiny. Public access to oral argument can surely be managed.

¶49 There is, in my view, no legitimate reason supporting the court's decision to cancel oral argument entirely. I conclude that oral argument is warranted in the present cases.

¶50 For the reasons set forth, I dissent.

¶51 DAVID T. PROSSER, J. *(dissenting).* On December 16, 2014, I disagreed with the court's decision to "consolidate" "these three proceedings" "for purposes of briefing and oral argument." Now, because of the unusual complexity of the proceedings and the secrecy inherent in a pending John Doe investigation, the court decides to dispense with oral argument altogether. This is a mistake.

¶52 Although I originally voted with the majority because of the impracticability, if not impossibility, of having oral argument open to the public, I believe upon reflection that my vote was wrong. We should not dispense with oral argument simply because the hearing room would have to be closed. The court could have promptly released a redacted transcript, a redacted recording, and a redacted video of oral argument after reviewing the argument and ensuring that information protected by the secrecy order was not disclosed.

¶53 Oral argument could have been limited to the most critical issues before the court—not all 14 issues set out in our December 16 order. It could have been reasonably limited in duration. Counsel could have been directed not to make any argument and not to respond to any question from the court that would disclose confidential information.

¶54 Closing the hearing room to the public would not have been popular, but the court indisputably has the authority to do so when it has a legitimate and substantial reason. As we said in State ex rel. La Crosse Tribune v. Circuit Court for La Crosse County, 115 Wis. 2d 220, 235, 340 N.W.2d 460 (1983):

> [T]he closure of a courtroom should ensue only when not to do so would defeat the very purpose of the court proceedings or would otherwise substantially

> impinge upon widely held public values which have been declared by the legislature in particular circumstances to supersede the general public policy of the open courtroom.

¶55 In that same case, the court also said that the reason for closure must be "substantial," "compelling," and that failing to close the courtroom would jeopardize "cherished and legislatively recognized values." Id. at 235, 236.

¶56 Here, the compelling reason for closing the hearing room would be the protection of the secrecy of the John Doe proceeding. The legislature has explicitly recognized the need to maintain secrecy in a John Doe proceeding.

¶57 The John Doe statute specifically authorizes the John Doe judge to issue a secrecy order to protect testimony given and documents collected during a John Doe proceeding. Wis. Stat. § 968.26(3) (2013-14) ("The examination may be adjourned and may be secret."). This court has that authority as well.

¶58 As members of this court, our job is to do the right thing, as each of us understands the right thing, regardless of the inconvenience, or the controversy, or the consequences.

¶59 For these reasons, I respectfully dissent.

Diane M. Fremgen
Clerk of Supreme Court

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