UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

CYNTHIA ARCHER,

Plaintiff,

v. Case No. 15-cv-922

JOHN CHISHOLM, DAVID ROBLES, BRUCE LANDGRAF, ROBERT STELTER, DAVID BUDDE, and AARON WEISS,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION TO PRESERVE EVIDENCE ON BEHALF OF DEFENDANTS DAVID BUDDE, ROBERT STELTER, AND AARON WEISS

NOW COME the defendants David Budde, Robert Stelter, and Aaron Weiss (hereinafter, collectively, "the Investigator Defendants"), by and through their attorneys of record, Wilson Elser Moskowitz Edelman & Dicker, LLP, and hereby submit this Memorandum in Support of Their Motion to Preserve Evidence.

INTRODUCTION

The Court has before it an extraordinary circumstance in which lifelong law enforcement personnel have been portrayed in court opinions and the media as lawless thugs for investigating and seeking to enforce the laws as they existed. The partisan-fueled maelstrom has resulted in orders from the Wisconsin Supreme Court that not only prevent a public response to those disparagements, but also take from the Investigator Defendants the evidence relevant to their conduct and investigations. The events are truly unprecedented.

Those same orders directly intrude upon this Court's jurisdiction over this proceeding and threaten to prevent the parties from full and fair litigation of the plaintiff's allegations. As a dissenting supreme court justice observed in direct reference to this litigation: "The stay the per curiam grants does not . . . preserve John Doe materials to use in future criminal prosecutions. Nor does the per curiam assure that the materials will be preserved and available for use by the Special Prosecutor and others in their defense of presently pending civil litigation relating to the John Doe trilogy." *State ex rel. Three Unnamed Petitioners v. Peterson*, 2015 WI 103, ¶ 78 n.19 (Abrahamson, J., dissenting) (citing this litigation and two other matters). This Court's protection of evidence relevant to its proceedings is critically necessary.

Justice requires that civil litigants have access to evidence that is necessary to defend themselves in federal court. Despite the obvious nature of this principle, the Wisconsin Supreme Court has refused the Investigator Defendants' requests to be heard in order to seek protection of evidence germane to their defense in this lawsuit. The plaintiff alleges that the Investigator Defendants, while performing their duties as investigators in the Milwaukee County District Attorney's Office, violated her constitutional rights while investigating her for misconduct in public office. These allegations, which support claims asserted against the Investigator Defendants in their personal capacities, relate on their face to proceedings commonly referred to as "John Doe I" and "John Doe II." This motion asks the Court to order the defendants to preserve documents and materials from those proceedings so that they are able to rebut the serious accusations made by the plaintiff in this federal lawsuit.

BACKGROUND

The background information underlying this motion relates to five subjects: (A) the John Doe I and John Doe II proceedings; (B) the plaintiff's amended complaint; (C) John Doe Judge

Neal P. Nettesheim's use and dissemination order; (D) recent events in the Wisconsin Supreme Court; and (E) plaintiff's counsel's involvement in both this Court and the Wisconsin Supreme Court. The Investigator Defendants will address each of these subjects in turn below.

A. The John Doe I and John Doe II Proceedings

John Doe I, the colloquial name for *In the Matter of a John Doe Proceeding*, Milwaukee County Case No. 10-JD-7, was a John Doe proceeding commenced under Wis. Stat. § 968.26 by the Milwaukee County District Attorney's Office on May 7, 2010. (Dkt. Doc. Nos. 19-3, 23-3.) The proceeding was overseen by John Doe Judge Neal P. Nettesheim. John Doe I culminated in six criminal prosecutions, all of which yielded criminal convictions. Kevin Kavanaugh, a Milwaukee County official, and former Deputy Chief of Staff for the County Executive's Office, Timothy Russell, were convicted of felonies for stealing in excess of $60,000 in charitable donations. *State v. Kavanaugh*, Milwaukee Co. Case No. 12-CF-52 (filed January 5, 2012); *State v. Russell*, Milwaukee Co. Case No. 12-CF-53 (filed January 5, 2012). Brian Pierick, Russell's domestic partner, was convicted of intentionally contributing to the delinquency of a minor. *State v. Pierick*, Waukesha Co. Case No. 12-CF-22 (filed January 5, 2012). Kelly Rindfleisch, the Deputy Chief of Staff for the County Executive's Office and Russell's successor, was convicted of a felony for misconduct in public office. *State v. Rindfleisch*, Milwaukee Co. Case No. 12-CF-438 (filed January 26, 2012). Darlene Wink, the constituent services coordinator for the County Executive's Office, was convicted of political solicitation involving public officials and employees. *State v. Wink*, Milwaukee Co. Case No. 12-CM-579 (filed January 26, 2012). William Gardner, a railroad executive and campaign donor to then-County Executive Scott Walker, was convicted of felonies for excessive political contributions and intentional unlawful

political contributions. *State v. Gardner*, Washington Co. Case No. 11-CF-137 (filed April 11, 2011). John Doe I ended on February 21, 2013.

As part of John Doe I, the Milwaukee County District Attorney's Office investigated the plaintiff for misconduct in public office. On December 17, 2010, the District Attorney's Office sought and obtained a search warrant for the plaintiff's former office. The search warrant sought evidence that the plaintiff committed misconduct in public office by performing campaign activities on county time, contrary to Wis. Stat. §§ 946.12 ("Misconduct in Public Office"), 11.36 ("Political solicitation involving public officials and employees restricted"), and 11.61 ("Criminal penalties; prosecution"). (Dkt. Doc. Nos. 19-11, 23-11.) Additionally, on September 13, 2011, the District Attorney's Office sought and obtained a search warrant for the plaintiff's residence. The search warrant sought evidence that the plaintiff committed misconduct in public office, party to a crime, by improperly disseminating insider bid information, contrary to Wis. Stat. §§ 946.12 ("Misconduct in Public Office") and 939.05 ("Parties to a Crime"). (Dkt. Doc. Nos. 19-18, 23-18.) Both of these warrants were signed by John Doe Judge Nettesheim.

Based on some evidence that was obtained during John Doe I, on August 10, 2012, the Milwaukee County District Attorney's Office commenced a separate John Doe proceeding under Wis. Stat. § 968.26 commonly known as John Doe II. This proceeding, which ultimately involved the District Attorneys of five counties,[1] was overseen initially by John Doe Judge Barbara A. Kluka and later by John Doe Judge Gregory A. Peterson. John Doe II was prosecuted by an appointed special prosecutor, Francis Schmitz. It investigated whether a campaign committee for a political official had coordinated fundraising and expenditures with ostensibly-

[1] Milwaukee County Case No. 12-JD-000023; Columbia County Case No. 13-JD-000011; Iowa County Case No. 13-JD-000001; Dodge County Case No. 13-JD-000006; and Dane County Case No. 13-JD-000009.

independent groups that were raising and spending money to advocate for that official. *See O'Keefe v. Chisholm*, 769 F.3d 936, 937 (7th Cir. 2014). On January 10, 2014, John Doe Judge Peterson halted John Doe II, concluding that the prosecution's theory of criminal liability contravened the First Amendment.

The special prosecutor appealed John Doe Judge Peterson's order, and John Doe II eventually ended up before the Wisconsin Supreme Court. On July 16, 2015, the Wisconsin Supreme Court affirmed John Doe Judge Peterson's order, ruling that John Doe II could not proceed on the prosecution's theory because it violated the First Amendment. *See generally State ex rel. Two Unnamed Petitioners v. Peterson*, 866 N.W.2d 165 (Wis. 2015).

B. The Plaintiff's Amended Complaint

The plaintiff's amended complaint pertains largely to the conduct of John Doe I. The plaintiff alleges that, in May 2010, prior to then-County Executive Scott Walker's gubernatorial election and Ms. Archer's transition into state government, John Doe I was petitioned in Milwaukee County to investigate funds purportedly stolen from Operation Freedom, a charity. (Dkt. Doc. No. 17 ¶¶ 70-71.) Some of the information upon which the investigation was based came from then-County Executive Scott Walker's Chief of Staff, Tom Nardelli. (Id. ¶ 70.) Subsequently, the Milwaukee County District Attorney's Office investigated the plaintiff. (Id. ¶ 102.) The District Attorney's Office obtained a search warrant for the plaintiff's former workplace and residence which were signed on December 17, 2010 and September 13, 2011, respectively. (Id. ¶¶ 104, 112, 141.) Pursuant to the warrants, plaintiff's former workplace and residence were searched and certain items were seized. (Id. ¶¶ 132, 136.) During the execution of the search warrant on her residence on September 14, 2011, Ms. Archer agreed to submit to questioning by authorities. (E.g., id. ¶¶ 128-31.) The plaintiff broadly asserts that these

investigatory actions were taken to retaliate against her First Amendment-protected speech and violated her rights under the Fourth Amendment.

In an effort to support her retaliation claim, the plaintiff alleges that the Investigator Defendants engaged in a *pattern* of misconduct against individuals, like the plaintiff, who associated with Scott Walker. The very first paragraph of her amended complaint states:

> 1. Since at least May 2010, the Milwaukee County District Attorney's Office, under the direction of Defendant Chisholm, has conducted a continuous campaign of harassment and intimidation against individuals and organizations in retaliation for their association with Scott Walker and their support for his policies, including public-sector collective-bargaining reforms ("Act 10"). Defendants orchestrated home raids, issued invasive subpoenas, badgered victims in secret interrogations, and took numerous other actions calculated to silence the voices that favored Walker's agenda and to punish his allies for their support of and association with him.

(Id. ¶ 1.) Her amended complaint alleges other instances of such alleged conduct constituting a supposed pattern. (E.g., id. ¶¶ 3, 67-69, 76-79, 83-84, 88.)

The pattern of misconduct alleged by the plaintiff encompasses both the John Doe I and John Doe II proceedings. An entire section of her pleading focuses explicitly on John Doe II and the Wisconsin Supreme Court's ruling therein, including the following pertinent excerpts:

> IV. THE WISCONSIN SUPREME COURT'S REPUDIATION OF THE INVESTIGATION
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> 95. In August 2012, Defendant Robles petitioned for a second John Doe proceeding, again motivated by the desire to target Walker, his campaign, and his supporters. Subsequently, four additional separate proceedings were commenced, and ***Defendants continued their retaliatory efforts against Walker through these investigations***. . . .
>
> 97. The Court found that the Defendants' actions subjected targets [of John Doe II] to ***"paramilitary-style home invasions conducted in the pre-dawn hours"*** in retaliation for their free speech, based on unconstitutional legal theories. The Court took care to note that Defendant Stelter signed the affidavits for the ***"pre-dawn, armed, paramilitary-style raids, in which bright floodlights were used to illuminate the targets' homes."*** . . .

> 100. The Court found that the John Doe judge in that investigation "failed in her duty to limit the scope of the investigation to the subject matter of the complaint." ***The investigation was a "fishing expedition" and a campaign of "harassment and persecution by a vengeful [and] unethical prosecutor."***

(Id. ¶¶ 95-101 (emphases added).) Accordingly, the plaintiff clearly seeks to prove in this matter a pattern of retaliatory conduct that is based on the Investigator Defendants' alleged conduct in John Doe II.

C. John Doe Judge Neal P. Nettesheim's Use and Dissemination Order

Shortly after the plaintiff commenced this lawsuit, on July 15, 2015, John Doe Judge Nettesheim signed an order titled "Order Permitting Use and Dissemination of John Doe Information and Materials—Cynthia Archer." (Dkt. Doc. Nos. 19-1, 23-1.) The order, pertaining to John Doe I, stated that "the District Attorney's Office and any agency assisting the District Attorney's Office are permitted to use and disseminate information and records from [John Doe I] as may be deemed necessary to defend against the civil proceedings as set forth in [Cynthia Archer's civil complaint.]" (Id.)

D. Recent Events in the Wisconsin Supreme Court

When the Wisconsin Supreme Court ruled on July 16, 2015 that John Doe II was premised on an unconstitutional criminal theory, it ordered that "the special prosecutor and the district attorneys involved in [John Doe II] must cease all activities related to the investigation, return all property seized in the investigation from any individual or organization, and permanently destroy all copies of information and other materials obtained through the investigation." *Two Unnamed Petitioners*, 866 N.W.2d at 212. Several days after the ruling, on August 11, 2015, the Milwaukee Journal-Sentinel reported that "attorneys who beat back the probe are seeking to have a third party oversee prosecutors as they return evidence they gathered

during the investigation," and "[t]heir request to the state Supreme Court would also affect the treatment of material gathered in an earlier investigation that resulted in six convictions, according to the judge who oversaw that first investigation." (Declaration of Samuel J. Leib, Ex. 1.) According to the article, attorneys representing parties in *Two Unnamed Petitioners* were arguing in sealed submissions to the Wisconsin Supreme Court that, despite the fact that the case involved only John Doe II, it should order the return and destruction of documents generated and collected in both John Doe II *and* John Doe I. (Id.)

Based on this information, the Investigator Defendants petitioned to intervene in the Wisconsin Supreme Court. (Id., Exs. 2, 3.) They argued in their petitions, subsequently sealed by the Wisconsin Supreme Court *sua sponte*, that the Court should permit the Investigator Defendants to intervene to protect their interests in the documents and materials generated and collected in John Doe I and John Doe II. These documents and materials, the Investigator Defendants argued, were essential to their defense in this lawsuit and implicated their right to due process under the United States and Wisconsin Constitutions.

On December 2, 2015, the Wisconsin Supreme Court denied the Investigator Defendants' petitions to intervene without any explanation or reason. (Id., Ex. 4.)

Also on December 2, 2015, the Wisconsin Supreme Court issued a decision on the special prosecutor's motion for reconsideration and stay of the July 16, 2015 ruling. (Id., Ex. 5.) Although the decision purported to deny the reconsideration motion, it reformulated the remedy portion of the original ruling. (Id., Ex. 5 at pp. 20-27.) Without any explanation, the Wisconsin Supreme Court ordered that the special prosecutor must retrieve all documents relating to John Doe II and certain documents relating to John Doe I from *all persons* authorized to possess such documents and file them with the Clerk of the Wisconsin Supreme Court. (Id., Ex. 5 at pp. 22-

24.)[2] All retained copies, meanwhile, must be destroyed. This task, the Wisconsin Supreme Court ordered, must be completed within 30 days after either the completion of appellate activities in the United States Supreme Court or the lapse of the deadline to file a petition for writ of certiorari. (Id., Ex. 5 at p. 21.) In the last paragraph of the majority's opinion, the Wisconsin Supreme Court stated:

> [T]he documents and electronic data will not be destroyed, but will be stored by the clerk of this court in a sealed and secure manner pending further order of this court. Thus, in the event that the investigation would be allowed to proceed at some future date, the documents and electronic data would still be available. They could also **potentially** be available for use in related civil proceedings, if there is a request and a determination that such use is proper under the circumstances.

(Id., Ex. 5 at p. 28 (emphasis added).)

Justice Shirley S. Abrahamson, in dissenting from the denial of both the special prosecutor's motion for reconsideration and the defendants' petitions to intervene, noted that the majority had (1) denied the Investigator Defendants in this matter any opportunity to be heard despite their timely and meritorious petitions to intervene, (Abrahamson, J., dissenting from denial of petitions to intervene, ¶ 10); (2) ordered the sequestration of all evidence (and copies of evidence) plainly relevant to the plaintiff's allegations in this lawsuit, providing no guidance or assurance that it would ever be made available to the litigants (Abrahamson, J., dissenting from denial of motion for reconsideration, ¶ 119); and (3) revoked the standing of any advocate for

[2] The Wisconsin Supreme Court stated that the John Doe I materials that are subject to the return-and-destroy order are those John Doe I materials that John Doe Judge Nettesheim authorized to be used in John Doe II. John Doe Judge Nettesheim authorized the use of John Doe I materials "as may be reasonably necessary for the commencement of [John Doe II] to investigate the specific violations that are identified in the Eighteenth Petition to Enlarge the John Doe proceeding" relating to the regulation of coordinated issue advocacy. (Leib Decl., Ex. 6.) Because the Investigator Defendants foresee a controversy as to the scope of this portion of the Wisconsin Supreme Court's return-and-destroy order, this motion seeks preservation of all John Doe I materials.

preservation of the evidence by attempting to de-authorize the special prosecutor from proceeding. (Abrahamson, J., dissenting from denial of motion for reconsideration, ¶ 124).

Justice Abrahamson specifically noted that the evidence the majority seeks to control had proved relevant and helpful to the Investigator Defendants in this very lawsuit. (Abrahamson, J., dissenting from denial of motion for reconsideration, ¶ 119). She referred specifically to the audio tape introduced by the Investigator Defendants that indisputably refuted the narrative at the heart of the plaintiff's claims, noting that such evidence would be sequestered under the majority's ruling. (Abrahamson, J., dissenting from denial of motion for reconsideration, ¶ 120). Justice Abrahamson concluded, "Will this aspect of the per curiam be subject to challenge as due process gone awry?" (Abrahamson, J., dissenting from denial of motion for reconsideration, ¶ 125).

E. Plaintiff's Counsel's Involvement in Both this Court and the Wisconsin Supreme Court

Plaintiff's counsel, while simultaneously prosecuting the plaintiff's claims against the defendants here, has advocated for the destruction of John Doe I and John Doe II documents before the Wisconsin Supreme Court. (Id., Ex. 7.) Unnamed Movant No. 3, represented before the Wisconsin Supreme Court by the law firm of Hansen Reynolds Dickinson Crueger LLC, joined a brief which stated: "[redacted]" (Id., Ex. 7 at p. 20.) The submission further stated that, "[redacted]" (Id., Ex. 7 at p. 21.) By

joining these arguments, plaintiff's counsel effectively sought to deprive the defendants of the evidence they need to defend themselves from Ms. Archer's allegations in this lawsuit.

On August 21, 2015, defense counsel wrote to plaintiff's counsel to ask for its support in preserving evidence relevant to the plaintiff's claims from potential destruction. (Id., Ex. 8.) While it would seem clear that a litigant would want to assure that evidence relevant to her claim is preserved, plaintiff's counsel would not join defense counsel in advocating for that result. (Id., Ex. 9.) Nor would plaintiff's counsel assure defendants that they are not actively seeking the destruction of *Archer*-related records. (Id.)

SPECIFIC EVIDENCE WARRANTING PRESERVATION

The Investigator Defendants ask that any and all documents and other materials generated in or obtained by John Doe I and II, including but not limited to those documents and materials seized through search warrants and subpoenas, as well as any court testimony or interviews, be preserved by order of the Court, including the following:

JOHN DOE I MATERIALS		
#	**Type of Materials**	**Description**
1	Request to initiate John Doe proceeding and supporting affidavit (and all attached exhibits)	These documents show on what basis John Doe I was initiated
2	All orders initiating the John Doe proceeding	These documents show the approval of the D.A.'s Office's request to initiate John Doe I
3	All requests to amend the scope of the John Doe proceeding and supporting affidavits (and all attached exhibits)	These documents show on what bases the scope of John Doe I changed over time, including the plaintiff's involvement therein

4	All orders amending the scope of John Doe proceeding	These documents show the approval of the D.A.'s Office's requests to amend the scope of John Doe I, including the plaintiff's involvement therein
5	All search warrants and supporting affidavits (and all attached exhibits)	These documents show the form of and bases for the search warrants requested by the D.A.'s Office in John Doe I, including John Doe Judge Nettesheim's approval thereof
6	All evidence collected in execution of search warrants	These documents show evidence that the plaintiff and others engaged in criminal activity
7	All subpoenas and supporting affidavits (and all attached exhibits)	These documents show the form of and bases for the subpoenas requested by the D.A.'s Office in John Doe I, including John Doe Judge Nettesheim's approval thereof
8	All evidence collected in execution of subpoenas	These documents show evidence of criminal activity, include by the plaintiff
9	All documents incidental to the execution of search warrants and subpoenas, including drafts	These documents, like search warrant reports and inventories, show the steps taken by the D.A.'s Office and others to document the collection of evidence, including reports and photographs
10	All recordings of the execution of search warrants	These recording show the professional and legal manner in which the search warrants were executed
11	All John Doe proceeding and interview transcripts, including for interviews conducted outside the presence of the John Doe judge	These documents show evidence of criminal activity, include by the plaintiff
12	All documents relating to the John Doe secrecy orders	These documents show steps taken by the D.A.'s Office to maintain the secrecy of the proceeding and John Doe Judge Nettesheim's approval thereof
13	All work product, drafts, notes, internal memoranda and communications	These documents show the strategy and internal processes of John doe I
14	Other miscellaneous police reports and pleadings	This catchall category refers to police reports and pleadings in John Doe I not specifically referred to in # 1-13

JOHN DOE II MATERIALS		
#	**Type of Materials**	**Description**
15	Request to initiate John Doe proceeding and supporting affidavit (and all attached exhibits)	These documents show on what basis John Doe II was initiated
16	All orders initiating the John Doe proceeding	These documents show the approval of the D.A.'s Office's request to initiate John Doe II
17	All requests to amend the scope of the John Doe proceeding and supporting affidavits (and all attached exhibits)	These documents show on what bases the scope of John Doe II changed over time
18	All orders amending the scope of John Doe proceeding	These documents show the approval of the D.A.'s Office's requests to amend the scope of John Doe II
19	All search warrants and supporting affidavits (and all attached exhibits)	These documents show the form of and bases for the search warrants requested by the D.A.'s Office in John Doe II, including John Doe Judge Kluka or Peterson's approval thereof
20	All evidence collected in execution of search warrants	These documents show evidence of criminal activity
21	All subpoenas and supporting affidavits (and all attached exhibits)	These documents show the form of and bases for the subpoenas requested by the D.A.'s Office in John Doe II, including John Doe Judge Kluka or Peterson's approval thereof
22	All evidence collected in execution of subpoenas	These documents show evidence of criminal activity
23	All documents incidental to the execution of search warrants and subpoenas	These documents, like search warrant reports and inventories, show the steps taken by the D.A.'s Office and others to document the collection of evidence, including reports and photographs

24	All recordings of the execution of search warrants	These recording show the professional and legal manner in which the search warrants were executed
25	All John Doe proceeding and interview transcripts, including for interviews conducted outside the presence of the John Doe judge	These documents show evidence that others engaged in criminal activity
26	All documents relating to the John Doe secrecy orders	These documents show steps taken by the D.A.'s Office to maintain the secrecy of the proceeding and John Doe Judge Kluka or Peterson's approval thereof
27	All work product, notes, internal memoranda and communications	These documents show the strategy and internal processes of John doe II
28	Other miscellaneous police reports and pleadings	This catchall category refers to police reports and pleadings in John Doe II not specifically referred to in # 15-27

(Declaration of Robert Stelter, ¶¶ 3-4.)

Although it will be covered in more specificity below, the Investigator Defendants propose that any use of the above-referenced materials in this lawsuit would be done under certain restrictions. For example, the parties would be prohibited from using or disseminating any of the materials, or any information gleaned from the materials, for any purpose other than this lawsuit, and any filings which attach or refer to the materials, or any information gleaned from the materials, must be done under seal or with appropriate redactions.

ARGUMENT

The Investigator Defendants respectfully request that the Court order the defendants to preserve the above-mentioned materials for use by the parties. The law permits a district court to order parties to preserve evidence, particularly when it is necessary to avoid disruption of the orderly resolution of the case before it. The Wisconsin Supreme Court, by ordering the

defendants to surrender custody of relevant evidence and inserting itself as the gatekeeper of that evidence, has obstructed the defendants' federal duty to preserve evidence and has jeopardized their federal right to a fair and just adjudication of this lawsuit on the merits. An order, narrowly tailored, which instructs the defendants to retain custody of materials from John Doe I and II is warranted under these extraordinary circumstances.

I. THE LAW AUTHORIZES THE COURT TO ORDER THE PARTIES TO PRESERVE EVIDENCE.

A. Federal Litigants Are Under a Duty to Preserve Evidence.

A federal litigant has a duty to preserve evidence. *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 681 (7th Cir. 2008); *MacNeil Auto. Prods. v. Cannon Auto. Ltd.*, 715 F. Supp. 2d 786, 800 (N.D. Ill. 2010) ("A party has a duty to preserve evidence over which it had control and reasonably knew or could reasonably foresee was material to a potential legal action."). Indeed, the failure to do so may expose the offending party to sanctions, including an adverse-inference instruction. *Domanus v. Lewicki*, 742 F.3d 290, 298-99 (7th Cir. 2014); *Crabtree v. Nat'l Steel Corp.*, 261 F.3d 715, 721 (7th Cir. 2001). Aside from the case law, the duty to preserve evidence arises from the common law, federal rules, and court orders. *See* Fed. R. Civ. P. 26, 37 (stating in the 2006 Committee Notes to Rule 37 that "[a] preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case"); *Sokn v. Fieldcrest Cmty. Unit Sch. Dist. No. 8*, 2015 U.S. Dist. LEXIS 22966, *15 (C.D. Ill. 2015) (stating that "[t]he Court has time and again explained that the duty to preserve evidence in this case emanated from the Defendants' common law duty to preserve evidence in the impending litigation . . . ."); *Forrest v. All Cities Mortgage & Financial, Inc.*, 2007 WL 3026787, *1 (E.D. Wis. 2007) (noting that the preservation obligation is "inherent in the litigation process").

B. Courts May Order a Federal Litigant to Preserve Evidence.

Courts are advised to aid in the preservation of evidence. *Mathis v. John Morden Buick, Inc.*, 136 F.3d 1153, 1156 (7th Cir. 1998) ("Judges must be vigilant to prevent the destruction of evidence . . . ."). Upon motion, a court may exercise its authority to control discovery to order a party to preserve evidence. *See, e.g.*, *McDaniel v. Loyola University Medical Center*, 2014 WL 1775685, *2 (N.D. Ill. 2014) (setting forth the standard for a motion to preserve evidence); *In re African–American Slave Descendants' Litigation*, 2003 WL 24085346, *2 (N.D. Ill. 2003) (same); *Walker v. Cash Flow Consultants, Inc.*, 200 F.R.D. 613, 617 (N.D. Ill. 2001). Under the test articulated in *McDaniel*, the Court should consider "1) whether [the moving party] can demonstrate that [the non-moving party] will destroy necessary documentation without a preservation order; 2) whether [the moving party] will suffer irreparable harm if a preservation order is not entered; and 3) the burden imposed upon the parties by granting a preservation order." *Id.*

Of course, in this case, the moving party is also the party in control of the evidence to be preserved. Nonetheless, the Wisconsin Supreme Court's order directly impacts the Investigator Defendants' ability to defend the claims in this case. Consistent with the Court's broad authority to oversee discovery under *McDaniel*, *African–American Slave Descendants' Litigation*, and *Walker*, the test would be modified to require that the moving party show (1) that evidence will be unavailable for use during this litigation without a preservation order; (2) that the parties will suffer irreparable harm if a preservation order is not entered; and (3) that the parties will not be unduly burdened by the imposition of a preservation order.

C. Courts May Order the Preservation of Evidence Under the All Writs Act If It is Necessary to Aid in the Court's Jurisdiction.

In addition to the Court's inherent powers to control discovery, the Court is also authorized by the All Writs Act, 28 U.S.C. § 1651, to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The All Writs Act provides the Court a remedy, for instance, "where a parallel state court action threatens to frustrate proceedings and disrupt the orderly resolution of the federal litigation." *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202 (7th Cir. 1996) (citing *Carlough v. Amchem Products, Inc.*, 10 F.3d 189, 197 (3d Cir. 1993), *Garcia v. Bauza-Salas*, 862 F.2d 905, 909 (1st Cir. 1988), *In re Baldwin-United Corp.*, 770 F.2d 328, 336 (2d Cir. 1985), and *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1332, 1334-35 (5th Cir. 1981)). The United States Congress even enacted a specific exception to the Anti-Injunction Act, 28 U.S.C. § 2283, to enable federal courts to issue such orders, recognizing that "federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atlantic C. L. R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 295 (1970).

As its general language implies, the relief available under the All Writs Act is flexible. *See, e.g., Sycuan Band of Mission Indians v. Raoche*, 54 F. 3d 535, 540-541 (9th Cir. 1994) (injunction against state prosecutions of employees of Native American gaming facilities); *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877 (11th Cir. 1989) (injunction against state court plaintiffs for pursuing claims that were substantially similar to claims settled by final judgment in a federal class action); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 501 F.2d 383, 384 (4th

Cir. 1974) (injunction against state cases interfering with school desegregation).[3] As with any federal authority bearing on state proceedings, though, the All Writs Act and its corollary exception in the Anti-Injunction Act should be used only when necessary in light of "the respect due the courts of a sovereign state" and when the moving party can demonstrate irreparable harm. *Zurich Am. Ins. Co. v. Superior Court for Cal.*, 326 F.3d 816, 824 (7th Cir. 2002) (concluding that it was inappropriate for the district court to enjoin a parallel state proceeding while it decided whether to compel arbitration); *see also Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2375 (2011).

The Seventh Circuit has held that a district court may use the All Writs Act and the exception to the Anti-Injunction Act to protect its control over discovery from interference by state courts. *Winkler*, 101 F.3d at 1203 ("[W]e believe the two statutes in concert permit a district court, under certain circumstances, to issue an injunction to safeguard a pre-trial ruling like the discovery order at issue here."). Not surprisingly, the All Writs Act has been used in the past by district courts to preserve evidence for use in the proceeding. *See, e.g., In re Grand Jury Proceedings of United States*, 626 F.2d 1051, 1058-59 (1st Cir. 1980) (holding that the All Writs Act authorized the district court to order a party to deposit evidence with the court to preserve its use by other parties); *Adidas AG v. adidas2013online.com*, 2013 WL 6667043 (S.D. Fl. 2013) (using the All Writs Act to order prospective defendants to preserve evidence of trademark

[3] The Seventh Circuit has recognized that relief in aid of federal jurisdiction under the All Writs Act and the Anti-Injunction Act is no longer confined to parallel *in rem* actions alone. *Adkins v. Nestlé Purina Petcare Co.*, 779 F.3d 481, 485 (7th Cir. 2015) (stating that, for example, a district court in an *in personam* action could enjoin a state court from prohibiting a witness from appearing at the federal trial); *Winkler*, 101 F.3d at 1202. It is important to note, however, that both this lawsuit and *Two Unnamed Petitioners* involve a common *res* which forms the basis for this motion: documents and materials generated and obtained in John Doe I and II. In other words, the evidence that is the subject of this motion is a "thing" that is essential to the resolution of this federal case, and the state court is trying to deprive the defendants of custody of that evidence. As such, this situation strikes at the very heart of the language in the All Writs Act and the Anti-Injunction Act that allows a district court to protect its jurisdiction.

infringement); *Slahi v. Bush*, 2005 WL 1903682 (D. D.C. 2005) (using the All Writs Act to order the federal government to preserve all documents relating to a habeas corpus petitioner); *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 137-38 (Fed. Cl. 2004) (using, *inter alia*, the All Writs Act to order the preservation of evidence in the proceeding).

II. THE COURT SHOULD ORDER THE DEFENDANTS TO PRESERVE THE AFOREMENTIONED EVIDENCE FOR USE IN THIS PROCEEDING.

The posture of this lawsuit is extraordinary, perhaps unprecedented. The plaintiff has alleged that the Investigator Defendants violated her constitutional rights while investigating her for misconduct in public office in John Doe I. The Investigator Defendants intend to use, and in fact have already used, the pleadings, search warrants, recordings, and evidence obtained during John Doe I to rebut her accusations that they violated her rights. The Investigator Defendants also intend to use the pleadings, search warrants, recordings, and evidence from John Doe I and John Doe II to refute the plaintiff's allegations that they engaged in a pattern of retaliatory actions against associates of Scott Walker. The Investigator Defendants and their counsel must have access to this evidence to fairly defend against the plaintiff's federal law claims.

The Wisconsin Supreme Court has erected a barrier between the Investigator Defendants and the evidence they need to defend themselves. After slamming the door on the their requests to intervene without any explanation, the Wisconsin Supreme Court took the unprecedented step of ordering all persons with custody of investigation materials, including the Investigator Defendants and their counsel, to deposit a copy of those materials with its clerk and destroy all retained copies. The Wisconsin Supreme Court suggested that it might make some materials available for use in civil litigation, although it did not provide any assurances or prescribe a procedure or standard for doing so. Perhaps most importantly, it did not account for the fact that

it *denied* the Investigator Defendants' petitions to intervene, depriving them of any standing to tender a request to use the materials submitted to the clerk.

The consequences to the lawsuit pending before this Court if the requested relief is denied cannot be overstated. Even had the Wisconsin Supreme Court provided means for the Investigator Defendants to retrieve evidence from its clerk in some fashion, their counsel needs the full set of evidence to properly formulate strategy, prepare written discovery, obtain needed document discovery, prepare to depose witnesses, prepare witnesses to be deposed, and do the ordinary pretrial activities that attend all federal litigation. Without knowing whether they possess the full universe of evidence to which they are entitled, the Investigator Defendants and their counsel cannot provide a competent defense.

Moreover, the Wisconsin Supreme Court's scheme for accessing documents, even when one ignores its apparent flaws, is simply unworkable. The Wisconsin Supreme Court intends to make items of evidence only "potentially" available to the Investigator Defendants, and then only "if there is a request and a determination"—that is, a determination by the Wisconsin Supreme Court—"that such use is proper under the circumstances." (Leib Decl., Ex. 5 at p. 28.) Such an arrangement, in which a state court is permitted to determine what is needed by the parties to litigate a federal lawsuit, will be impossible for either this Court or the parties to manage. Indeed, while the Court probably wishes, out of respect for comity and federalism, to avoid issuing orders binding on the Wisconsin Supreme Court or its clerk, denying the present request will make such requests inevitable whenever the Wisconsin Supreme Court decides that a document request by a defendant is, for whatever reason, not "proper." Given the volume of documents and materials that will be needed to defend against the claims in this case, one can easily imagine that resolving the disputes that will arise from the Wisconsin Supreme Court's

scheme will require frequent motion practice before this Court.[4] Such requests, and the resulting case management problem, can be avoided entirely by ordering the defendants to maintain possession of the documents and materials with suitable protections as described herein.

Additionally, the Wisconsin Supreme Court's restrictions substantially interfere with the Investigator Defendants' due process rights. As Justice Abrahamson observed:

> Fairness and due process counsel in favor of granting the proposed intervenors' motions for limited intervention. The interests of the proposed intervenors are totally unrepresented in any future proceedings relating to the John Doe II triology. . . . The July 16, 2015 majority opinion (as well as Justice Ziegler's concurrence of that date) condemns the conduct of the prosecutors and law enforcement in executing search warrants. No evidentiary basis or findings of fact about the execution of the search warrants exists in the record to support this condemnation. Now, these four justices deny the proposed intervenors the opportunity to preserve materials, including audio recordings that they assert reveal the truth about the execution of the search warrants. Does such a conclusion violate due process?

(Abrahamson, J., dissenting from denial of petitions to intervene, ¶ 10, subpara. 2-3).

The unjust intrusion is clearly demonstrated by the circumstances involving defendant Aaron Weiss, a sworn officer and investigator in the Milwaukee County District Attorney's Office. Mr. Weiss had no role in the John Doe II investigation that was before the Wisconsin Supreme Court, yet would have his ability to present evidence in this matter substantially curtailed by the supreme court's rulings. His petition to the Wisconsin Supreme Court to intervene and be heard was, like the other Investigator Defendants' petitions, rejected without explanation. Mr. Weiss should not have to seek the permission of a court that has refused to hear him in order to obtain access to evidence that this Court requires for a just adjudication. Nor

[4] Furthermore, as a practical matter, the document requests to the Wisconsin Supreme Court and the resulting motion practice before this Court will require the Investigator Defendants and their counsel to divulge essential strategy about their case. It is fundamentally unfair to require a party to disclose for what purposes he or she needs evidence. This would be tantamount to circulating a roadmap of the defendants' theory of the case.

should Mr. Weiss be subjected to the whim of that court as to whether the evidence will be destroyed. The potential destruction of evidence that clearly exonerates Mr. Weiss violates his right of due process in defending this case.

The relief the Investigator Defendants request is narrowly tailored to achieve the goal of averting disruption in this lawsuit without unduly encroaching on state matters. First and foremost, the Court would not be ordering any state court to do anything; it would simply direct the defendants—over which the Court unquestionably has jurisdiction—to retain custody of the above-referenced evidence. Additionally, the Investigator Defendants would respectfully ask that the Court incorporate the following suggested restrictions in its preservation order:

1. That the defendants and their counsel be permitted to retain custody over the evidence set forth above for use in this lawsuit;
2. That the defendants and their counsel may distribute the evidence set forth above only to parties in this lawsuit within the ordinary rules of evidence and civil procedure;
3. That the parties and their counsel be prohibited from using or distributing the evidence set forth above, or any information gleaned from the same, in any way outside of the context of this lawsuit;
4. That any filings from the parties that attach or refer to the evidence set forth above, or any information gleaned from the same, must be done under seal or with proper redactions; and
5. That upon completion of this lawsuit, including any appellate proceedings, the evidence set forth above must be deposited by the parties with the Clerk of the Wisconsin Supreme Court.

The Investigator Defendants believe that the above-mentioned restrictions will serve the interests of the parties in this lawsuit and address the concerns of the parties before the Wisconsin Supreme Court. An order to this effect would be no more invasive upon the state courts than is necessary to aid in the Court's jurisdiction over this case.

Certainly, the legal prerequisites for issuing the requested narrow relief are met. First, a preservation order is necessary to protect the parties' rights to due process and a fair adjudication of the plaintiff's claims with the full complement of the evidence. Just as the Seventh Circuit stated in *Adkins* that a federal court can prevent a state court from barring a witness from testifying at a federal trial, 779 F.3d at 485, the Court here can prevent the Wisconsin courts from interfering with the parties' access to the evidence they need to rely upon at trial. Second, the Investigator Defendants will suffer irreparable harm without the preservation order. The Wisconsin Supreme Court's return-and-destroy order deprives the Investigator Defendants of access to essential evidence, providing no appropriate framework or means to intervene to re-gain such access. Even if the parties could somehow achieve piecemeal access, the gatekeeper role that the Wisconsin Supreme Court has assumed will make the parties uncertain as to whether they have all of the evidence necessary to competently prosecute or defend the case.

Finally, the extraordinary circumstances of this case not only demonstrate that the Court *can* issue a preservation order, it also demonstrates that it *should*. The Wisconsin Supreme Court's order is unfair to the Investigator Defendants. They are law enforcement officers facing politically-incendiary accusations from a former employee of the Wisconsin Governor. They have been sued in their personal capacities for alleged violations of the plaintiff's civil rights. Their reputations are on the line, and anyone who opens a newspaper in Wisconsin knows it. They cannot defend themselves in this lawsuit with the Wisconsin courts tying one hand behind

their backs. A preservation order would afford them the access to evidence they need moving forward in this lawsuit.

CONCLUSION

Based on the foregoing arguments, defendants David Budde, Robert Stelter, and Aaron Weiss respectfully request that the Court issue the requested relief to protect them against imminent prejudice.

Dated this 21st day of December, 2015.

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