STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

IN THE MATTER OF SUBPOENA SERVED ON

ATTORNEY JAMES TROUPIS Case No. 24CV2432

MOTION TO UNSEAL AND FOR RELIEF FROM ORDER

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I. Introduction and a brief overview of why the First Amendment does not tolerate sealing this file and preventing Troupis from speaking about it.

By way of background, the Court entered its order sealing the file on May 10, when it granted the subpoena for documents. The subpoena was not served on Troupis until almost a month later and days after that he was charged in a criminal complaint. The criminal complaint was filed publicly and was accompanied by a press conference featuring the Attorney General, speaking at length about the allegations. The press conference and the complaint were followed nationally—featured in headlines and stories in newspapers as wide ranging as the New York Times and the Washington Post to the Iron County Miner and the Mendota Reporter—Troupis's hometown newspaper. The headlines were clear: Troupis, a former judge and very well-respected lawyer, had been charged with conspiring to utter a forgery.

The criminal complaint that issued to such fanfare and public discussion largely mirrored the subpoena application. The great difference is that while the criminal complaint is public and its merits touted in a press conference for all to see, the subpoena and Troupis's response have sat buried in a sealed Group File. The reason it lies outside the public eye is this Court's order sealing the case—an order entered before the State announced its charge to the world. But now, in light of the public filings and the press releases, the factual and legal support for such an order no longer exist.

While Wisconsin Circuit Court Judges routinely sign subpoenas for documents, it's common for an investigator or a prosecutor to request that the file, including the

application for the subpoena, be sealed—even after it has been served. Once that order is entered, the filings are not available to the public. Here, there are several compelling reasons for the file to be unsealed. First, this is a case of national interest and the public should know about both the allegations and Troupis's attempts to fight them—including the motion to quash. That is, there is little sense for the one-sided version of the allegations shared by the State while Troupis is left to respond in sealed filings. The public's right of access, in fact, compels a "strong presumption in favor of openness for judicial proceedings and records."[1]

That important point aside, Troupis has a First Amendment right to speak about the subpoena, yet this Court's order sealing the file has also placed a gag order on him. It proscriptively restricts his right to speech—with no provision as to its end. So not only does the order prevent the public from knowing about a case of interest, it also keeps Troupis from talking about the subpoena publicly. The First Amendment does not tolerate such restrictions. Nor, for that matter, do this State's open records laws. Those laws do not tolerate government operating in secret—absent a stated and compelling need, which is not present here. Thus, for the reasons expressed below, the file should be unsealed and the gag-order lifted. As a final matter, undersigned counsel reached out the State and they have indicated that they oppose this motion.

[1] *Doe v. Madison Metro. Sch. Dist.*, 2022 WI 65, ¶ 19, 403 Wis. 2d 369, 976 N.W.2d 584.

II. The factual background that informs this motion.

On May 9, 2024, DCI Special Agent Mary Van Schoyck signed an Affidavit in support of a subpoena for documents in relation to an ongoing criminal investigation. At the end of it, Van Schoyk explains the need to seal the document:

> 69. The investigation continues and is on-going. I believe that, at this time, secrecy of the accompanying request and this affidavit, as well as all related orders, returns and other information concerning the requested subpoena it is appropriate in order to:
>
> (i) prevent premature disclosure of the status, progress or details of the investigation, including the identity of the subpoena recipients, as reflected in this affidavit and the accompanying request;
>
> (ii) avoid the disclosure of possible sources of evidence, including sources over which one or more targets may have access or control;
>
> (iii) avoid those interested in thwarting the investigation from tampering with, concealing or destroying investigative evidence; and
>
> (iv) to protect against the inadvertent disclosure of personally identifiable information and data.

The reasons she gives are general in nature and boil down to not tipping anyone off about the investigation. And in an appropriate case that could be a compelling reason *until* facts change and *everyone* knows about the investigation.

Days after Van Schoyck made that averment, this Court signed the subpoena, and it contains the following (problematic) admonition:

> **You are further ordered not to disclose the nature of the contents of this Subpoena or the existence of this investigation to anyone, other than your legal counsel, except on specific order of this Court.**[2]

[2] *See* Exhibit A (emphasis in original).

That language cannot be found anywhere in the Van Schoyk Affidavit, but it's there in the subpoena and in bold.

Then, nothing happened for weeks. The subpoena sat sealed and unserved. On June 4, the State filed a criminal complaint alleging Troupis conspired with others to utter a forged document.[3] And the criminal complaint was accompanied by both a press release and a press conference. In response, the press ran with the story and the Governor even tweeted about it—giving the old thumbs up.

Two days later, the subpoena was served on Troupis's counsel. The Affidavit and Criminal Complaint are very similar: both are signed by Special Agent Van Schoyk, both are about the same length, both lay out the same facts regarding the events relevant to the investigation, both attach the same exhibits, and both purport to show probable cause that Troupis conspired to utter a forgery. In sum and substance, the two documents overlap—almost completely. That's not hyperbole. Paragraph by paragraph, line by line, the criminal complaint and the subpoena application almost mirror one another. Here's how they break down in a chart, with the differences noted.

[3] *See State v. Troupis*, Dane County Case No. 2024CF1295.

General Point	Affidavit	Criminal Complaint
Van Schoyk is complainant	Yes	Yes
Lengthy, with exhibits	25 pages with exhibits A–G	26 pages with exhibits A–G
Subjects of investigation are the same	¶¶ 1–5	¶¶ 1–4
The process for certifying presidential election results	¶¶ 6–14	¶¶ 5–13
The 2020 presidential election and subsequent legal challenges in Wisconsin	¶¶ 15–24	¶¶ 14–23
The alternate elector plan	¶¶ 25–34 (includes specific names)	¶¶ 24–45 (quoting of emails and contact between defendants)
The alternate elector meeting	¶¶ 35–49 (alternate electors listed)	¶¶ 45–60 (more email documentation)
Further planning for use of the alternate elector certificate on Jan. 6	N/A	¶¶ 61–71 (detailed contact between Chesebro, Roman, and Troupis)
Subsequent delivery of the unappointed elector certificate	N/A	¶¶ 72–79 (continued detailed communication between Chesebro, Roman, and Troupis)
Subsequent interviews and testimony	¶ 50–54 (focuses on testimony by Mr. Hitt and Ms. Ruh)	¶¶ 80–83 (fewer specific names)
Wisconsin elections commission complaint	¶¶ 55, 56	¶¶ 84–86
Documents sought	¶¶ 57–64	N/A
Custody and disposition of documents	¶¶ 65–74	N/A

To be clear, a detail here or there may be different in the respective paragraphs, but the substance of the allegations in both the Complaint and the Affidavit are the same. What's more, the Affidavit and Complaint track the allegations made in a prior civil case, *Penebaker v. Hitt*, which was resolved in March.[4] That case involved civil claims related to an alternate (Republican) slate of electors who met as part of the Electoral College process. That case also involved Troupis as a defendant.

Given the overlapping allegations, there is nothing in the Affidavit that would tip off Troupis (or others) about anything dealing with the investigation that they didn't know from the prior case, the criminal complaint, the press conference, or the extensive, year-and-a-half long Congressional investigation.[5] Thus, the reason originally stated (tipping off targets) is no longer in play, and there is no other possible reason to keep the file under seal. Yet as the Order remains in place, Troupis is restrained from speaking about the subpoena to anyone other than his lawyer. That is, while the world can read all about the allegations in the criminal complaint, and the Attorney General can issue press releases to the media regarding the investigation, Troupis cannot even speak about the defenses he has raised in the motion to quash and that will inform his defense to the criminal charge. This violates both common sense and principles of fair play that govern our legal system.[6] And as explained below, the First Amendment does not tolerate such limitations.

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[4] *Penebaker v. Hitt,* Dane County Case No. 2022CV1178

[5] *See* H.R. REP. NO. 117-63 (2022) (presenting eighteen months of research for the public to review in a report which, upon printing, is as thick as about two reams of paper).

[6] *See Nixon v. Adm'r of General Servs.*, 433 U.S. 425, 477 (1977).

III. The sealing of the file and the prior restraint on speech violate the First Amendment.

The practice of routinely sealing subpoena files raises issues of constitutional dimension. There is no recourse available to the subject or the public, because the application and adjudication of the issuance of these orders occurs out of the public's eye—it's all done *ex parte*. While that does not affect the lawfulness of the Court's action, it removes any possibility for oversight that open records allow. Such a practice does not allow for testing the request's alleged necessity. While the Court's role is to ensure that the investigator's request is appropriate, the Court also has to balance the subject's and the public's interests in that decision. Here, whatever merit there may have been in sealing the file *before* the charges issued has now vanished.

A. The legal basis for secrecy is not supported by any facts alleged in the Affidavit.

The request to seal the case file cites to no legal authority—nothing whatsoever—and that's a real problem. When a movant requests the court to seal a document related to an ongoing criminal investigation, it's common to cite to *State v. Cummings* for the proposition that the court may seal the court record.[7] Here, the State didn't cite *Cummings,* but for sake of this motion we'll assume the State will cite to it in its response brief and argue that it has met the *Cummings* test, even if it didn't cite the law.[8]

[7] *State v. Cummings*, 199 Wis. 2d 721, 546 N.W.2d 406 (1996).
[8] *Id.* at 742.

Cummings arose out of a John Doe investigation, a proceeding that was designed as an investigatory tool to be used as an "inquest for the discovery of crime."[9] But its reasoning has been extended to similar proceedings—including search warrants and subpoenas. In *Cummings*, the Court recognized that it is desirable for this function to be carried out in secrecy.[10] And it has identified five reasons why such secrecy is vital:

1. keeping knowledge from an un-arrested defendant which could encourage escape;
2. preventing the defendant from collecting perjured testimony for the trial;
3. preventing those interested in thwarting the inquiry from tampering with prosecutive testimony or secreting evidence;
4. rendering witnesses to be free in their disclosures; and
5. preventing testimony which may be mistaken or untrue or irrelevant from becoming public.[11]

All of that makes sense when such interests are *actually* present.

But the circumstances of a John Doe proceeding are usually different than most common subpoena applications. In the case of a John Doe, the procedure is invoked because secrecy is integral to the investigation. But the vast majority of subpoenas are not issued under the authority of a John Doe. The common subpoena seeks evidence of a crime, after a finding that there's probable cause to believe that a crime has been committed and before an arrest has been made. Properly understood, *Cummings* holds that a judge has the authority to seal matters intrinsic to a secret investigation.

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[9] *Id.* at 735–36 (citing *State v. Washington*, 83 Wis. 2d 808, 822, 266 N.W.2d 597 (1978) and *Wolke v. Fleming*, 24 Wis. 2d 606, 613, 129 N.W.2d 841 (1964)).
[10] *See, e.g., State* ex rel. *Newspapers Inc. v. Circuit Court*, 65 Wis. 2d 66, 72, 221 N.W.2d 894 (1974).
[11] *State v. O'Connor*, 77 Wis. 2d 261, 279, 252 N.W.2d 671 (1977); *Cummings*, 199 Wis. 2d at 736.

But that does not end the inquiry and resolve whether the matter should be sealed. While recognizing that power, the Court in *Cummings* was quick to note: "that a John Doe judge has the authority to seal a search warrant does not, however, end the inquiry. Whenever any judge seals a search warrant, *fundamental rights may be implicated*."[12] A judge, therefore, must balance the government's right to investigate crimes and those of the public to scrutinize executive department's actions.

Making the point plain: before sealing the file, the Court had to make findings. Those findings had to be based on statements in the application that set out the *particular* need for secrecy. There were none cited in the Affidavit other than tipping off Troupis and the moment the Criminal Complaint issued that need was washed away—the need for secrecy has passed. Indeed, while the serving of the subpoena usually (and subtly) discloses the investigation's existence, here it was the press conference that told Troupis (and the world) that he'd been charged. And so, under *Cummings* the public's right to see this file must be weighed against the State's no-longer-existing need. When this Court does that balancing, the scales have to weigh in favor of unsealing. After all, the public's right versus the State's non-existent need will always favor disclosure. For the sake of public access and fair play, openness is the rule and secrecy the rare exception—an exception that has no place in this case anymore.[13] Thus, the Court should vacate the order to seal and allow the public to see the file and all the pleadings.

[12] *Cummings*, 199 Wis. 2d at 738 (emphasis in original).
[13] *Doe v. Madison Metro. Sch. Dist.*, 2022 WI 65, ¶ 12, 403 Wis. 2d 369, 976 N.W.2d 584.

B. The secrecy order is an unlawful prior restraint of speech and violates the First Amendment.

A judicial order forbidding the disclosure of information from a presumptively public judicial proceeding collides with two basic constitutional protections under the First Amendment: the right against prior restraints on speech and the right to know what transpires in court.[14] It has been long established that prior restraints on speech (here based on the content of the speech) constitute "the most serious and least tolerable infringement" on our freedom of speech.[15] And any imposition on prior restraint bears "a heavy presumption against its constitutional validity."[16]

The order forbidding the disclosure of information related to the subpoena is a content-based gag order because it effectively precludes speech on an entire topic: the subpoena and records it seeks. Such a "naked prohibition against disclosure is fairly characterized as a regulation of pure speech."[17] And the Supreme Court has declared that "[any] system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity," and it's the State "that carries a heavy burden of showing justification for the imposition of such a restraint."[18] In order to justify such a prior restraint, the State must demonstrate that the activity restrained (here:

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[14] *See Doe v. Gonzales*, 546 U.S. 1301, 1307–08 (2005); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604–06 (1982).
[15] *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).
[16] *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).
[17] *In re Sealing & Non-Disclosure*, 562 F. Supp. 2d 876, 881 (S.D. Tex. 2008) (quoting *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001) (referring to analogous Wiretap Act provision prohibiting disclosure of contents of illegally intercepted communication)).
[18] *Id.* at 882 (quoting *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1305 (1983) (citation omitted)).

pure speech) poses an imminent threat to a compelling government interest; less restrictive means to protect that interest are unavailable.[19]

The State's interest in maintaining the integrity of its investigation does not automatically trump the First Amendment.[20] The discussion of *Cummings* set out above makes that plain. And here, the State has not set out that post-press conference there's a compelling government interest in secrecy or that less restrictive means to protect that interest are unavailable.[21] With nothing on the "need" side of the ledger, this Court must weigh what the gag order does to Troupis. He appears to be restrained from substantively speaking even to family members about the subpoena. And thus, though publicly accused, he's left to stew to his lawyer and to this Court in secret. Such compelled silence cannot be squared with the robust and free speech that the First Amendment protects; indeed, fair play and the principles of fundamental justice demand that he be allowed to speak publicly—through (in the very least) his filings—about this case.

C. The secrecy order is inconsistent with Wisconsin's public records law.

The sealing of the file violates not just *Cummings* and the First Amendment, it also offends the common law right of public access to court files. The common law rule is that public records are open to public inspection, which "reflects a basic tenet of the democratic system that the people have the right to know about operations of their government, including the judicial branch, and that where public records are involved

[19] *Id.*; *see generally Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).
[20] *See, e.g.*, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978); *Butterworth v. Smith*, 494 U.S. 624, 632 (1990).
[21] *See In re Sealing & Non-Disclosure*, 562 F. Supp. 2d at 886.

the denial of public examination is contrary to the public policy and the public interest. The courts, whose obligation it is to ensure that the executive and legislative branches of government remain open to public scrutiny, must abide by the same high standards they prescribe for others."[22]

Wisconsin's open records law creates a general presumption that court records are open to the public.[23] And it provides that anyone has a right to inspect any record "except as otherwise provided by law."[24] While there are certain, limited exceptions to that right, this case does not fall under them.[25] Rather, the file is governed by the common law public right to access discussed in *Nixon*.[26] There, the public's desire "to keep a watchful eye on the workings of public agencies" weighs heavy in the balance.[27] And the Court must make specific findings of fact on the record to allow for appellate review, when it's going to side against disclosure.[28] Here the problems with the request for secrecy are placed in focus: the Court is not presented with information on which it can balance the rights of the investigators against Troupis's rights and those of the public. As such, Troupis's rights and those of the public must prevail and the order to seal be lifted.

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[22] *State ex rel. Bilder v. Delavan*, 112 Wis. 2d 539, 553, 334 N.W.2d 252, 260 (1983) (citing *State ex rel. Journal Co. v. County Court*, 43 Wis. 2d 297, 168 N.W.2d 836 (1969)); *see also* WIS. STAT. § 59.40(2).
[23] *See* WIS. STAT. §§ 19.31–39.
[24] WIS. STAT. § 19.35(1)(a).
[25] *State ex rel. Unnamed Person No. 1 v. State (In re Doe)*, 2003 WI 30, ¶¶ 66–67, 260 Wis. 2d 653, 660 N.W.2d 260.
[26] Nixon v. Warner Communications, Inc., 435 U.S. 589, 597–98 (1978).
[27] *Id.* at 598.
[28] *Cummings*, 199 Wis. 2d at 741–42 (internal citation omitted).

IV. Conclusion

The Affidavit offers conclusory statements in support of its request to seal the file and to prevent Troupis from speaking about it to others. It cites no case law. And the reasons provided are generic, present in every case where the court authorizes a subpoena before a criminal charge is filed. Indeed, no information was offered to show why, *in this case*, almost four years after the fact and following civil litigation of the same issues, it's reasonable for the Court to determine that Troupis might act in a way that could imperil the investigation. Nor does the request explain why Troupis would be able to (or want to) destroy or otherwise tamper with the evidence. No facts support those claims. None. The lack of specific details to explain why the case should be sealed and Troupis proscriptively silenced should cause this Court to grant Troupis the relief he seeks. Thus, for the reasons set forth above and because the May 10, 2024 Order doesn't meet the necessary legal standards, the Court should unseal the case and relieve Troupis from any prior restraint on his speech.

Dated this 6th day of September, 2024.

Respectfully submitted,

JAMES TROUPIS, *Defendant*

/s Joseph A. Bugni (electronically signed)

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