STATE OF WISCONSIN CIRCUIT COURT GRANT COUNTY

THE JOHN K. MACIVER INSTITUTE
FOR PUBLIC POLICY, INC. and
BRIAN FRALEY,
Plaintiffs,

v.

Case No. 12-CV-63

JON ERPENBACH,
Defendant.

PLAINTIFFS' RESPONSE BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Senator Erpenbach says he wants toprotect the communications of people he calls "constituents" who wished to do nothing more than communicate with their Senator on pending legislation. But the information at issue here relates not to mere constituents. In fact, it is impossible to know whether the most of the correspondents that the Defendant seeks to protect were, in fact, his constituents.

To the contrary, the Plaintiffs have sought e-mails sent by government employees to another government employee using government technology with respect to legislation affecting their government jobs. Even if it is proper to characterize these communications as attempts to influence a legislator, the terms of use for government e-mail accounts expressly prohibit such political activity on government time. In Senator Erpenbach's view, the public has no right to know which government employees are communicating with legislators regarding their public employment. It has no right to know which public employees are using taxpayer provided resources in violation of workplace policies governing the way in which these resources may be used.

Government employees are certainly aware that their communications using publicly provided resources might be disclosed under the open records law. No privacy interests are implicated here. Government employees using government resources to communicate to other government employees on political issues should expect their communications to be subject to disclosure under Wisconsin's Open Records Law.

ARGUMENT

I. COMPLIANCE WITH THE WISCONSIN OPEN RECORDS LAW IS NOT A "RULE OF PROCEEDING," AND ITS APPLICABILITY TO THE REQUESTED E-MAILS IS NOT A NONJUSTICIABLE POLITICAL QUESTION

A. Compliance with the Wisconsin Public Records Law Is Not a "Rule of Proceeding"

The Defendant argues that his desire not to disclose the identity of government employees who communicated with him concerning Act 10 through the use of government computers, government internet service and government e-mail accounts is protected as a legislative "rule of proceeding" within the meaning of Art. IV, sec. 8 of the Wisconsin Constitution. The application of the Wisconsin Open Records Law, §§ 19.21, et seq. ("ORL"), to overrule his decision to redact the identity of public employees using public resources to communicate on legislation affecting public employment would, in his view, violate the constitutional principle of separation of powers and should be considered a nonjusticiable political question.

The Defendant offers no definition of a "rule of proceeding," choosing, for reasons that will become clear, not to address the Wisconsin cases that have defined the meaning of that constitutional term. One can infer from the Defendant's initial Brief in Support of Summary Judgment, however, that his view of the concept is capacious,

extending to any statutes governing whatever activities a legislator might undertake "to do his job." (D. Br. 8.) At the heart of his argument is an assertion that anything a legislator may need to do in order to propose, consider and vote on legislation – including interactions with those who seek to influence him – is a "rule of proceeding," and any law regulating such activity may not be interpreted or enforced by the courts.

This proposition is, to put it mildly, far from self-evident. A "proceeding" is defined as "a course of action; a procedure." Proceeding, The American Heritage Dictionary of the English Language, 5th ed. 2011, *available at* http://www.ahdictionary.com/word/search.html?q=proceeding (last accessed December 17, 2012). In this context, a rule of proceeding governs the process by which the legislature constitutes itself and proposes, considers, and passes legislation. Many things influence how people engaged in a process behave. Participants in a legal process will think and do many things to prepare themselves to participate in that process. But that doesn't make these external influences and activities part of the proceeding itself. To suggest otherwise is to eliminate the distinction between the proceeding itself and everything that might inform it.

In such a world every statute, custom, or practice concerning anything a legislator might do as part of his duties would be a "rule of proceeding." In that world, regulation of lobbying would be a rule of proceeding free from judicial enforcement because it involves the provision of information that may be critical to legislative decision-making. On this view of what is a "rule of proceeding," the legislature can pass rules governing lobbying, but the ultimate care of that particular hen house must be left to the fox. Similarly, limitations on the use of state resources to communicate with constituents or

other parties that might influence the legislative process would be nonjusticiable. For that matter, it is hard to see why the use of private resources to engage in such communications would be anything other than a rule of proceeding. Legislators need to build political support and solicit community input and how they choose to communicate in order to do so – newsletters, electronic communications, broadcast, cable or satellite communications – is simply part of the process. A legislature may pass laws governing franking[1] and political communications (including the source of funding them) but in the Defendant's world, courts may not enforce them.

In this world, statutes regulating "pay to play" would be susceptible to only legislative enforcement. Striking compromises between competing interests and forming judgments about what legislation to propose or support is part of the legislative "proceeding" and thus would be immune from judicial examination. The list could go on – campaigning could be considered part of the legislative process. If a "rule of proceeding" extends to anything that a legislator – much less an individual legislator – does as part of his job, then all statutes governing the behavior of legislators *qua* legislators are nonjusticiable.

Not surprisingly, very few courts have accepted the Defendant's position and the courts of Wisconsin have expressly rejected it. In fact, the only support the Defendant offers is the sharply divided decision of the Iowa Supreme Court in *Des Moines Register and Tribune Co. v. Dwyer*, 542 N.W.2d 491 (Ia. 1996). By a 4-3 vote, the majority adopted an expansive reading of "rule of proceeding," covering regulation of any

[1] "Franking refers to the regulated practice of elected representatives sending certain political mailers to constituents at taxpayer expense. *See* U.S. Senate Select Committee on Ethics, *Franking – Ethics Rules*, *available at* http://www.ethics.senate.gov/public/index.cfm/franking (last accessed December 17, 2012).

"integral part" of a legislator's performance of his or her duties. *Id.* at 498. This included "communication with the public." *Id.* In so holding, the majority expressly disapproved of the holding of California Court of Appeals in *Watson v. California Political Practices Comm'n*, 217 Cal. App. 3d 1059, 266 Cal. Rptr. 408 (1996), in which that court made clear that the phrase "rules of proceeding" includes only those rules by which the legislature – as a whole – conducts its business. *Id.* at 1071; *see Dwyer*, 542 N.W.2d at 498.

Dwyer is an outlier and, most importantly, its rule is not the law in Wisconsin. To the contrary, our Supreme Court has adopted a construction of the term "rules of proceeding" more akin to *Watson* than to *Dwyer*. It has made clear that, under the Wisconsin Constitution, "[r]ules of proceeding have been defined as those rules having 'to do with the process the legislature uses to propose or pass legislation or how it determines the qualifications of its members.'" *Milwaukee Journal Sentinel v. Dep't of Admin.*, 2009 WI 79, 319 Wis. 2d 439, 768 N.W.2d 700, quoting *Custodian of Records for the LTSB v. State*, 2004 WI 65, ¶ 30, 272 Wis. 2d 208, 680 N.W.2d 792 ("*LTSB*").

The Court's decision in *LTSB* is dispositive on this question. The case arose from a John Doe investigation commenced by the District Attorney for Dane County into activities of the former political caucuses in the State Senate and Assembly. The investigation, part of the now infamous caucus scandals, was aimed at determining whether these caucuses were engaged in protected legislative behavior or whether they were engaged in political conduct that might constitute felony misconduct in office.

At issue in *LTSB* was a subpoena seeking the back-up tapes for all electronic communications and other data generated or received by certain legislators – a request far

broader than that at issue here. 2004 WI 65, ¶ 4. In seeking to quash the subpoena, the Director of the Legislative Technology Services Bureau – an arm of the legislature itself[2] – argued that compelling production of these materials would constitute an improper judicial examination of a "core zone of legislative power" and was forbidden by the doctrine of separation of powers. *Id.*, ¶ 24. He also argued that Wis. Stat. § 13.96, which provided that the data maintained by the Legislative Technology Services Bureau was confidential, constituted a "rule of proceeding" immune from judicial examination under Art. IV, sec. 8. If the Defendant was correct about the scope of "rules of proceeding," the legislature's agent would have prevailed in *LTSB*. *Id.*, ¶ 27. Certainly the electronic communications and data were generated in the course of and used in the legislative process and were an "integral part" of that process as the Defendant would define it.

But the legislature did not prevail. The Wisconsin Supreme Court rejected the separation of powers argument, explaining that "[t]he subpoena is not attempting to change the way in which the legislature functions, but rather attempting to gather information to investigate the commission of a crime." *Id.*, ¶ 26. That this crime involved the assessment of the conduct of individual legislators and their employees to determine whether they had crossed the line from "legislative" to "political" activities in contravention of state statutes and legislative rules did not violate the doctrine of separation of powers.

Nor was § 13.96's mandate of confidentiality a rule of proceeding immune from judicial interpretation:

> We note that Wis. Stat. § 13.96 has nothing to do with the process the legislature uses to propose or pass legislation or how it determines the

[2] *Id.*, ¶ 3; *see* Wis. Stat. § 13.69.

> qualifications of its members. It simply provides for assistance with electronic data and for an electronic storage closet for communications created or received by legislators and other employees of the legislature.

Id., ¶ 30. Thus, the Court concluded, it was free to examine whether § 13.96 precluded enforcement of the subpoena. *Id.*, ¶ 31.[3]

The Court of Appeals reached a similar conclusion with respect to charges brought against individual legislators as a result of the caucus scandals. These legislators argued that prosecuting them would violate the principle of separation of powers and Art. IV, sec. 8. Relying, as Defendant does, on *State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 338 N.W.2d 684 (1983), they argued that courts were constitutionally barred from considering whether the activities of the caucuses were "political" and not "legislative" and whether these activities were in violation of statutes and internal legislative rules that were claimed to limit the caucuses to the latter and to prohibit the former on state time in state facilities using state resources. *State v. Chvala*, 2004 WI App 53, ¶ 46, 271 Wis. 2d 115, 678 N.W.2d 880. The Court of Appeals flatly rejected the argument:

> Chvala misconstrues the court's holding in *Stitt*. One of the issues before the *Stitt* court was whether the court had the authority to determine whether the legislature complied with its own internal operating rules or procedural statutes in the course of enacting legislation. The court was reluctant to do so because of the separation of powers doctrine and comity.
>
> This case presents an entirely different issue. The court is not being asked to enforce legislative rules governing the enactment of legislation. Rather, the court is being asked to enforce a penal statute that relates to the duties

[3] Wisconsin's common sense interpretation of "rules of proceeding" resolves the anomalies presented by a more expansive reading and is consistent with the treatment of open records laws in other states. While courts may find that the legislature expressly exempted itself or certain types of records from open meetings law, the application of such laws has been treated as justiciable. In other words, the courts of these states have examined the law and determined whether it applies to the records being sought. *See, e.g.*, *Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla. 1992) (court had power to determine whether statute applied to legislature over separation of powers objection); *Legislative Joint Auditing Comm. v. Woosley*, 722 S.W.2d 581 (Ark. 1987); *Westinghouse Broadcasting Co. v. Sergeant-at Arms*, 375 N.E.2d 1205 (Mass. 1978).

> of a legislator and are relevant insofar as it gives affected persons notice of those duties.

Id., ¶¶ 47-48 (internal citations to *Stitt* omitted); *see also State v. Jensen*, 2004 WI App 89, ¶¶ 45, 48; 272 Wis. 2d 707, 681 N.W.2d 230 (making same point in almost identical language).

The cases described in more detail in the Plaintiffs' original brief better illustrate what a "rule of proceeding" truly is – "the process the legislature uses to propose or pass legislation or how it determines the qualifications of its members.'" *MJS v. DOA*, *supra*, 2009 WI 79, ¶18 (quoting *LTSB*, 2004 WI 65, ¶ 30); *see, e.g.*, *Stitt*, supra, 114 Wis. 2d at 363 (statute requiring referral of certain bills to joint survey committee on debt management); *Wis. Solid Waste Recycling Auth. v. Earl*, 70 Wis. 464, 484-87, 235 N.W.2d 648 (1975) (provision requiring that any deficit in the operation budget of a newly-created state agency be made up in a bill introduced by the Joint Finance Committee); *Integration of Bar Case*, 244 Wis. 8, 29-31, 11 N.W.2d 604 (1943) (rule of "pairing," by which representatives on opposite sides of an issue would each agree not to cast a vote and not be counted as "members present").

The differences between the ORL and its companion statute – the Open Meetings Law – show that claiming confidentiality of legislative communications with other government officials or even constituents is not a "rule of proceeding." A session of the legislature is an "open meeting", but interference with the legislative process of proposing, amending, and adopting legislation – as governed by the rules of proceeding – encroaches on the legislature's constitutional authority. The legislature recognized this in crafting Wisconsin's Open Meetings Law, a sister bill to the ORL. Recognizing that it could be used to superintend legislative rules of procedure, it took care to make clear that

the latter control. Wis. Stat. § 19.87(2), (3). There are no parallel exceptions for or deference to legislative rules in the ORL. (*See* Pl. Br. 27-28).

B. Application of the ORL to Individual Legislators Does Not Violate Art. I, sec. 8 or the Separation of Powers.

Wisconsin courts have recognized a distinction between enforcement of a statute against an individual legislator as opposed to the legislature as a whole. In other words, the legislature itself can create a judicially enforceable standard to which its members must adhere even if that standard cannot be enforced against the body itself – for example, to invalidate a legislative act. For example, the Wisconsin Supreme Court recently made clear that a law cannot be invalidated for failure of the legislature to comply with the state's open meetings law. *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, 334 Wis. 2d 70, 798 N.W.2d 436.

In contrast, however, it is well-established that violations of the open meetings law by individual legislators facing individual penalties are judicially cognizable. In *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 239 N.W.2d 313 (1976), the District Attorney for Dane County sought a declaration that the open meetings law, as it was then codified at Wis. § 66.77, was violated by a private meeting of the Democratic members of the Joint Committee on Finance. Although the court ultimately concluded that the meeting was within the partisan caucus exception as it then existed, the court held that the applicability of the open meetings law and the compliance of individual legislators with it were justiciable. *Id.* at 700. In so doing, it made a clear distinction between invalidating an act of the legislature for failure to comply with the law – that would impinge upon the separation of powers and interfere with the legislature's ability to determine the rules by which it will proceed – and application of the law to an individual legislator:

> We construe the open meeting law and its exception to apply, through use of legislative intent and strict construction. The case is accepted, as not contrary to separation of powers, in that it concerns application of the forfeiture penalty to members of a body, not to the branch of government itself.

Id.

The court in *Stitt* drew the same distinction. In declining to examine legislative compliance with § 13.96 requiring referral of certain legislation to a certain legislative committee, the court reconciled its examination of the activity of individual legislators in *Conta,* observing that the issue in the earlier case "was whether certain legislators had violated the open meeting law and whether they could be subject to forfeitures for such violations" and not the "voidability of legislative actions taken in violation of the open meeting law." *Stitt*, 114 Wis. 2d at 368.

In light of this, the existence of a senate custom or usage contrary to the requirements of the ORL is irrelevant. The legislature chose to make itself subject to the ORL. The law is not a rule of proceeding and judicial enforcement – at least against an individual legislator – does not violate the separation of powers.

C. There is No Rule, Custom, Usage or Precedent Prohibiting Judicial Enforcement of the ORL Against Individual Legislators.

But there is no Senate rule, custom, policy or practice inconsistent with the ORL. To be sure, the ORL commits to each custodian – in this case, each legislator – the duty to balance the public's right of inspection against the public's interest in nondisclosure. But that balancing is conducted in accordance with the standards established by and judicial interpretation of the ORL. It is subject to judicial review and, as we explain

elsewhere, the Defendant erred in concluding that he was entitled to redact identifying information as a result of this balance. *See* Part IV, *infra*.

But the Defendant claims more than that. He claims that the Senate has a rule expressly exempting its members from a duty to comply with the ORL and placing the production of responsive documents in their sole discretion. In support of that claim, he offers nothing more than his own self-serving assertion that it is so. *See Neff v. Indus. Comm'n*, 24 Wis. 2d 207, 216, 128 N.W.2d 465, 470 (1964) (trier of fact not bound to accept self-serving testimony). While his affidavit goes to great lengths to establish the authority of Mason's Manual of Legislative Proceeding and the custom and usage of the Senate, those sources do not establish a custom, usage or practice of permitting legislators to decide whether or not they will comply with the ORL. Even if compliance with the ORL could be seen as a rule of procedure, none of these sources of authority creates the exemption that he wants.

The legislature enacted the ORL and made it clearly applicable to the legislature without the legislative exceptions set forth in its sunshine companion, the open meetings law. This reinforces the conclusion that the legislature did not regard the ORL as a rule of proceeding, but rather intended to subject itself – and its individual members – to its terms and judicial enforcement.

Although the Wisconsin Legislative Council's Legislator Briefing Book provides that in certain circumstances a legislator may redact personally identifiable information about a constituent from documents produced in response to a public records request," the Briefing Book does not purport to establish any rules at all, warning legislators that the book is not the definitive answer to any situation. (Pl. Br. 30-31.)

Beyond that, all the Briefing Book has to say about this situation is that "in certain circumstances, a legislator may redact from a letter personally identifiable information about a constituent." (Pl. Br., Kamenick Aff. ¶3.) That statement is certainly true; the Open Records Law provides several circumstances in which personally identifiable information about a constituent can be redacted. But the Briefing Book lists no situation in which a government worker's government e-mail address can be redacted from governmental correspondence with another government worker. Nothing in the Briefing Book is inconsistent with, much less overrides, the ORL.

In his answer, the Defendant claimed that the Senate Policy Manual "exempts from disclosure personal identification information about constituents who contact a Senator to voice personal concerns with regard to proposed legislation, such as the legislation pertaining to the change in Wisconsin's collective bargaining law." (Ans., Aff. Def. 6.)

The manual contains no such exemption. (Pl. Br. 28-29.) Not surprisingly, the Defendant does not repeat that argument in the papers supporting his motion for summary judgment. This "exemption" existed only in the mind of the Defendant and not in the documented practice of the body.

The record is clear that the legislature intended to subject itself to the WPRL and the duties and prerogatives of individual legislators as custodians are no different than those of any other record custodian.

II. GOVERNMENT E-MAIL ADDRESSES ARE RECORDS UNDER THE ORL

As noted in the Plaintiffs' initial Brief in Support of Motion for Summary Judgment (Pl. Br. 31), this Court may not consider the Defendant's argument that

government e-mail addresses are not "records" under the ORL, because it was not raised in the Defendant's denials of the Plaintiffs' record requests. *See Osborn v. Bd. of Regents of Univ. of Wis. Sys.*, 2002 WI 83, ¶16, 254 Wis. 2d 266, 647 N.W.2d 158. A court "must issue" a writ of mandamus compelling disclosure if the custodian gave "insufficient reasons for denying access." *Id.* This procedure emphasizes the duty of a record custodian to provide legally-adequate reasons for denying a request at the time he makes that denial. *Mayfair Chrysler-Plymouth, Inc. v. Baldarotta*, 162 Wis. 2d 142, 158-59, 469 N.W.2d 638, 643-44 (1991).

Moreover, the Defendant's argument is based on a serious mischaracterization of the Wisconsin Supreme Court's fractured *Schill v. Wisconsin Rapids School District* decision. The Defendant repeatedly refers to the lead opinion in the case as a holding of the court without acknowledging to this Court that that lead opinion did not garner a majority of votes from the participating justices and thus does not represent a holding of that court. (*See* D. Br. 19-22, citing and quoting to *Schill*, 2010 WI 86, ¶¶ 9, 22, 32, 81, 83-85, 133-34, 137, all of which are found within the lead opinion authored by Chief Justice Abrahamson.)

Importantly, a majority of justices *rejected* the lead opinion's conclusion that "[t]o be a record under § 19.32(2), the content of the document must have a connection to a government function." *Schill*, 2010 WI 86, ¶22 (Abrahamson, C.J., lead opinion); *see id.*, ¶¶150-152 (Bradley, J., concurring in the result but holding that the teachers' personal e-mails were records despite their non-governmental content); ¶175 (Gableman, J., concurring in the result but holding that the teachers' personal e-mails were records despite their non-governmental content); ¶¶202-222 (Roggensack, J., joined by Ziegler,

J., dissenting and holding that the teachers' personal e-mails were records despite their non-governmental content).[4]

The majority in *Schill* held that a "record" need not have a connection to a governmental function. *Id.*, ¶¶149-52 (Bradley, J., concurring), ¶173 (Gableman, J., concurring), ¶188 (Roggensack, J. dissenting, joined by Ziegler, J).

If an e-mail sent to a government account and stored on a government server is a "record," regardless of its content, it naturally follows that all of the content contained in that e-mail must be a record as well. The e-mail address from which an e-mail is sent is as much a part of the record as the physical mailing address in the header of a letter is. Nothing in the WPRL limits requestors from learning only "what" was communicated to and from public officials. "Who" sent that "what" to "whom" are also integral parts of a public record.[5]

Even under the approach proffered by a minority of justices in *Schill* – judging a document to be a record when its "content . . . ha[s] a connection to a government function," *see id.*, ¶22 (Abrahamson, C.J., lead opinion) – the e-mail addresses in this case are records. A *government* e-mail address, given to a *government* employee by a *government* entity for the purpose of conducting *government* work (even if incidental

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[4] Four separate opinions generated two separate majorities – one majority of four justices concluding that e-mails sent to government accounts and stored on government servers are e-mails, and one majority of five justices concluding that purely personal e-mails evincing no violation of law or employer policy may be withheld in response to an open record request. *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶10, n. 4 (Abrahamson, C.J., lead opinion) (noting a majority for the conclusion that purely personal e-mails not evincing a violation of law or policy should not be released); ¶188, n. 2 (Roggensack, J., dissenting) (noting a majority for the conclusion that the e-mails in dispute were records).

[5] While the Plaintiffs believe that all information in a document identifying the sender is part of the "record" – regardless of whether the sender is a government worker or a private citizen – they currently are challenging only the redaction of government e-mail addresses. They express no opinion as to the application of the balancing test to private contact information within documents.

personal use of the account is permitted), has a strong connection to government function. Such an e-mail address would not even exist without a government function justifying it. Nothing in *Schill* indicates that, despite all the personal information that was permissibly redacted, the school-issued e-mail addresses of the senders or recipients of those e-mails were redacted. *See id.*, ¶32 (Abrahamson, C.J., lead opinion) ("The circuit court ordered that sensitive information, including pupil records, medical information, social security numbers, bank account information, home addresses, and telephone numbers[6] be redacted upon disclosure.").

If an e-mail address – or any identifying address – were not part of the record, authorities would be able to redact information identifying the sender and recipient of all government correspondence in all circumstances – allowing government officials to operate clandestinely and avoid meaningful public oversight. Such a result would gut the purpose of the open records law.

More fundamentally, and as noted above, the e-mails in question here relate to proposed legislation impacting the senders of the e-mails as government employees. There are two ways to characterize such communications – both of which are adopted by the Defendant at various points in time depending on which of the flaws in his position he is attempting to evade. (*Compare* D. Br. 18-22 (claiming that e-mails do not relate to a governmental function because they are "constituent" communications[7] about a political issue) *with* D. Br. 32, n. 8 (claiming that do not reflect misuse of state resources for

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[6] The Defendant highlights the words "home addresses, and telephone numbers" in this passage. (D. Br. 21.) Such attention is unwarranted, however, as the Plaintiffs are not seeking that information, but rather *government* workplace e-mail addresses.

[7] Although the Defendant refers to the e-mails in question as "constituent communications," there is no way to know whether most of the correspondents were actually his constituents.

political purposes because they are communications about the employees' governmental function).)

Either way, the e-mails are records under either the majority or minority views in *Schill*. They relate to a governmental function because they are communications about the terms and conditions of government employment or they are unrelated to a governmental function because they are communications by citizens with their legislator on a political matter. But, if they are the latter, they constitute misuse of public resources and, as evidence of such misuse, are producible under *Schill*.

III. THE SPEECH AND DEBATE CLAUSE DOES NOT PERMIT A SENATOR TO REDACT GOVERNMENT E-MAIL ADDRESSES FROM A RESPONSE TO A RECORDS REQUEST

Article IV, Section 16 of the Wisconsin Constitution states that "No member of the legislature shall be liable in any civil action, or criminal prosecution whatever, for words spoken in debate." The "speech and debate" clause has been interpreted to protect a legislator "not only from adverse judgments but also from questioning in a judicial proceeding." *State v. Beno*, 116 Wis. 2d 122, 142, 341 N.W.2d 668 (1984). Legislators (and, in some cases, their agents) may not be compelled to respond to civil process to testify regarding matters "that are an integral part of the processes by which members of the legislature participate with respect to the consideration of proposed legislation or with respect to other matters which are within the regular course of the legislative process." *Id.* at 143-144. In *Beno*, a legislative aide was found to be immune from being forced to testify via subpoena as to what he learned while, as directed by the Assembly Speaker and acting on the Speaker's behalf, he investigated another legislator's misconduct. *Id.* at 145-46.

The Defendant wants to extend *Beno* from compelled testimony concerning the activities of a legislator to compliance with the ORL. The short answer to his argument is that it has already been rejected by the Wisconsin Supreme Court. As noted above, in *LTSB*, an arm of the legislature made separation of powers arguments to resist a subpoena seeking, among other things, legislators' e-mail communications with each other and persons outside the legislature. The LTSB relied on Article IV, sec. 16, just as the Defendant does here. The Court refused to extend *Beno* to the production of legislator's communications:

> As set forth above, our past examinations of Section 16 focused on use, or potential use, of constitutionally protected communications. However, [the Director of the LTSB] seems to argue that Section 16's protections go beyond prohibiting use and also create a privilege to prevent disclosure. Wahl develops no legal argument to support that contention. The only case he cites in regard to Section 16 is *Beno*. But as we have explained, *Beno* concludes that the purpose of Section 16 is to limit the use that may be made of "words spoken in debate." It grants immunity for those tasks undertaken in fulfillment of the legislator's constitutional functions so as not to chill the legislator's efforts on behalf of the electorate. However, *Beno* does not address attempts to keep legislative communications secret.

LTSB, *supra*, 2004 WI 265 at ¶ 22 (internal citations omitted). The Court made clear that the privilege created by Art. IV, sec. 16 applies to compelled testimony and not disclosure. It held that "if it is later determined that Article IV, Section 16 applies to communications within the possession of the LTSB, it provides only use immunity, not a right to keep all legislative communications secret." *Id.*, ¶ 23.

LTSB applies here. First, the Speech and Debate Clause creates a limited immunity for legislators from *civil process*. An open record request is not civil process. It does not compel a legislator, or those acting on his or her behalf, to testify. All he must do is comply with a obligation to make certain records public, an obligation that the

legislature itself has created. While this lawsuit is a civil process, it is not the source of the Defendant's obligation to produce documents. It was filed, not to examine the Defendant's communications or his legislative activities, but his choice to deny the Plaintiffs' open record request. The Defendant has not claimed that denying open record requests is part of the "legislative process."

Second, neither constituent communications – nor communications from government employees – are themselves part of the legislative *process* or as part of the steps taken in formal passage of legislation. The Defendant has not cited any Wisconsin court that has held constituent communications to be part of the core legislative process and the "rules of proceeding." cases cited by Plaintiffs establish that they are not. *See* Part I.A, *supra*. Just as with Defendant's argument on Art. IV, sec. 8, the attempt to apply the Speech and Debate Clause here proves much too much. Conflating enforcing compliance with an open records request with the very limited immunity created by *Beno* would extend Article IV, sec. 16 to the full panoply of legislative activity that has traditionally been subject to state statute, *e.g.*, lobbying, use of public funds, "play for pay," etc. *See* Part I.A., *supra*. Just as rules governing these activities – and responding to open records requests – are not part of legislative proceedings, they are not part of the legislative process.

Third, although Wisconsin courts have extended the aegis of Article IV, Section 8 beyond legislators themselves to legislative aides, they have not extended it to wholly unrelated third parties. The justification for extending such immunity to legislative aides applies only when such aides are acting as the "alter ego" of a legislator, at the legislator's direction. *Beno*, 116 Wis. 2d at 146. Here, the open records request is

directed at the statements of other people, who not only cannot claim to be legislative aides, cannot claim that the justification for extending immunity to aides would apply to them, as they are not in the slightest acting as "alter egos" of the Defendant.

Fourth, as Chief Justice Abrahamson observed in *Beno*, Art. IV, sec. 16 "should be construed to extend only so far as is necessary to achieve its objective of protecting the integrity of the legislative process." *Id.* at 143. The idea is to protect legislators from being called to answer for their speech or debate or other activities that they have undertaken as part of the legislative process. In being held to his legal obligations under the ORL, Senator Erpenbach is not being asked to explain anything that he has done as part of the legislative process.

Finally, exempting legislators from the ORL is not necessary to protect them from harassment or to preserve the legislature's independence. *See id.* at 141 (extending the scope of immunity to compelled testimony regarding legislative activities to prevent intimidation or harassment of members of the legislature.) It was the legislature itself that created the ORL.

IV. PUBLIC POLICIES IN FAVOR OF DISCLOSURE OUTWEIGH ANY PUBLIC POLICIES IN FAVOR OF NONDISCLOSURE OF GOVERNMENT E-MAIL ADDRESSES

There is no need to rehash the structure of the balancing test or re-explain each of the interests identified by the parties in their original briefs. Before considering the particular arguments made by the Defendant, it is important to make clear what we are *not* arguing. The Defendant claims that the Plaintiffs are asserting a "public policy purpose of policing *personal use* of government employee e-mail." (D. Br. 32 (emphasis added).) To the contrary, Plaintiffs are claiming that the use of government e-mail

accounts by government workers to communicate with another government worker regarding a government subject is a *governmental use*, not a *personal use*. (*See, e.g.*, Pl. Br. 1, 11-14, 17, 23, 31.) The Defendant appears to concede that such use is, in fact, a governmental use. (*See* D. Br. 32, n. 8, contrasting use of government e-mails for a "private purpose" with what actually happened in this case – "public employees" "[c]ontacting Senator Erpenbach about a law that affected their employment status while at their place of employment.")

A review of *Schill* reinforces a conclusion that such use is a governmental use. The purely personal content referenced and considered in that case involved topics such as "e-mail from a teacher to her spouse about child care responsibilities and an e-mail from a friend to a teacher regarding social plans," 2010 WI 86, ¶30 (Abrahamson, C.J., lead opinion), e-mails "address[ing] personal or family issues," ¶170 (Bradley, J., concurring), "after-work plans, setting up a doctor's appointment, or securing baby-sitting for her children," ¶182 (Gableman, J., concurring). *See also id.* ¶7 (Abrahamson, C.J., lead opinion) (describing personal e-mails as "e-mails not related to government business"). Child care, doctor visits, and social plans are a far cry from government employment, government-labor relations, and pending legislation.

As outlined in Plaintiff's opening brief, on the disclosure side of the scale are public interests in a strong presumption of disclosure built into the ORL, discovering potential violations of law and employer policy, the lack of an expectation of privacy in e-mails sent from a work account discovering misuse of public resources, overseeing the official responsibilities of a legislator, overseeing an official in a position of high visibility, and holding both elected officials like the Defendant and public employees like

the e-mail senders responsible for their actions taken using government resources. (Pl. Br. 13-18.)

On the other side of the scale are the public policy interests favoring non-disclosure identified by both the Plaintiffs and the Defendant: (1) the public interest in protecting anonymous speech (Pl. Br. 22-23, D. Br. 27-28); (2) the public interest in preventing harm to people (Pl. Br. 18-21, D. Br. 28, 36-37); (3) the public interest in preventing the chilling effect on First Amendment freedoms caused by fear of reprisal (Pl. Br. 21-23, D. Br. 37-38); and (4) the public interest in preventing the chilling effect on First Amendment freedoms of mere disclosure, even without the fear of reprisal (Pl. Br. 21-23, D. Br. 28-31, 33-36).

As the rest of this brief will explain, three of these interests are not implicated seriously in this case, and the fourth is deserving of only minimal weight. The strong public policy interests favoring disclosure greatly outweigh the single weak interest favoring nondisclosure.

A) The Senders of the E-Mails in Question Did Not Choose to Speak Anonymously; Therefore, No Public Interest in Protecting Their Right to Speak Anonymously Exists in this Case

The senders of the e-mails at issue in this case did not choose to speak and petition the government anonymously.[8] They chose to speak and petition in a manner that made their identity plain and easily-identifiable by including their names within their messages and using a method of communication that transmits the identifying account of

[8] Defendant argues that there is a right of anonymous speech recognized by the United States Supreme Court's decision in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) (D. Br. 27). It is not clear how much of McIntyre survives the Supreme Court's recent decisions in *Citizens United v. FEC*, 588 U.S. 310, 130 S. Ct. 876 (2010) and *Doe v. Reed*, 130 S. Ct. 2811, 2820 (2010).

the sender. *See, e.g.*, Laundrie Aff. Ex. H (a sampling of e-mails with identifying information in the body).

Not only did the senders choose to speak under their own names, they willingly chose to use their *public, government* personae by sending these e-mails from government accounts. The terms of use policies to which these accounts are subject typically make clear that e-mails are subject to the ORL, *i.e.*, there is no such thing as anonymous use of your government employer's e-mail facility. *See, e.g.*, Department of Administration's Internet and E-Mail Usage Policy ("All employes using Internet and e-mail resources are also reminded that the department's Internet and e-mail files may be subject to disclosure under the state's public records law."), *available at* http://www.doa.state.wi.us/docs_view2.asp?docid=521) (last accessed December17, 2012).

Those senders cannot claim now – nor can the Defendant on their behalf – that their right to speak anonymously is infringed by the disclosure of communications they willingly sent under their own names, in full knowledge that both they and the person receiving their communications are subject to the ORL. No interest in preserving anonymity is presented by this case. The public has a right to know who is seeking to influence legislators,[9] *especially* when those people are using government resources and speaking in their government personae to do so. *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 915-16 (holding that an "informational interest" in learning who is "attempt[ing] to influence legislation" justified the burdens on speech created by a disclosure requirement).

[9] Many of the sample of e-mails included in the Defendant's submissions urge him to vote against and otherwise work to defeat Act 10. (Laundrie Aff., Ex. H.)

B) The Defendant Has Provided No Evidence that Disclosure Would Be at All Likely to Precipitate Threats, Harassment, or Reprisals Against the Senders of the E-Mails

As the party resisting legally-mandated disclosure, the Defendant bears the burden of introducing specific evidence that supports his claim that the persons whose identities are asked to be disclosed face a "'reasonable probability that the compelled disclosure [of individuals' personal information] will subject [those individuals] to threats, harassment, or reprisals from either Government officials or private parties.'" *Doe v. Reed*, 130 S. Ct. 2811, 2820 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976). Such evidence would include "specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself" or "[a] pattern of threats or specific manifestations of public hostility." *Doe*, 130 S. Ct. at 2823 (quoting *Buckley*, 424 U.S. at 74).

Although those principles originate in First Amendment cases where the individuals or groups challenge the constitutionality of laws mandating disclosure of their identities, they are equally applicable here. *Cf. Many Cultures, One Message v. Clements*, 830 F. Supp. 2d 1111, 1167 (W.D. Texas 2011) (rejecting an argument that the disclosure jurisprudence of *Citizens United* and *Buckley* should be limited to the campaign context); *see generally Doe*, 130 S. Ct. 2811 (applying First Amendment disclosure principles to public records law); *ProtectMarriage.com v. Bowen*, 830 F. Supp. 2d 914 (E.D. Cal. 2011) (same); *Shepherdstown Observer, Inc. v. Maghan*, 700 S.E.2d 805 (W. Va. 2010) (same). Like the balancing test applicable to the ORL, the "exacting scrutiny" test applicable to disclosure laws balances the government or public interests served by disclosure against the degree of burden to the speakers represented by the chilling effect of disclosure and any likely harmful reprisals. *See Citizens United*, 130 S. Ct. at 914.

Wisconsin courts echo these requirements and speak to the insufficiency of mere allegations of subjective fear and chilling:

> [A] subjective fear of reprisal is insufficient to invoke first amendment protection against a disclosure requirement. The proof offered must be objective – an allegation of apprehension of subjective deterrence . . . is not sufficient. [A]llegations of a subjective chil' are not an adequate substitute for a claim of specific present objective harm.
>
> Many courts have grappled with the sufficiency of such a showing. A factor emphasized in each of those decisions is the need for objective and articulable facts, which go beyond broad allegations of subjective fears.

Lassa v. Rongstad, 2006 WI 105, ¶64, 294 Wis. 2d 187, 718 N.W.2d 673[10] (internal citations to and quotations of federal circuit court and Supreme Court opinions omitted). Cases applying the ORL also emphasize that only a "substantial" risk of harassment or retaliation will justify withholding public records. *See Klein v. Wis. Resource Ctr.*, 218 Wis. 2d 487, 496, 582 N.W.2d 130 (Ct. App. 1995) (finding a "substantial risk of harassment or other jeopardy" justified nondisclosure under the ORL).

Failure to supply such specific evidence dooms a challenge to disclosure. In *Lassa*, the party challenging disclosure in civil discovery introduced an affidavit that a leader of an organization had been told by an unspecified number of members that they would quit if their identities were disclosed, "for fear of public reprisal and potential legal action." 2006 WI 105, ¶66. The court rejected this showing, concluding that it was "insufficient to establish the required preliminary showing under *NAACP* and its progeny," due to a lack of "particular instances of past or present threats, harassment, or reprisals," or any "pattern of threats or specific manifestations of public hostility against the [organization] or similar groups." *Id.*, ¶67. The court analogized that situation to a

[10] *Lassa* was referenced by the Defendant, but without acknowledging that the *Lassa* court ruled *against* anonymity and nondisclosure. (*See* D. Br. 27.)

Michigan case where member affidavits outlining fear of reprisals were found insufficient. *Id.*, ¶69 (citing *Friends Soc. Club v. Sec'y of Labor*, 763 F. Supp. 1386 (E.D. Mich. 1991); *see also Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 483 (7th Cir. 2012) (rejecting a challenge to disclosure because "[t]he Center has "provided us scant evidence or argument," beyond bare speculation, that [campaign finance disclosure laws] would be at all likely to precipitate "threats, harassment, or reprisals" against it or other similarly situated advocacy groups") (quoting *Doe v. Reed*, 130 S.Ct. at 2820-21 and *Buckley*, 424 U.S. at 74); *Family PAC v. McKenna*, 685 F.3d 800, 807-08 (9th Cir. 2011) (rejecting challenge to disclosure because plaintiff failed to show its contributors would be subject to "harassment, intimidation or retaliation"); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010) (same).

Even in cases where those challenging disclosure introduce clear evidence of harmful reprisal, it must be substantial enough to create that "reasonable probability" of harm. For example, the serious harms inflicted on public supporters of "Proposition 8" (a ballot initiative in California to enshrine the definition of marriage as between one man and one woman in the state constitution) were found not to justify nondisclosure in separate cases in each of those states.

In *ProtectMarriage.com v. Bowen*, *supra*, the evidence included:

> [D]eath threats, physical assaults and threats of violence, vandalism and threats of destruction of property, arson and threats of arson, angry protests, lewd demonstrations, intimidating emails and phone calls, hate mail, mailed envelopes containing white suspicious powder, blacklisting, loss of employment and job opportunities, intimidation and reprisals on campus and the classroom, acts of intimidation through photography, economic reprisals and demands for hush money, and gross expressions of anti-religious bigotry."

830 F. Supp. 2d at 927-28. Justice Thomas, dissenting from the majority's opinion upholding disclosure laws in *Citizens United*, further described what had occurred in California:

> Many supporters (or their customers) suffered property damage, or threats of physical violence or death, as a result. They cited these incidents in a complaint they filed after the 2008 election, seeking to invalidate California's mandatory disclosure laws. Supporters recounted being told: "Consider yourself lucky. If I had a gun I would have gunned you down along with each and every other supporter," or, "we have plans for you and your friends." Proposition 8 opponents also allegedly harassed the measure's supporters by defacing or damaging their property. Two religious organizations supporting Proposition 8 reportedly received through the mail envelopes containing a white powdery substance.
>
> Those accounts are consistent with media reports describing Proposition 8–related retaliation. The director of the nonprofit California Musical Theater gave $1,000 to support the initiative; he was forced to resign after artists complained to his employer. The director of the Los Angeles Film Festival was forced to resign after giving $1,500 because opponents threatened to boycott and picket the next festival. And a woman who had managed her popular, family-owned restaurant for 26 years was forced to resign after she gave $100, because "throngs of [angry] protesters" repeatedly arrived at the restaurant and "shout[ed] 'shame on you' at customers." The police even had to "arriv[e] in riot gear one night to quell the angry mob" at the restaurant. Some supporters of Proposition 8 engaged in similar tactics; one real estate businessman in San Diego who had donated to a group opposing Proposition 8 "received a letter from the Prop. 8 Executive Committee threatening to publish his company's name if he didn't also donate to the 'Yes on 8' campaign."

Citizens United, 130 S. Ct. at 981 (Thomas, J., concurring in part and dissenting in part) (citing to and quoting the trial court record in *ProtectMarriage.com v. Bowen*, Case No. 2:09-cv-58 (E.D. Cal.) and various news reports) (internal citations omitted).

Yet despite that evidence, the *ProtectMarriage.com* court rejected the argument that such evidence showed a reasonable probability that disclosure would lead to threats, harassments or reprisals. 830 F. Supp. 2d at 931-36. There were too few, and they were too limited in time, scope, and degree. *Id.* at 932-33. Many of the complained-of actions

were "typical of any controversial campaign," such as "picketing, protesting, boycotting, distributing flyers, destroying yard signs and voicing dissent," which did not "rise to the level of harassment or reprisals, especially in comparison to acts directed at groups in the past." *Id.* at 934. The court reasoned that the threats faced by Proposition 8 supporters, while real, were not even remotely similar to the threats faced by the membership of the NAACP in the 1950s deep south or the Socialist Workers Party during the "red scare,"[11] the only two cases historically where courts have found threats of reprisal sufficiently strong to mandate nondisclosure. *Id.* at 928, 931-32, 933. To approach that level of danger, the court concluded, the plaintiffs would have to show thousands of incidents. *Id.* at 933.

The State of Washington faced a similar situation, with signers of a marriage amendment petition bringing suit to prevent disclosure of their names as signatories under Washington's own open records law. *Doe v. Reed*, 130 S. Ct. 2811. After the U.S. Supreme Court rejected a facial challenge to the open records law but left open the opportunity for plaintiffs to present evidence in support of an as-applied challenge, *id.* at 2821, the plaintiffs presented testimony from nineteen witnesses, all of whom who had been public supporters of the amendment who had suffered threats, harassment, and reprisals, *Doe v. Reed*, 823 F. Supp. 2d 1195, 1204-10 (W.D. Wash. 2011). It was also shown that "two groups proposed to place on the Internet the names and addresses of all those who signed Referendum 71, and it is alleged that their express aim was to

[11] Courts have even questioned whether a large "movement" of only loosely-affiliated people with a common interest could ever qualify for a disclosure exemption under threat of reprisal, given that only "minor parties" or "fringe organization[s] with unpopular or unorthodox beliefs" or groups that are "seeking to further ideas that have been 'historically and pervasively rejected and vilified by both this country's government and its citizens'" have ever successfully obtained such relief. *See, e.g.*, *ProtectMarriage.com v. Bowen*, 830 F. Supp. 2d 914, 928-31 (E.D. Cal. 2011); *Doe v. Reed*, 823 F. Supp. 2d 1195, 1202-03 (W.D. Wash. 2011).

encourage "uncomfortable conversations." *Doe v. Reed*, 130 S. Ct. at 2825 (Alito, J., concurring) (referring to earlier proceedings in the district court in the same case).

The court rejected the plaintiffs' claim, concluding that such evidence did not show a sufficient likelihood of reprisal to petition signers who were not publicly-known to be supporters of the amendment. *Doe v. Reed*, 823 F. Supp. 2d at 1210-11. Comparing the case before it to *NAACP v. Alabama*, 357 U.S. 449 (1958), *Brown v. Socialist Workers '74 Campaign Comm'n (Ohio)*, 459 U.S. 87 (1982) and the Eastern District of California's *ProtectMarriage.com* decision, the court concluded that the circumstances did not come close to the level of evidenced provided in the former cases, where disclosure was prevented. *Id.* at 1203, 1210. Instead, the court concluded, it was very similar to the *ProtectMarriage.com* case, both cases involving a "massive movement" of similarly-interested, but unorganized, persons holding a widely-held opinion, and (relative to the size of the movement) a small number of diffuse threats. *Id.* at 1203-04.

Here, the Defendant has introduced absolutely no evidence of threats, harassment, or reprisals likely to befall the senders of the e-mails should their names be disclosed. He has introduced threats directed to *him* and *his family*, but not to private citizens who expressed opposition to Act 10 to their legislator via e-mail or written communication. (Erpenbach Aff., ¶15.) The police reports of closed complaints he submitted show no more than three complaints of bad behavior targeted at what are termed "Anti Walker Supporters" in and around the Capitol. (Erpenbach Aff., Ex. J.) One complains of a Tea Party plan that "may be in place" to infiltrate Non-Walker Supporters and "incite violence" (and a similar plan on the opposite side), but no information is given about whether such infiltrations actually occurred; another complains of a man who left a voice

mail message saying he was "going to the capitol and no one better mess with me or else"; the third consists of an e-mail sent to the Madison school board stating the sender would be "making an appearance at the Capitol rotunda tonight at midnight. Pray for the protestors. They will need it." (*Id.*) None of these were threats addressed to people who send letters of support to their representatives, and even as threats to on-site protestors, they are vague and weak.

Reading over these long lists and comparing them to the remarkably few actual violent incidents,[12] the reader gets the impression that there was a lot of smoke, but very little fire – a lot of angry blustering but very little action. The scarcity of actual incidents makes implausible the claim that any active, on-site supporters (or opponents) faced a reasonable probability of harm, much less off-site e-mail senders.

The Defendant does claim that he received communications that "expressed constituent concern about reprisals" (*id.*, ¶17), but did not include any such examples, so we are left to pure speculation as to how reasonable those expressed fears were and even what, exactly, was feared to result in reprisals. He vaguely describes "unrest" and the "emotional" and "volatile" nature of the atmosphere inside and around the Capitol (*id.*, ¶16) but fails to point to any specific instances of violence or other harm or explain how the atmosphere at that location is relevant to the potential for threats, harassment or reprisals to the government worker e-mail senders spread across his geographic constituency. All he has is his own raw conjecture that they would be subject to reprisals,

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[12] News agencies reported a surprising lack of physical altercations, despite the high tensions and lengthy period of time those conditions persisted. *See, e.g.*, Channel3000.com, Peaceful Protests Lead to No Arrests, February 19, 2011, http://www.channel3000.com/news/Peaceful-Protests-Lead-To-No-Arrests/-/1648/8309038/-/8olco4/-/index.html (last accessed December 17, 2012); WKOW, Capitol Rallies Continue to Be Peaceful, but Violent History Not Forgotten, March 5, 2011, http://www.wkow.com/Global/story.asp?S=14193084/ (last accessed December 17, 2012).

should their identities be released. *See Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 483 (7th Cir. 2012) (plaintiffs provided "scant evidence or argument beyond bare speculation" and lost based on that failure).

Because he has produced no evidence showing a reasonable probability of threats, harassment, or reprisal, much less a substantial likelihood of such, this court should assign no weight at all to any public interest in preventing harm to individuals.

C) Because the Defendant Has Provided No Evidence that Disclosure Would Be at All Likely to Precipitate Threats, Harassment, or Reprisals Against the Senders of the E-Mails, No Interest in Preventing the Chilling of Speech for Fear of Harm Is Implicated in this Case

Distinct from the potential public interest in preventing harm to individuals is the related public interest in preventing the chilling of First Amendment freedoms – speech and petitioning in particular[13] – caused by fear of those harms. *See Citizens United*, 130 S. Ct. at 916 (agreeing with the plaintiffs' argument that "disclosure requirements can chill donations to an organization by exposing donors to retaliation").

Because he has not provided any evidence that disclosure would create a reasonable probability that the senders of the e-mails in question would be subjected to threats, harassment, or reprisals, the Defendant has no basis by which to claim that fear of such harms would chill the speech and petitioning of those individuals.

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[13] The Defendant briefly suggests a chilling effect on the e-mail senders' First Amendment right of association. (D. Br. 34-35.) However, simply agreeing with another person is not enough to form an "association" for First Amendment purposes. *See Doe v. Reed*, 823 F. Supp. 2d 1195, 1203 (W.D. Wash. 2011) (rejecting an argument that the signers of a marriage amendment referendum petition were a "group or an organization" that had chosen to associate for First Amendment purposes). The Defendant has not demonstrated a conscience decision by his supporters to form an association among themselves or with him. Perhaps ironically, if those supporters *had* organized formally, their concerted effort to persuade a legislator with regards to pending legislation might trigger the far more onerous disclosure requirements inherent in campaign finance regulation. Regardless, the Plaintiffs are not attempting to discover a list of members of any such organization, as was the case in *NAACP* and *Brown*.

D) The Defendant Has at Best Shown a Minimal Interest in Preventing the Chilling of Speech Caused by Mere Disclosure Itself

Having failed to create a material issue of fact as to the potential public interest in preventing both harm and the chilling effect that harm can cause, the Defendant argues that there is a public interest in preventing the chilling of First Amendment freedoms caused by the mere fact of disclosure, as opposed to fear of threats, harassment, or reprisals. This is the fear that some people have about speaking publicly on political issues. After all, the aphorism tells us never to discuss religion *or politics* at the dinner table.

Plaintiffs do not deny that any disclosure similar to that sought here will have *some* deterrent effect. Courts far and wide have acknowledged this basic truism. *See generally Citizens United*, 130 S. Ct. 876 (addressing the chilling effect of disclosing the identities of political speakers); *Buckley v. Valeo*, 424 U.S. 1 (1976) (addressing the chilling effect of disclosing the identities of political donors). The relevant question for this court is the *severity* of this deterrent effect and, in the final step of the balancing test, addressed later, whether the public interests in disclosure outweigh that deterrence.

The Defendant's expert witness details this sort of deterrent effect at length. He cites to two studies showing a measurable deterrent effect on caucus attendance and voting related to whether or not the participants are informed about the public nature or secrecy of their actions. (Canon Aff. ¶¶15-18.) He does not cite to any study on the effect of disclosure on citizens' willingness to contact their representatives on matters of public interest.

The usefulness of one of Canon's studies is severely weakened by its mixed results, showing no statistically significant effect on two of the three groups studied.

(McAdams Aff. ¶¶10-12.) The two groups of subjects who were "old hands" at the political process – those who had voted at least once and those who had registered to vote a long time ago but never voted – were not affected by a flyer informing them that their vote was secret. (*Id.*, ¶¶11-12.) Only the true neophytes – those who had recently registered but never voted – were measurably affected. (*Id.*, ¶11; Canon Aff. ¶16.) The relevance of the positive result for one group and a negative result for the other two is unclear, making assumptions about the application of this data to the context of constituent communications of limited value. (McAdams Aff. ¶14.) Furthermore, people politically aware and active enough to contact their legislator would fall more naturally into the groups on which the secrecy information had no effect. (*Id.*)

Furthermore, these two studies – on caucus attendance and voting – do not clearly generalize to other contexts, such as that at issue here, communicating with a legislator via e-mail. (*Id.*, ¶13.) The two situations are not comparable. The "disclosure" of a caucus preference or perceived "disclosure" of a vote is immediate and automatic, where the disclosure of a communication is not only delayed by a lengthy amount of time, it is conditional and unlikely to even happen. (*Id.*, ¶16.) This reduces any expected chilling effect of disclosure of written communications, compared to face-to-face exposure. (*Id.*, ¶17.)

Another weakness of Canon's opinions is that the studies he cites measure deterrent effects only on "ordinary" constituents, not constituents who also are government workers, identify themselves in their communication as government workers, and are using government, rather than personal, resources to contact their legislator. (*See id.*, ¶26.) Opposition to Act 10 was naturally higher among government workers – and in

Madison more generally – than in the general public. An opponent of Act 10 would be far less likely to be the "outlier" in a government workplace and face ostracism than a supporter would be.

Canon also fails to take into account the effect the passionate feelings of those involved is likely to have on their willingness to be heard and speak out publicly against Act 10, at whatever cost. (*See id.*, ¶18.) 23,000 people, according to the Defendant, wrote him letters and e-mails of support or opposition, with no promise or reassurance that their communications would be private. (Laundrie Aff., ¶8.) Individuals were even willing to send hateful, bigoted, and potentially criminal messages to the Defendant, *using their own name*. (*See, e.g.*, *id.*, Ex. I.) If the risk of criminal prosecution, civil lawsuit, or even public branding as a bigot is not enough to deter them, what effect would mere disclosure, well after the fact, have?

Of the tens of thousands of people on both sides of the issue who showed up at the Capitol, untold numbers of them skipped work, or even fraudulently called in sick, at the risk of workplace discipline. *See* David Wahlberg, *UW Sanctioned 20 Doctors for Writing Sick Notes for Protestors*, Wisconsin State Journal, April 6, 2012, *available at http://host.madison.com/news/local/education/university/uw-sanctioned-doctors-for-writing-sick-notes-for-protesters/article_0869a5c6-7f47-11e1-a7f7-0019bb2963f4.html* (last accessed December 17, 2012). Knowing their identity could be captured by any number of cameras, video recorders, cell phones, and other recording devices did not deter these people, despite whatever risk to them they felt. If such obstacles did not dissuade people, it is extremely unlikely that the mere possible disclosure of a

communication to a legislator at some unknown future time, well after the fact, would chill their spirits.

The Defendant also argues that mere disclosure is likely to chill constituents' willingness to consult with their representatives during "the early stages of the legislative drafting process." (D. Br. 34.) Aside from the obvious point that the e-mail commentary at issue in this case occurred after the bill had passed the early drafting stage and had been proposed and unveiled for *public* comment and debate, it is not at all clear that the public interest favors *secrecy* rather than *transparency* in the legislative process. (McAdams Aff. ¶¶28-32.) Such balancing of interests is the role of the Wisconsin Legislature, (*id.*, ¶32) which has acted on the subject by passing "'Sunshine Laws, . . . powerful tool[s] for everyday people to keep track of what their government is up to,'" protecting "'[t]he right of the people to monitor the people's business.'" *Schill*, 2010 WI 86, ¶2 (Abrahamson, C.J., lead opinion) (quoting Editorial, *Shine Light on Public Records,* Wis. State J., Mar. 14, 2010, at B1). As noted previously, the Legislature created exemptions from the Open Meetings Law for itself, but not the Open Records Law. *See supra*, Part I.A.

Finally, the Defendant claims that "Strategic Lawsuits Against Political Participation" (SLAPPs) can chill First Amendment freedoms. (D. Br. 35-36.) Because the Defendant's denial letters did not contain any discussion of SLAPPs, this Court may not consider this argument. *See Osborn*, 2002 WI 83, *supra*. Furthermore, while Plaintiffs do not dispute this basic principle, the Defendant fails to explain its relevance to this case. The Defendant makes an unsupported and unwarranted accusation that this lawsuit is a SLAPP. (D. Br. 35, n. 10.) He provides absolutely no support for this wild and

reckless claim. Furthermore, an open record request (the denial of which is the subject of this lawsuit) itself is not a lawsuit, nor is an open records lawsuit "aimed" at the record subjects.

To summarize, while any disclosure such as that requested in this case may have some chilling effect, the Defendant has failed to demonstrate that any such effect here will be more than minimal. The mere existence of that effect is not enough to award victory to the Defendant – he also must prove that the public interest in avoiding that effect outweighs every other public interest supporting disclosure. This, he cannot do.

E) The Balancing of Interests Strongly Favors Disclosure of these Government E-Mail Addresses

The Defendant's letters denying the Plaintiffs' open record request failed to offer sufficient public interests in non-disclosure of the government e-mail addresses at issue to outweigh the strong default presumption of disclosure created by the ORL. When the numerous other public interests favoring disclosure are added to the equation, *see supra*, Part IV, the balance tips overwhelming in favor of disclosure.

As noted in the Plaintiffs' opening brief, the Wisconsin Government Accountability Board has already concluded that the ORL requires disclosure of recall petition signatures – political action born, like the e-mails at issue here, out of Act 10 – despite those signatures including home addresses – information far more sensitive than government work e-mail addresses. (Pl. Br. 20-21.) Although the GAB is not tasked with interpretation of the ORL (at least, no more than any other custodian of records), this Court should give persuasive weight to that decision, made in the heat of the political firestorm and made with far more information than this court has in front of it.

Courts around the country have already concluded that the balancing of interests still requires disclosure – either under election law or public records laws – even in the middle of contentious public debates and acknowledged personal dangers. *See, e.g.*, *Doe v. Reed*, 130 S. Ct. 2811, *supra*; *Citizens United*, 130 S. Ct. 876, *supra*; *Buckley*, 424 U.S. 1, *supra*; *Asgerisson v. Abbott*, 696 F.3d 454 (5th Cir. 2012) (upholding a law "requir[ing] that speech about public business be disclosed" under *Citizens United* and *Doe v. Reed*); *Family PAC v. McKenna*, 685 F.3d 800, *supra*; *Human Life of Wash. Inc.*, 624 F.3d 990, *supra*; *Many Cultures, One Message*, 830 F. Supp. 2d 1111, *supra*; *Doe v. Reed*, 823 F. Supp. 1195, *supra*; *ProtectMarriage.com*, 599 F. Supp. 2d 1197, *supra*; *Shepherdstown Observer, Inc.*, 700 S.E.2d 805, *supra*.

All of these cases concluded that disclosure was warranted after considering only *government* interests. Here, the Plaintiffs have demonstrated numerous other interests held by the public more generally, which, when added to the equation, demonstrate the propriety of disclosure that much more strongly. If government interests alone, even in cases involving real physical danger far more evident than here, can outweigh the burdens of disclosure, government interests and public interests together surely do.

As the Defendant notes, some cases have reached the conclusion that identifying details in communication records should not be disclosed; however, as well as being distinguishable by applying foreign public records law – with differing strengths of presumptions of access and rules for nondisclosure, are distinguishable for other reasons. *North Jersey Newspaper Co. v. Passaic County Board of Chosen Freeholders*, for example (*see* D. Br. 29-30), rests entirely on a quirk of New Jersey constitutional law: unlike the United States Supreme Court's interpretation of the Fourth Amendment, under

the New Jersey Supreme Court's interpretation of Article I, Paragraph 7 of the New Jersey Constitution, the billing records of phone calls from homes and businesses fall within the ambit of a "privacy interest in the home and place of business. 584 A.2d 275, 277-78 (Sup. Ct. N.J. 1990). The Defendant has not pointed to a similar interpretation of constitutional privacy law in Wisconsin.

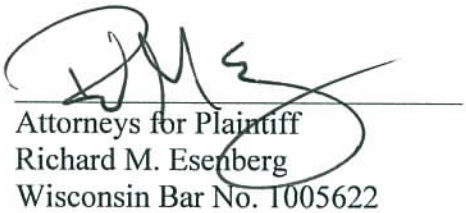
In *Taylor v. Worrell Enterprises., Inc.* (*see* D. Br. 30-31), a minority opinion of the Virginia Supreme Court did discuss the chilling of speech, but in the context of separation of powers and the rights of the *governor* (whose records were sought), not in the context of an infringement of the rights of the record subjects. 409 S.E.2d 136, 138-39 (Va. 1991) (Lacy, J., lead opinion). The court ordered nondisclosure in a fractured 3-1-3 ruling, but neither the lead opinion nor the sole concurring justice concluded that disclosure would infringe the right of constituents to communicate with an elected representative. The lead opinion concluded that the doctrine of interpreting statutes to avoid constitutional problems required an exemption for "[m]emoranda, working papers and correspondence held . . . by the office of the Governor" to be stretched to cover the call logs at issue in order to avoid violating separation of powers. *Id.* at 224 (Lacy, J., lead opinion) ("Therefore, the information at issue here must fall within the [statutory] exemption and is not subject to compelled disclosure."). The sole concurrence concluded that the plain meaning of the memoranda exemption applied to the call logs. *Id.* at 225 (Carrico, C.J., concurring) ("I think that under the rule requiring the courts to give statutory language its "plain meaning," the monthly billings at issue here are '[m]emoranda ... held ... by the office of the Governor' and thus exempt from disclosure under Code § 2.1-342(B)(4).") (Internal citation omitted.).

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court deny the Defendant's Motion for Summary Judgment, grant the Plaintiffs' Motion for Summary Judgment, declare that the Defendant violated the Open Records Law, issue a writ of mandamus ordering him to provide unredacted public records as requested by the Plaintiffs, and award the Plaintiffs the actual and necessary costs of prosecuting this action, including reasonable attorney fees.

Dated this 17th day of December, 2012.

Respectfully submitted,
WISCONSIN INSTITUTE FOR LAW & LIBERTY,



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