No. __-____

IN THE

Supreme Court of the United States

IN RE GRAND JURY PROCEEDINGS (SIOBHAN REYNOLDS AND PAIN RELIEF NETWORK ALLIANCE, INC.)

On Petition for Writ of Certiorari to the Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether courts must apply strict scrutiny in reviewing grand jury subpoenas that infringe First Amendment rights and whether such scrutiny requires specific findings about the expressive materials being compelled?

2. Whether the presumption of regularity should be applied to grand jury subpoenas that seek expressive materials and information on associations protected by the First Amendment where the litigation history suggests a prosecutorial interest in suppressing speech?

3. Whether the government may meet its burden of proof that it has a compelling interest in requiring the production of expressive materials and that the subpoenaed materials are substantially related to the grand jury investigation entirely through *ex parte, in camera* submissions?

4. Whether the First Amendment or Rule 6(e) of the Federal Rules of Criminal Procedure limit the court's authority to seal the entire docket of ancillary grand jury proceedings imposing sanctions for contempt?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Petitioners state that the Pain Relief Network Alliance, Inc. is a nonprofit corporation with no shares held by a publicly traded company.

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The opinion of the court of appeals (App. 8 *et seq.*) is not yet reported in any source, official or unofficial, and was issued under seal. The docket in this case is sealed in its entirety, including the opinions and orders of the district court and all pleadings filed by the parties and *amici*.[1]

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 20, 2010. On July 9, 2010, this Court granted an extension of time to file a petition for a writ of certiorari to and including September 17, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The court of appeals' jurisdiction was based on 28 U.S.C. § 1291, as an appeal from a final order of civil contempt.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which provides that:

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[1] Counsel is aware that the Court strongly disfavors filings under seal. However, because of the sealed dockets below, and out of an abundance of caution, Petitioners file herewith a Motion for Leave to file Petition for Certiorari Under Seal with Redacted Copy for the Public. Petitioners intend to file a Motion to Unseal Petition for Certiorari with this Court as soon as is practicable.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The case also involves Rule 6(e) of the Federal Rules of Criminal Procedure, which is set out in the Appendix to this Petition.

STATEMENT

This case involves the use of grand jury subpoenas that seek [redacted] The grand jury investigation was initiated by a federal prosecutor only after she failed to obtain orders in a related case that would have disrupted Petitioners' associations and imposed a prior restraint on their political advocacy. Efforts to obtain judicial relief from the subpoenas have been cloaked in secrecy, with district and appellate court dockets and decisions under seal. The case raises profound unanswered questions about the level of scrutiny required to review grand jury subpoenas that infringe First Amendment interests, the meaning of the requirement that such investigations must be undertaken in good faith, and

whether judicial proceedings seeking to review such actions may be shrouded from public view.

A. The Petitioners

The Petitioners here are the Pain Relief Network Alliance, Inc. ("PRN"), a New York nonprofit corporation, and its founder and president, Siobhan Reynolds. Reynolds founded PRN in 2002 to advocate for the rights of patients suffering from chronic pain to have access to adequate medical care, including the use of opioid drugs and other lawful controlled substances. Petitioners have been involved in an ongoing public debate over the propriety and wisdom of federal prosecutors' use of the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, to prosecute licensed health care practitioners who use lawful prescription medications to treat patients suffering from chronic intractable pain.

PRN provides information and assistance to patients and physicians for whom such drug policies have become a barrier to effective medical treatment. Reynolds' opposition to expanding the "war on drugs" to criminalize chronic pain management has included various forms of public advocacy, such as filmmaking and congressional testimony.[2] In addition, Reynolds

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[2] *See, e.g.*, Testimony of Siobhan Reynolds, President, Pain Relief Network, *Drug Enforcement Administration's Regulation of Medicine*, Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security, House Judiciary Comm., 110th Cong., 1st Sess., July 12, 2007, at 32-38 ("*Reynolds Testimony*").

and PRN have helped doctors obtain access to counsel, expert witnesses, and other resources when prosecuted for pain management practices.

Like many public advocates, Reynolds came to this cause through personal experience. Her late husband suffered for years with chronic illness that produced constant unremitting pain, and he had difficulty in finding a physician who was able to provide adequate relief. When he finally located a doctor who could help treat his condition, that physician was prosecuted under the Controlled Substances Act and removed from practice. *Reynolds Testimony* at 36. Thereafter, Reynolds' husband was unable to obtain adequate substitute treatment, and died in 2006. Reynolds believes that her husband's death was hastened by the federal government's actions blocking his access to adequate pain treatment. *Id.* at 38. She soon learned that her situation was not unique, nor even unusual. *Id.* at 33.

To tell her story and to reach others in similar situations, Reynolds produced a documentary film entitled *The Chilling Effect*, which described her husband's case and that of another patient. That film, which is available for viewing on the Internet,[3] figures prominently in this case, because the grand jury subpoenas now presented for review required

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[3] The film, released in 2005, may be viewed at http://video.google.com/videoplay?docid=2765050655422810328# (last visited Sept. 15, 2010).

Petitioners to produce [redacted] (App. 83, 91.)

B. The Underlying *Schneider* Prosecution

The events leading to the court of appeals' decision in this case arose from the prosecution of a physician and his wife in the District of Kansas. *United States v. Schneider, et al.*, No. 07-10234-WEB. From its inception, the case received extensive media coverage, beginning with a press release issued by the assistant U.S. attorney. *See* www.justice.gov/usao/ks/press/Dec07/Dec20a.html. Media coverage intensified as groups, including PRN, questioned the prosecution. *E.g.*, Roxana Hegeman, *Kansas: Pain Group Rallies to Doctor's Defense*, Associated Press, Joplin Globe.com, Jan. 3, 2008; Roxana Hegeman, *Patients Sign Petition in Support of Indicted Doctor*, Associated Press, Jan. 9, 2008; Roxana Hegeman, *Doctor, Wife Held Incommunicado From Family*, Associated Press, Jan. 11, 2008; Laura Bauer & Diane Carroll, *Despite Federal Indictment, Doctor Still Has His License*, Kansas City Star, Jan. 27, 2008, at A1; Ron Sylvester, *Pain Relief Network: Prosecutor's Claims Are 'Preposterous,'* Wichita Eagle, Mar. 7, 2008; Tim Carpenter, *Physician Prolific at Writing Drug Rx's*, Topeka Capital-Journal, Mar. 28, 2008, at A1.

Reynolds and PRN assisted the Schneiders by helping them obtain counsel and find expert witnesses for the defense. The assistant U.S. attorney sought to disrupt this assistance by filing a

motion to disqualify the Schneiders' counsel. Motion for Determination of Conflict, *United States v. Schneider, et al.*, No. 07-10234-WEB (Mar. 7, 2008). The government alleged that defense counsel had actual or potential conflicts because PRN may be paying defense counsel and that Reynolds was "orchestrating" defense counsel and was "using the criminal case as a springboard for her own designs." *Id.* at 15-16. Whatever the objective of that motion, the court found no conflict and denied it. Minute Entry, *United States v. Schneider, et al.*, No. 07-10234-WEB (Mar. 14, 2008).

Less than one month later, the government sought extraordinary relief in the form of a gag order. It asserted that Reynolds "has inserted herself into this criminal trial and is serving in several capacities in addition to 'public relations' and 'media consultant.'" Motion Pursuant to Local Rule 83.2.3 [to Ban Extrajudicial Statements], *United States v. Schneider, et al.*, No. 07-10234-WEB (Apr. 4, 2008). The government claimed that the defendants and Reynolds were "working to make it a sensational case, and may be attempting to use the media to influence the jury pool." *Id.* at 2. As a consequence, the government asked the court "to restrain the defendants, their family members, [and] Ms. Reynolds . . . from making extrajudicial statements to the media." *Id.* at 15. It frankly acknowledged it was seeking a prior restraint, but claimed that "[t]his is not a prior restraint on the media, but is a prior restraint on trial participants." *Id.*

The district court failed to see "how the news

coverage will taint the jury pool" and held that the government had failed to show "a compelling governmental interest to restrict speech." (App. 71.) Accordingly, it denied the prosecutor's motion and rejected the proposed gag order as "a 'prior restraint' on speech." (App. 70.)

Free to continue its public advocacy, PRN commissioned a roadside billboard in Wichita in early 2009 stating simply, "Dr. Schneider never killed anyone." The billboard also listed PRN's web address, www.painreliefnetwork.org. *See* Harvey A. Silverglate, *Wichita Witch Hunt*, Forbes.com, Sept. 1, 2009. PRN also printed bumper stickers that said "Free the Schneiders."

C. The Grand Jury Subpoenas

Approximately six weeks after PRN's billboard appeared, the same prosecutor convened a separate grand jury investigation [redacted] and issued two subpoenas, one directed to [redacted] and the other to [redacted]. (App. 74, 84.) The subpoenas were served in late March 2009.

Both subpoenas specifically targeted [redacted]

[redacted]

In addition to seeking materials concerning [redacted] the subpoenas probed [redacted] The government demanded [redacted]

Petitioners moved to quash the subpoenas, but the district court denied the motion after briefing and argument. (App. 68.) Without specifically analyzing the individual document requests, the court concluded that "[a]ll of the documents sought bear a substantial relationship to [the] investigation into [redacted] (App. 67.) It

found no evidence that the investigation was being pursued in bad faith based on its *in camera* review of an *ex parte* statement submitted by the government. (App. 66.)

The district court reaffirmed its decision on reconsideration, finding that [redacted] and finding that the Tenth Circuit does not require [redacted] (App. 67.)

Petitioners continued to resist production and the government moved to compel, seeking a finding of contempt. Petitioners filed a motion to open the contempt hearing to the public, which was granted in part and denied in part. (App. 35.) In a sealed docket, the district court held [redacted] (App. 21.)

D. The Court of Appeals Decision

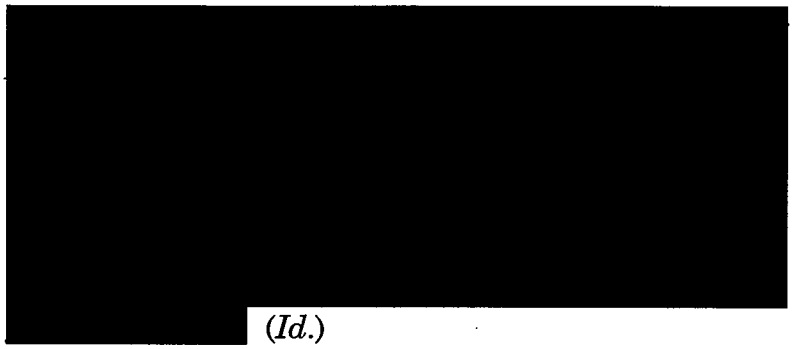
Petitioners appealed the contempt findings to the Tenth Circuit, which also conducted its proceedings under seal. (App. 8.) That court agreed that [redacted] The court defined strict scrutiny as requiring the government to show "both a compelling interest to justify the infringement and that the specific documents bear a substantial relationship to that

compelling interest." (*Id.*)

As to the initial showing required to satisfy this level of review, the court held that "a good faith grand jury investigation is a compelling state interest sufficient to generally allow infringement of First Amendment rights." (App. 14.) This means an investigation undertaken in bad faith necessarily would fail this threshold question, but the court did not articulate what proof would be required to show when an inquiry is "simply a tactic" to silence "protected political speech and activities." (App. 15.) Rather, it found [redacted]

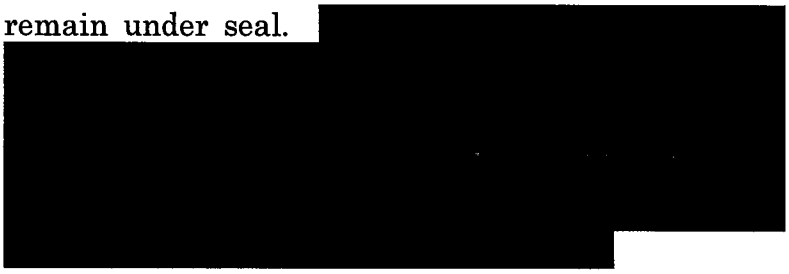
The Tenth Circuit agreed with the district court [redacted]

The Tenth Circuit found that its review of [redacted]

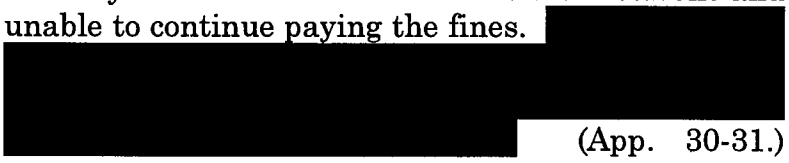


(*Id.*)

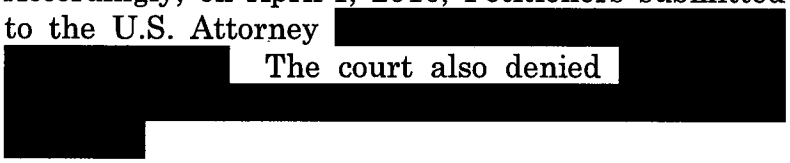
The Tenth Circuit decision and all docket entries remain under seal.



During the course of the appeal, Petitioners paid the fines required by the contempt order, ultimately paying $39,400 to the district court. On December 18, 2009, Reynolds informed the district court by letter that she and PRN were insolvent and unable to continue paying the fines.



(App. 30-31.) Accordingly, on April 1, 2010, Petitioners submitted to the U.S. Attorney



The court also denied

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD CLARIFY THE APPLICABLE STANDARD OF REVIEW AND ITS APPLICATION TO GRAND JURY SUBPOENAS SEEKING EXPRESSIVE MATERIALS

This case presents significant unanswered questions about the level of scrutiny required when the investigatory power of the grand jury conflicts with basic First Amendment protections for political speech. Although grand juries have a broad mandate to investigate possible crimes, this Court has stated that "the invocation of grand jury interests is not 'some talisman that dissolves all constitutional protections,'" *Butterworth v. Smith*, 494 U.S. 624, 630 (1990) (*quoting United States v. Dionisio*, 410 U.S. 1, 11 (1973)), and that "grand juries must operate within the limits of the First Amendment." *Branzburg v. Hayes*, 408 U.S. 665, 708 (1972). Courts must find a way to protect both investigatory interests and in freedom of expression where there is "a clear collision between First Amendment freedoms and the broad powers of a grand jury." *Ealy v. Littlejohn*, 569 F.2d 219, 226 (5th Cir. 1978).

A. This Case Presents a First Amendment Issue of Critical Importance

The subpoenas directed at public policy advocacy by Reynolds and PRN directly implicate essential First Amendment rights. The First Amendment's protection for "freedom of speech, or of the press" was

designed to allow individuals to criticize their government without fear. "There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991). The liberty to criticize government conduct is "the central meaning of the First Amendment." *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964).

Without a doubt, the government has a legitimate interest in investigating potential crimes, and, as a general matter, the public "has a right to every man's evidence." *Branzburg*, 408 U.S. at 688 (citation omitted). But this Court has stressed that compulsory process must be "carefully circumscribed when the investigative process tends to impinge upon highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas." *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957). Abuses of the investigative process "may imperceptibly lead to abridgment of protected freedoms." *Watkins v. United States*, 354 U.S. 178, 197 (1957).

The fact that the general scope of an inquiry may be authorized "does not necessarily carry with it the automatic and wholesale validation of all individual questions, subpoenas, and documentary demands." *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 545 (1963). When particular inquiries impinge substantially on First and Fourteenth Amendment associational rights, reviewing courts "must . . . determine the permissibility of the challenged actions." *Id.*

These general constitutional constraints apply fully to grand jury investigations. As this case illustrates, however, the Court has never defined what First Amendment limits must be applied in this context.

B. The Level of Scrutiny Governing Grand Jury Subpoenas Seeking Material Protected by the First Amendment is a Significant Unresolved Issue

This Court has addressed the First Amendment implications of grand jury investigations in various contexts. In *Branzburg*, 408 U.S. at 708, it held that reporters are not privileged to refuse to appear or answer "relevant and material questions" during a "good-faith grand jury investigation." In *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), the Court found that the First Amendment protection for academic freedom does not shield peer review materials from an administrative subpoena. And in *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 299 (1991), the Court held that the test of admissibility at trial did not apply to a subpoena for business records of an adult bookstore, although it declined to rule on the First Amendment issues raised by the demand.

Unfortunately, no Supreme Court decision addresses how the law should be applied when a lower court finds, as the Tenth Circuit did here, that the subpoenaed party [redacted] (App. 13-14.) In *R. Enterprises, Inc.*, 498 U.S. at 303, on which the

court below purported to rely, this Court expressed no view as to what the First Amendment requires the government to show when it subpoenas expressive materials. As a consequence, lower courts have little guidance because "the Supreme Court has yet to define the appropriate standard for reviewing grand jury subpoenas that implicate First Amendment concerns." *In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461*, Misc. No. 09-118, 2009 WL 3495997, at *6 (D.D.C. Oct. 26, 2009). *See In re Grand Jury Subpoena to Amazon.com Dated August 7, 2006*, 246 F.R.D. 570, 573 (W.D. Wisc. 2007) ("no Supreme Court precedent yet has required the government to pass a test of substantial relation or compelling need.").

This doctrinal vacuum has spawned confusion among the lower courts. The circuits are divided about whether strict scrutiny applies to grand jury subpoenas for expressive materials—and if it does—how it governs particular demands. Several circuits, including the Tenth Circuit below, have held that such subpoenas must satisfy a two-part test in which the government must show it has a compelling interest in the information and that there is a "substantial relationship" between the subject matter of the investigation and the material to be compelled. *See, e.g., In re Grand Jury Subpoena Duces Tecum*, 78 F.3d 1307, 1312 (8th Cir. 1996); *In re Grand Jury Proceeding*, 842 F.2d 1229, 1233-34 (11th Cir. 1988); *In re Grand Jury Proceedings*, 776 F.2d 1099, 1102-03 (2d Cir. 1985). The Fourth Circuit, however, has declined to apply greater scrutiny based on the claim that this Court has twice failed to use the substantial

relationship test in cases challenging subpoenas that implicated First Amendment interests.[4] That view of the law has been applied in other cases. *See In re Grand Jury 95-1*, 59 F. Supp. 2d 1, 10 (D.D.C. 1996).

As a consequence, federal prosecutors have continued to argue that strict scrutiny is inapplicable and have misinterpreted this Court's holdings in *University of Pennsylvania v. EEOC*, 493 U.S. 182, and *Branzburg*, 408 U.S. 665, as support for that position. Contrary to this reasoning, however, *University of Pennsylvania v. EEOC* and *Branzburg* fashioned no test, since "neither case found a First Amendment right [that] was implicated by the challenged subpoenas." *In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461*, 2009 WL 3495997, at *6. Under these circumstances, lower courts have had to find their own way without guidance from this Court.

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[4]*In re Grand Jury 87-3 Subpoena Duces Tecum*, 955 F.2d 229, 234 (4th Cir. 1992). An earlier Fourth Circuit decision strongly endorsed strict scrutiny as the applicable standard in an opinion especially focused on demands for "material presumptively protected by the first amendment." *In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291, 1298 (4th Cir. 1987). However, on rehearing, the court confined its holding to whether one of the document demands was impermissibly vague and overbroad, *In re Grand Jury Subpoena: Subpoena Duces Tecum (Four Cases)*, 844 F.2d 202, 203 (4th Cir. 1988) (per curiam), and the Fourth Circuit subsequently abandoned strict scrutiny.

C. This Court Must Resolve a Rift Among the Lower Courts Regarding What Strict Scrutiny Requires Where Subpoenas Seek Materials Protected by the First Amendment

It should come as no surprise in this circumstance that lower courts have been unable to agree on more than just the level of scrutiny that governs challenges to grand jury subpoenas. The circuits are split on the equally important question of what strict scrutiny means in this setting. The court below purported to apply strict scrutiny before upholding the subpoenas, but the absence of Supreme Court authority has resulted in confusion about the nature of such review.

The Tenth Circuit held that strict scrutiny does not require an item-by-item review to determine that the expressive materials sought are substantially related to the grand jury probe. (App. 16.) The court's analysis muddies the already murky waters and conflicts directly with holdings by other circuits that, "[w]hen First Amendment interests are at stake, the Government must use a scalpel, not an ax." *Littlejohn*, 569 F.2d at 228; *Bursey v. United States*, 466 F.2d 1059, 1088 (9th Cir. 1972).

Specifically, the decision below conflicts with the Ninth Circuit's holding that the government "is obliged to show that there is a substantial possibility that the information sought will expose criminal activity within the compelling subject matter of the investigation." *Bursey*, 466 F.2d at 1083. Under this more rigorous approach, a reviewing court "must decide whether the Government has carried its

burden almost question by question before it can compel answers." *Id.* at 1086. The Fifth Circuit likewise has held that reviewing courts must use a particularized analysis that distinguishes between material "connected to the compelling objects of the investigation" and documents that are "none of the grand jury's business." *Littlejohn*, 569 F.2d at 228. *See also id.* at 229 ("We have no doubt that the leaflet circulated by the United League is 'speech' protected by the First Amendment.").

The absence of clear guidance from this Court also has fostered disagreement about whether the constitutional requirement that a grand jury investigation be conducted in good faith is a threshold qualification or a mere factor in determining whether a subpoena demand is sufficiently related to the investigation. Thus, some courts have held that there is no compelling governmental interest at all if subpoenas are based on bad faith. *Id.* at 230 ("This abuse of the grand jury process cannot be tolerated in a free society."). Others have found that "the balance of interests may apply only when the grand jury's inquiry is not conducted in good faith." *See In re Grand Jury 95-1*, 59 F. Supp. 2d at 14. Under this less rigorous view of strict scrutiny, the reviewing court must analyze whether subpoena demands are "substantially related" to the investigation only *after* there has been a showing of bad faith.

The Tenth Circuit below [redacted]

[redacted] This is in significant tension with the observation of the Fifth Circuit and other courts that using investigative authority to chill expression is not a legitimate governmental interest at all. *Littlejohn*, 569 F.2d at 229. Obviously, if the government's purpose is illegitimate, there is no need to determine whether the subpoena's demands are sufficiently related to a potential crime.

In this case, the unexplained and generalized finding that [redacted]

The Tenth Circuit's analysis in this case contrasts sharply with decisions in cases like *Bursey* and *Littlejohn*. In *Littlejohn*, 569 F.2d at 228, for example, the Fifth Circuit found that a pamphlet criticizing a local prosecutor had been the catalyst for a grand jury investigation of an activist group. The court found both that the investigation was being pursued in bad faith "for the purpose of harassing those who, in the exercise of their First Amendment rights, had criticized defendant Littlejohn," and that the government had the burden to justify each inquiry. *Id.* at 230. The court explained that cases of this type "falls squarely within the . . . hypothetical

fact patterns not found present in *Branzburg* and which plainly would have produced a different result." *Id.* at 226.

This Court must address the disagreement among the circuit courts to clarify the applicable law.

II. THIS COURT SHOULD CLARIFY THE EXTENT TO WHICH THE PRESUMPTION OF REGULARITY APPLIES TO GRAND JURY SUBPOENAS THAT SEEK EXPRESSIVE MATERIALS CRITICAL OF GOVERNMENT POLICIES

A. This Court Has Not Opined on What Constitutes a "Bad Faith" Investigation

This Court has emphasized that "grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment." *Branzburg*, 408 U.S. at 707. *See also Reporters Comm. for Freedom of Press v. American. Tel. & Tel. Co.*, 593 F.2d 1030, 1064 (D.C. Cir. 1978) ("[B]ad faith use of these techniques may constitute an abridgment of the First Amendment rights of the citizens at whom they are directed, be they 'journalists' or less exalted citizens."). "It would be a cruel twist of history to allow the institution of the grand jury that was designed at least partially to protect political dissent to become an instrument of political suppression." *Bursey*, 466 F.2d at 1089.

Despite this self-evident principle, the Court has never provided clear guidance for distinguishing between legitimate investigations and politically-motivated witch hunts designed to quell expressive activities. It has made clear that grand juries may not "select targets of investigation out of malice or an intent to harass," *R. Enterprises*, 498 U.S. at 299, yet "[i]t is unclear from the case law precisely what factual showing, if any, [an objecting witness] must make to establish that its freedom of association would be impinged by enforcement of the subpoena." *In re Grand Jury Proceeding*, 842 F.2d at 1235.

The Tenth Circuit decision did nothing to clarify the relevant inquiry. Instead, the decision [redacted] The government's bare assurances that an investigation is being conducted in good faith are simply insufficient to address the questions raised by the underlying facts in this case. *See, e.g., Littlejohn*, 569 F.2d at 230.

The circumstances in which the subpoenas were issued raise serious questions about the showing required to overcome the presumption of good faith where the government seeks [redacted] The broad scope of the inquiries, which sought [redacted] plainly raise concerns about whether the investigation was conducted in good faith. These objective factors, when coupled with the prosecutors'

involvement in [redacted] raise serious questions about the legitimacy of the inquiry, as do the government's prior attempts to use a gag order to silence petitioners. (App. 69.)

"It would be a very sorry day were we to allow a grand jury to delve into the membership, meetings, minutes, organizational structure, funding and political activities of unpopular organizations on the pretext that their members might have some information relevant to a crime." *Littlejohn*, 569 F.2d at 229. This Court's guidance is needed to clarify the showing necessary to establish "bad faith" in this setting.

B. The Government Should Not Be Able to Meet its Burden of Proof With an *Ex Parte, In Camera* Affidavit

The Tenth Circuit's holding is even more troubling in light of its additional finding that the government can meet its burden of proof entirely with an *ex parte* and *in camera* submission. (App. 17.) Where the government's purpose is at issue, it is not enough to rely on "the presumption of regularity accorded grand jury subpoenas," *id.*, bolstered by nothing more than the prosecutor's *ex parte* statement. Not only does this place Petitioners "at a substantial disadvantage" in arguing "whether the demanded documents were substantially related to the grand jury's investigation," *id.*, there is no way to ensure the grand jury process is free from abuse where the government's submissions are both

shielded from the adversary process and the reviewing court is not required to make particularized findings of relevance.

This Court has cautioned that "[o]nce the investigator has only the conscience of government as a guide, the conscience can become 'ravenous.'" *Gibson*, 372 U.S. at 574 (*quoting* Robert Bolt, *A Man for All Seasons* 120 (1960)). Where the objecting witness makes a *prima facie* showing that the investigation impinges on protected speech, *in camera* review of proffered documents alone is not consistent with a strict scrutiny requirement and is insufficient to protect the First Amendment interests at stake.

No doubt, courts have approved the use of *ex parte* and *in camera* review to evaluate whether the documents or testimony at issue would constitute "grand jury material," *In re Grand Jury*, 103 F.3d 1140, 1145 (3d Cir. 1997), or to determine whether a privilege exists. *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138, 1151 (D.C. Cir. 2006). But this case presents a different question, because the Tenth Circuit agreed the Petitioners had shown [redacted] more must be required than the government's secret promise of pure motives. *See Littlejohn*, 569 F.2d at 229.

Here, the government's failed attempt to disrupt political associations and to impose a gag order, followed by broadly-drafted subpoenas seeking to compel production of protected materials, should trigger a more searching inquiry. As Justice Stevens wrote in his concurring opinion in *R. Enterprises*, "further inquiry into the possible unreasonable or oppressive character of this subpoena should also take into account the entire history of this grand jury investigation, including the series of subpoenas that have been issued to the same corporations and their affiliates during the past several years." *R. Enterprises*, 498 U.S. at 307 (Stevens, J., concurring) (citation omitted).

This Court must clarify that, where an objecting witness has shown that grand jury subpoenas infringe the First Amendment, the government's burden of proof cannot be met with nothing more than *ex parte, in camera* submissions.

III. THIS COURT SHOULD CLARIFY THE EXTENT TO WHICH THE FIRST AMENDMENT OR RULE 6(e) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE LIMIT THE AUTHORITY TO SEAL THE ENTIRE DOCKET

The blanket sealing orders in this case present another question that requires this Court's guidance. The existence of secret dockets before the district court and the court of appeals raises a significant issue, but such sealing is particularly problematic here, where the Petitioners were ordered to pay fines and threatened with imprisonment based on the

prosecutor's *ex parte* submissions. Because a principal issue to be resolved is whether the subpoenas may have been used to suppress dissent, such tight restrictions on public information in the name of grand jury secrecy is a perversion of an institution that was designed "as a kind of buffer or referee between the Government and the people." *United States v. Williams*, 504 U.S. 36, 47 (1992).

This Court has recognized exceptions to the general principle of grand jury secrecy where a complaining witness is facing punishment for contempt. *In re Oliver*, 333 U.S. 257 (1948). It noted the historic distrust of secret proceedings such as the Spanish Inquisition and the Court of the Star Chamber that had become "an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial." *Id.* at 269-70. Accordingly, the Court has held that Due Process requires a public tribunal before a person's liberty or property may be forfeited for failure to respond to a grand jury's questioning. *Id.* at 278. *See Levine v. United States*, 362 U.S. 610, 618 (1960).

Such concerns are not limited to questions of Due Process. This Court also has noted the First Amendment implications of excessive grand jury secrecy that can serve "as a device to silence those who know of unlawful conduct or irregularities on the part of public officials." *Butterworth*, 494 U.S. at 635-36. Closed dockets in a case like this subvert the very purpose of grand jury secrecy, which originally served to shield the institution from the Crown. *In re Grand Jury Subpoena to Amazon.com*, 246 F.R.D. at

575-76. But "the dynamics of modern federal prosecutions are different, with many citizens regarding the grand jury as a weapon of the government rather than a shield from it." *Id.* Clearly delineating the permissible extent of grand jury secrecy in this circumstance is needed to show "that this district's federal prosecutors are part of the solution, not part of the problem" and to "reassure[] the public that someone is watching the watchers." *Id.* at 576.

Despite the fact that "[n]o lesson from history was more indelibly impressed on the draftsmen of the First Amendment than the penchant of governments to stifle criticism by destroying free expression in the name of protecting the internal security of the state," *Bursey*, 466 F.2d at 1084, neither this Court nor the circuits have found a constitutional requirement for public docketing of ancillary grand jury proceedings. *See, e.g., In re Sealed Case*, 199 F.3d 522, 524 (D.C. Cir. 2000); *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 502 (D.C. Cir. 1998); *In re Newark Morning Ledger Co.*, 260 F.3d 217, 225 (3d Cir. 2001). *But see Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91-96 (2d Cir. 2004) (finding a qualified First Amendment right to docket sheets in other judicial proceedings).

However, allowing courts to conduct grand jury ancillary proceedings in total secrecy, all the way through the appeal, is inconsistent with the general principle that "justifiable governmental goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press, or association." *In re Grand Jury Proceedings*,

776 F.2d at 1103 (*quoting Branzburg*, 408 U.S. at 680-81). This is particularly true to the extent that the possibility of disclosing grand jury material, and thus the need for secrecy, attenuates as proceedings move to the appellate phase. *See In re Motions of Dow Jones & Co.*, 142 F.3d at 502. In such proceedings, appellate courts may preserve grand jury secrecy in various ways, such as by simply reducing the level of detail in discussing the relevant issues. *E.g.*, *Littlejohn*, 569 F.2d at 230.

It also is doubtful that the purposes underlying the historic interest in grand jury secrecy apply with equal force in a case such as this, where the government may be motivated to suppress public awareness of its actions. In other cases where courts have held that ancillary grand jury proceedings can be sealed, the stated purpose has been to uphold such traditional interests as ensuring that persons who are accused but exonerated by the grand jury are not exposed to public ridicule. *E.g.*, *United States v. Smith*, 123 F.3d 140, 148 (3d Cir. 1997) (ancillary proceedings involving government release of memorandum naming uncharged individuals) (*quoting Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979)); *Newark Morning Ledger Co.*, 260 F.3d at 222-23 (ancillary proceedings involving alleged leaks to the media of secret grand jury information by the Justice Department).

This case, however, involves the opposite concern. The Tenth Circuit denied a motion [redacted]

Put another way, the purpose of keeping the entire docket under seal is to *reduce* public discussion of the possible abuse of a grand jury investigation to quell political dissent.

Unlike cases such as *Smith* and *Newark Morning Ledger*, the unindicted targets of the investigation here have a definite interest in making the public aware of their plight, while the government's incentive is to cover it up. In this situation, the broad sealing orders ignore the fact that "information relating to alleged governmental misconduct [is] speech which has traditionally been recognized as lying at the core of the First Amendment," *Butterworth*, 494 U.S. at 632, and that public access to such information "has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution." *In re Oliver*, 333 U.S. at 270.

Even though circuit courts have not found a First Amendment right of access to ancillary grand jury proceedings in the circumstances before them, some circuit courts have held that the requirements of open proceedings and grand jury secrecy can be harmonized through careful structuring of proceedings pursuant to Rule 6(e)(5). *See In re Motions of Dow Jones & Co.*, 142 F.3d at 502; *In re Newark Morning Ledger Co.*, 260 F.3d at 225. Rule 6(e) contemplates the ability to challenge sealing orders as overbroad for material that "could not properly be classified as grand jury material or as material 'relat[ing] to grand jury proceedings.'"

United States v. McDougal, 559 F.3d 837, 841 (8th Cir. 2009).

In this case, however, sealing the docket and all materials related to the case through its appeal goes far beyond "matter occurring before the grand jury." Fed. R. Crim. P. 6(e)(6). Additionally, circuit courts have found that when information becomes widely known "it has lost its character as Rule 6(e) material." *In re Motions of Dow Jones & Co.*, 142 F.3d at 505 (*quoting Barry v. United States*, 740 F. Supp. 888, 891 (D.D.C. 1990)).

The Tenth Circuit below offered no explanation for how the blanket sealing orders are consistent with the disclosure requirements of Rule 6(e). Although it noted that [redacted] *E.g.*, Harvey A. Silverglate, *Wichita Witch Hunt*, Forbes.com, Sept. 1, 2009; Jacob Sullum, *Drug Control Becomes Speech Control*, Reason.com, Sept. 9, 2009. The court merely said [redacted] *E.g.*, *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d at 1140. Such an opaque conclusion provides no basis for understanding when ancillary proceedings may be kept secret for a grand jury investigation that otherwise is known to the public.

This Court's guidance is needed to determine whether the First Amendment limits the government's ability to conduct contempt proceedings and impose sanctions on totally sealed dockets in the circumstances of this case. Even if no constitutional rule is implicated, the Court nevertheless should clarify the extent to which Rule 6(e) requires courts to make ancillary grand jury proceedings public when "continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury." *In re Sealed Case*, 199 F.3d at 526. The answers to those questions will help determine whether the grand jury will continue to serve as a buffer against government excesses or will become a tool of oppression.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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September 17, 2010

APPENDIX TABLE OF CONTENTS

Federal Rule of Criminal Procedure 6(e) – Grand Jury Proceedings - Recording and Disclosing the Proceedings

(1) *Recording the Proceedings.*

Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. But the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.

(2) *Secrecy.*

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(3) *Exceptions.*

(A) Disclosure of a grand-jury matter – other than the grand jury's deliberations or any grand juror's vote – may be made to:

(i) an attorney for the government for use in performing that attorney's duty;

(ii) any government personnel – including those of a state or state-subdivision, Indian tribe, or foreign government – that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or

(iii) a person authorized by 18 U.S.C. § 3322.

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401a), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any state, state subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only in a manner consistent with such guidelines as the Attorney General and the Director of National Intelligence shall jointly issue.

(ii) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D), an attorney for the government must file, under seal, a notice with the court in the

district where the grand jury convened stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

(iii) As used in Rule 6(e)(3)(D), the term "foreign intelligence information" means:

(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against –

• actual or potential attack or other grave hostile acts of a foreign power or its agent;

• sabotage or international terrorism by a foreign power or its agent; or

• clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to –

• the national defense or the security of the United States; or

• the conduct of the foreign affairs of the United States.

(E) The court may authorize disclosure – at a time, in a manner, and subject to any other conditions that it directs – of a grand-jury matter:

(i) preliminarily to or in connection with a judicial proceeding;

(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;

(iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation;

(iv) at the request of the government if it shows that the matter may disclose a violation of state or Indian tribal criminal law, as long as the disclosure is to an appropriate state, state-subdivision, or Indian tribal official for the purpose of enforcing that law; or

(v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(F) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte – as it may be when the government is the petitioner – the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:

(i) an attorney for the government;

(ii) the parties to the judicial proceeding; and

(iii) any other person whom the court may designate.

(G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(F) a reasonable opportunity to appear and be heard.

(4) *Sealed Indictment.*

The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons.

(5) *Closed Hearing.*

Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.

(6) *Sealed Records.*

Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent

and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

(7) *Contempt.*

A knowing violation of Rule 6, or of guidelines jointly issued by the Attorney General and the Director of National Intelligence pursuant to Rule 6, may be punished as a contempt of court.

App. 8-68 REDACTED

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff,

v.

STEVEN J. SCHNEIDER and LINDA K. SCHNEIDER, a/k/a LINDA ATTERBURY, d/b/a SCHNEDER [sic] MEDICAL CLINIC, Defendant.

No. 07-CR-10234

MEMORANDUM AND ORDER

This case comes before the court on the government's motion pursuant to local rule 83.2.3. (Doc. 57.) The motion has been fully briefed and is ripe for decision. (Docs. 57, 61, 69.) The government's motion is denied for the reasons herein.

The government seeks an order from the court to "restrain the defendants, their family members, Ms. Reynolds (who is essentially a proxy for the defendants and their family members), and potential witnesses, from making extrajudicial statements to the medial . . . [and] that the court order Mr. Williamson to produce to the government and to the court the 'recorded statement' defendant Stephen Schneider provided the press." (Doc. 57 at 15.) Alternatively, the government seeks an intra-district transfer to eliminate potential prejudicial impact on the jury pool. The government also requests that the court prohibit defendants, Ms. Reynolds and Ms. Hatcher from contacting victims and witnesses.

Analysis

Basically, the government seeks an order which would impose a "prior restraint" on speech. "A prior restraint on constitutionally protected expression, even one that is intended to protect a defendant's Sixth Amendment right to trial before an impartial jury, normally carries a heavy presumption against its constitutional validity." *United States v. Salameh*, 992 F.2d 445, 446-47 (2d Cir. 1993).

> In determining whether an order restraining speech is appropriate, the court must evaluate (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger. The precise terms of the restraining order are also important. We must then consider whether the record supports the entry of a prior restraint on publication [or speech], one of the most extraordinary remedies known to our jurisprudence.

Koch v. Koch Indus., Inc., 2 F. Supp. 2d 1409, 1412 (D. Kan. 1998) (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976)).

First, the government cites the *Koch* case but appears to make no effort to apply the factors to this case. The court is inclined to deny the motion on that

basis. Nevertheless, the court will review whether an order restraining speech is appropriate. In its submissions, the government has attached three news articles and one clip from a television newscast. After reviewing those articles, the court fails to see how the news coverage will taint the jury pool. Next, the government has attached numerous excerpts from phone calls recorded at the jail, most of which are between Linda Schneider and her sister, Ms. Hatcher. In these calls, there are references to getting the media's attention, movie roles, Ophrah [sic] and other fame-seeking actions. Again, the court does not understand, and the government hasn't explained, how these phone calls will affect any potential jurors. The government has not met its burden to show the court that there is a compelling governmental interest to restrict speech. *Journal Pub. Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986) (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07, 102 S. Ct. 2613, 2619-20, 73 L. Ed. 2d 248 (1982)). "The limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Procunier v. Martinez*, 416 U.S. 396, 413, 94 S. Ct. 1800, 1811, 40 L. Ed. 2d 224 (1974).

The government's concern of having a biased jury pool can be dealt with by other alternatives. "Less restrictive alternatives to an injunction against speech include such possibilities as a change of venue, trial postponement, a searching voir dire, emphatic jury instructions, and sequestration of jurors." *Koch*, 2 F. Supp. 2d at 1413. This court will conduct the necessary voir dire with potential jurors

to eliminate any prejudicial impact that the news media may have had.

Alternatively, the government seeks to transfer this case to a different venue within this district. The government is presumably asserting that the pretrial publicity is so prejudicial that it would severely impact the jury pool. Claims of prejudicial pretrial publicity are evaluated in two different contexts.

> The first context occurs where the pretrial publicity is so pervasive and prejudicial that we cannot expect to find an unbiased jury pool in the community. We "presume prejudice" before trial in those cases, and a venue change is necessary. The second context is where the effect of pretrial publicity manifested at jury selection is so substantial as to taint the entire jury pool.

Goss v. Nelson, 439 F.3d 621, 628 (10th Cir. 2006). Of these two methods for determining whether an impartial jury can be seated, the Tenth Circuit has concluded that voir dire of the venire panel is preferable to the speculation inherent in a finding of presumed prejudice, absent truly extraordinary circumstances. *See United States v. Pedraza*, 27 F.3d 1515, 1525 (10th Cir. 1994) ("Whether a jury harbors prejudice related to pretrial publicity is best determined during voir dire examination"); *Abello-Silva*, 948 F.2d at 1177 ("The proper occasion for determining juror partiality is upon voir dire examination." (Quotation omitted)).

Finally, the government seeks a recorded statement made by Stephen Schneider. Defendants have replied that they do not have any statements in their possession and that it is in the possession of the Associate Press. Therefore, this request is moot.[1]

Conclusion

The parties should not misinterpret this ruling as an endorsement of statements to the media by their counsel or their surrogates. The court firmly believes that cases should be tried in the courtroom, not on the courthouse steps. The court expects counsel to know and follow their ethical responsibilities in this regard. As to those persons who are not bound by any code of ethics, the words of Hubert H. Humphrey come to mind: "The right to be heard does not automatically include the right to be taken seriously."

The government's motion is denied. (Doc. 57).

IT IS SO ORDERED.

Dated this 10th day of July 2008, at Wichita, Kansas.

s/ Monti L. Belot
Monti L. Belot
UNITED STATES DISTRICT JUDGE

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[1] The government also asks this court to remind counsel of their ethical duties under Rule 3.6. The court assumes that all counsel are aware of their duties under the rules. If any counsel has any information regarding an ethics violation, he or she may report that violation to the Kansas Disciplinary Administrator's Office. This court is not a disciplinary review board.

App. 74-91 REDACTED