NO. 11-35854

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE #1, an individual, JOHN DOE #2, an individual,
and PROTECT MARRIAGE WASHINGTON,

Appellants,

v.

SAM REED, in his official capacity as Secretary of State of Washington,
BRENDA GALARZA, in her official capacity as Public Records Officer
for the Secretary of State of Washington,

Appellees.

On Appeal from the United States District Court
District of Washington, at Tacoma
No. C09-5456BHS
The Honorable Benjamin H. Settle
United States District Court Judge

Appellants' Emergency Motion Under 9th Cir. R. 27-3

James Bopp, Jr. (Ind. Bar No. 2838-84)
Joseph E. La Rue (Ohio Bar No. 80643)
Kaylan L. Phillips (Ok. Bar No. 22219)*
Noel H. Johnson (Wis. Bar No. 1068004)
THE BOPP LAW FIRM
1 S. Sixth Street
Terre Haute, IN 47807-3510
(812) 232-2434
Attorneys for Appellants
*Application for Admission Pending

Stephen Pidgeon (WSBA #25625)
ATTORNEY AT LAW, P.S.
30002 Colby Avenue, Suite 306
Everett, WA 98201
(360) 805-6677

Corporate Disclosure Statement

Pursuant to Fed. Rule of App. Proc. Rule 26.1, I hereby certify that Appellant John Doe #1 and John Doe #2 are individuals, and therefore do not have parent corporations. Appellant Protect Marriage Washington is a State Political Committee organized pursuant to Washington Revised Code § 42.17.040, is not a registered corporation, and does not have a parent corporation.

/s/ James Bopp, Jr.
James Bopp, Jr.

9th Circuit R. 27-3(a) Certificate

Pursuant to 9th Circuit R. 27-3(a), the undersigned counsel certifies as follows:

1. Attorneys for the Parties

Appellants John Doe #1, John Doe #2, and Protect Marriage Washington

James Bopp, Jr.
jboppjr@aol.com
Joseph E. La Rue
jlarue@bopplaw.com
Kaylan L. Phillips*
kphillips@bopplaw.com
Noel H. Johnson
njohnson@bopplaw.com
THE BOPP LAW FIRM
1 South Sixth Street
Terre Haute, Indiana 47807-3510
Telephone: (812) 232-2434
Facsimile: (812) 235-3685
*Application for Admission Pending

Stephen Pidgeon
ATTORNEY AT LAW, P.S.
30002 Colby Avenue, Suite 306
Everett, Washington 98201
Telephone: (360) 805-6677
Facsimile: (360) 812-5371

Respondent Sam Reed and Brenda Galarza

Anne E. Egeler
annee1@atg.wa.gov
Jay Geck
jayg@atg.wa.gov

William G. Clark
billc2@atg.wa.gov
Office of the Attorney General of Washington
P.O. Box 40100
Olympia, WA 98504-0100
Telephone: (360) 753-7085
Facsimile: (360) 664-2963

Intervenor Washington Coalition for Open Government

Steven J. Dixson
sjd@wkdlaw.com
Duane M. Swinton
dms@wkdlaw.com
Leslie R. Weatherhead
lwlibertas@aol.com
Witherspoon, Kelley, Davenport & Toole
422 Riverside, Suite 1100
Spokane, WA 99201
Telephone: (509) 624-5265
Facsimile: (509) 458-2728

Intervenor Washington Families Standing Together

Kevin J. Hamilton
khamilton@perkinscoie.com
Ryan McBrayer
rmcbrayer@perkinscoie.com
William B. Stafford
wstafford@perkinscoie.com
Rhonda L. Barnes
rbarnes@perkinscoie.com
Perkins Coie Barnes & Bain
1201 3rd Ave, Suite 4800
Seattle, WA 98101-3099
Telephone: (206) 359-8000
Facsimile: (206) 359-9000

2. Nature of the Emergency

Appellants John Doe #1, John Doe #2, and Protect Marriage Washington (collectively, "PMW") seek an injunction preventing Appellee Secretary of State of Washington ("State") from releasing Referendum 71 ("R-71") petitions pending the appeal of the district court's order. PMW also seek an injunction preventing the district court from further disclosing the identities of the PMW's John Does and witnesses.

In this case, PMW seek an exposure exemption from Washington's public records act due to "'a reasonable probability that the compelled disclosure of personal information will subject them to threats, harassment, or reprisals from either Government officials or private parties.'" *Doe v. Reed*, 130 S. Ct. 2811, 2821 (2010) (internal brackets omitted) (*quoting Buckley v. Valeo*, 424 U.S. 1, 74 (1976)); *see also Citizens United v. FEC*, 130 S. Ct. 876, 915 (2010); *McConnell v. FEC*, 540 U.S. 93, 198 (2003). On October 17, 2011, the district court granted summary judgment in favor of the State and denied PMW's motion for summary judgment. In so doing, this Court lifted the injunction preventing disclosure of R-71 petitions and disclosed the names of the John Does and PMW's witnesses *sua sponte*, the identity of which had previously been protected and either redacted or kept under seal.

3. Notification of Counsel

On October 20, 2011, Counsel Kaylan L. Phillips had a telephone conversation with Anne Egeler, representing the State Appellees. Ms. Phillips informed Ms. Egeler that this motion would be filed today. Ms. Phillips sent an electronic mail message to all Counsel representing State Appellees listed above stating that this motion would be filed today.

Ms. Phillips also sent an electronic mail message to Counsel representing Intervenors listed above stating that this motion would be filed today. Once filed, a copy of this motion will be served on all listed attorneys.

Proceedings in the District Court

On October 17, 2011, shortly after the district court's Order was released, PMW filed a motion seeking an injunction pending appeal in the district court. However, it is impractical to wait for relief in the district court for two reasons. First, under the local rules in the Western District of Washington, PMW's motion will not be heard until November 4th. As the State has already begun releasing the petitions, PMW simply cannot afford to wait that long. Second, as the district court allowed the petitions to be released just hours before PMW filed their motion, it is highly unlikely that the district court will grant PMW's motion. It is futile for PMW to wait for the district court to rule on that motion. In the interest

of justice, this Court should retain this motion.

I. Motion for Injunction Pending Appeal

PMW respectfully request that the State be enjoined from disclosing the R-71 petition pending PMW's appeal of the Order of the United States District Court for the Western District of Washington, No. C09-5456BHS, Granting Summary Judgment in Favor of Defendants and Denying Plaintiffs' Motion for Summary Judgment (W.D. Wash. Oct. 18, 2011) (hereinafter "Order") (attached as Exhibit 1). See FED. R. APP. P. 8.a.1.C. PMW also request that the district court be enjoined from further disclosing the names of John Does and PMW's witnesses that are listed in the Order.

II. Statement of the Case

Believing that the public exposure of their identities as R-71 petition signers would unconstitutionally abridge their First Amendment rights, PMW filed a two-count complaint in the Western District of Washington on July 28, 2009, seeking to enjoin the State from publicizing the names and addresses of R-71 petition signers. On the same date, PMW also filed motions for a temporary restraining order and a preliminary injunction. On July 29, 2009, the district court granted PMW's motion for a temporary restraining order. On September 10, 2009, the district court preliminarily enjoined the State from releasing copies of the R-71

petition. *Doe v. Reed*, 661 F. Supp. 2d 1194, 1205 (W.D. Wash. 2009). Because the court was able to dispose of the case under Count I of the complaint, the court did not reach Count II. *Id.*

On October 22, 2009, this Court reversed the district court's judgment, holding that the PRA was likely constitutional as applied to referendum petitions in general. *Doe v. Reed*, 586 F.3d 671, 680–81 (9th Cir. 2009).

On June 24, 2010, the U.S. Supreme Court rejected PMW's facial challenge and held that the PRA was constitutional as applied to "referendum petitions in general." *Doe v. Reed*, 130 S. Ct. 2811, 2821 (2010).

PMW then sought summary judgment on its claim that the PRA is unconstitutional as applied to R-71 petition signers. The State and two Intervenors filed cross motions for summary judgment. On October 17, 2011, the district court granted summary judgment in favor of the State and Intervenors and denied PMW's motion for summary judgment. Order at 34. In so doing, this Court lifted the injunction preventing disclosure of R-71 petitions and disclosed the names of the PMW's John Does and witnesses, the identity of which had previously been protected and either redacted or kept under seal.

III. Argument

The standard for an injunction pending appeal is the same as the standard for a

preliminary injunction. *See Natural Res. Def. Council, Inc. v. Winter*, 502 F.3d 859 (9th Cir. 2007). The 9th Circuit, in discussing the stay of a judgment pending appeal, articulated the standard:

> The factors regulating issuance of a stay [include]: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) *whether the applicant will be irreparably injured* absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) *where the public interest lies.*
>
> *Hilton* emphasizes that even "failing" a strong likelihood of success on the merits, the party seeking a stay may be entitled to prevail if it can demonstrate a "substantial case on the merits" and the second and fourth factors militate in its favor.

Natural Res. Def. Council, Inc. v. Winter, 502 F.3d 859, 863 (9th Cir. 2007) (internal footnotes and citations omitted). PMW can show that they are highly likely to succeed on the merits of their appeal and that they will suffer irreparable injury if an injunction is not issued. The State will not endure any irreparable injury if an injunction is granted. Finally, an injunction is in the public interest. Accordingly, the State should be enjoined from releasing the R-71 petition pending this appeal.

A. PMW Are Likely to Succeed on the Merits.

Regarding the first factor, PMW are likely to succeed on the merits of their claim. This Court reviews a district court's grant or denial of a summary judgment motion *de novo*. *See Bias v. Moynihan*, 508 F.3d 1212, 1218 (9th Cir. 2007). The

Court of Appeals applies the same standard used by the trial court under Rule 56 of the Federal Rules of Civil Procedure. *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1221 (9th Cir. 1999). The Court of Appeals determines, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id*.

The relevant substantive law is clear. The First Amendment requires an exception for groups that show "'a reasonable probability that the compelled disclosure of personal information will subject them to threats, harassment, or reprisals from either Government officials or private parties.'" *Doe v. Reed*, 130 S. Ct. at 2821 (internal brackets omitted) (*quoting Buckley*, 424 U.S. at 74); *see also Citizens United v. FEC*, 130 S. Ct. 876, 915 (2010); *McConnell v. FEC*, 540 U.S. 93, 198 (2003). PMW are likely to succeed on their claim that Washington's Public Record Act is unconstitutional as applied to R-71 petition signers because PMW have shown that there is a reasonable probability of threats, harassments, and reprisals. PMW submitted substantial evidence showing that a reasonable person would conclude that if he speaks up about traditional marriage in Washington, he risks facing a reasonable probability of threats, harassment, or

reprisals and, therefore, his speech is chilled. Regarding the evidence presented, the district court found that:

> While Plaintiffs have not shown serious and widespread threats, harassment, or reprisals against the signers of R-71, or even that such activity would be reasonably likely to occur upon the publication of their names and contact information, *they have developed substantial evidence that the public advocacy of traditional marriage* as the exclusive definition of marriage, or the expansion of rights for same sex partners, *has engendered hostility in this state, and risen to violence elsewhere*, against some who have engaged in that advocacy.

Order at 33 (emphasis added).

Yet, the district court denied the exemption, even though it acknowledged that PMW's produced "substantial evidence" of threats, harassment, and reprisals towards those who advocate for traditional marriage. In so doing, the district court required PMW to prove that the *signers* of the R-71 petition were *themselves* subject to harassment. Of course, this is to require an impossibility since, prior to the Order, the petitions had never been released to the public, so that the public did not know who to target for harassment. However, the district court did find that the PMW have proven that "public advocacy of traditional marriage as the exclusive definition of marriage, or the expansion of rights for same sex partners, has engendered hostility in this state, and risen to violence elsewhere, against some who have engaged in that advocacy." *Id*. Under the law, this is all that one has to prove, since making public the signers of R-71 would disclose the identity

of people who advocate traditional marriage to the public for harassment. Under the standard articulated by the Supreme Court, PMW should qualify for and should receive the requested exemption.

B. PMW Will Be Irreparably Injured Absent an Injunction.

The second factor requires PMW to demonstrate that they will suffer irreparable harm absent an injunction. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). PMW will be irreparably harmed if the State is not enjoined from releasing the petitions pending appeal. Not enjoining the State from releasing the names of the petition signers will forever deprive PMW of their First Amendment rights, which constitutes clear irreparable injury. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Brown v. Cal. Dep't of Transp.*, 32 F.3d 1217, 1226 (9th Cir. 2003) (noting that irreparable injury may be presumed when a plaintiff states a colorable First Amendment claim); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) (same). If PMW were to prevail on appeal, there would be no way to undo the catastrophic damage that would be caused by allowing the State to continue to release the names.

Unfortunately, the State began releasing the names mere hours after the Order was issued. *See* Press Release, Washington Secretary of State's Office (Oct. 17,

2011).[1] However, an injunction is necessary to stop the State from continuing to release the petitions, thereby causing further irreparable injury.

C. An Injunction Pending Appeal Will Not Injure the Other Parties.

The third factor requires the Court to address the degree of harm that other parties would suffer if an injunction is granted. *Hilton*, 481 U.S. at 776. Enjoining the State pending the appeal of this case will not injure the other parties, let alone *substantially* injure them. However, as is explained above, PMW face substantial irreparable injury absent an injunction pending appeal.

D. An Injunction Furthers the Public Interest.

The final factor requires the Court to examine whether an injunction is in the public interest. *Hilton*, 481 U.S. at 776. PMW's constitutional rights are at stake in this case and preserving those rights necessarily is in the public interest. *See Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir.1999) and *Sammartano v. First Judicial Dist. Court, in and for County of Carson City*, 303 F.3d 959, 973 (9th Cir. 2002). Thus, this Court should issue an injunction pending appeal.

[1] This press release is available at http://www.sos.wa.gov/office/osos_news.aspx?i=GnikqytYBtRKC0SnqxGCJw%3d%3d.

III. The Names of the John Doe Plaintiffs and of Plaintiffs' Witnesses Should Be Redacted Pending Appeal.

Along with enjoining the State from continuing to release the petitions, PMW seek relief from the district court continuing to disclose the names of PMW's John Does and witnesses in its Order. As explained above regarding the irreparable harm of the release of the names of the signers, if PMW succeeds in their appeal of the district court's order, they will be irreparably harmed by the listing of these individuals in the public document. Therefore, PMW seek an injunction sealing the unredacted Order pending the appeal of the case.

Conclusion

PMW respectfully request that this Court enjoin the State from continuing to disclose the R-71 petitions and enjoin the disclosure of PMW's John Does and witnesses in the unredacted order.

Respectfully submitted this 20th day of October, 2011.

s/ James Bopp, Jr.

James Bopp, Jr. (Ind. Bar No. 2838-84)
Joseph E. La Rue (Ohio Bar No. 80643)
Kaylan L. Phillips (Ok. Bar No. 22219)*
Noel H. Johnson (Wis. Bar No. 1068004)
THE BOPP LAW FIRM
1 S. Sixth Street
Terre Haute, IN 47807-3510
(812) 232-2434
Attorneys for Appellants
*Application for Admission Pending

Stephen Pidgeon (WSBA #25625)
ATTORNEY AT LAW, P.S.
30002 Colby Avenue, Suite 306
Everett, WA 98201
(360) 805-6677

Certificate of Service

I, James Bopp, Jr., am over the age of eighteen years and not a party to the above-captioned action. My business address is 1 South Sixth Street; Terre Haute, Indiana 47807-3510.

On October 20, 2011, the foregoing document described as Appellants' Emergency Motion for Injunction Pending Appeal was filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to:

Anne E. Egeler
annee1@atg.wa.gov
Jay Geck
jayg@atg.wa.gov
William G. Clark
billc2@atg.wa.gov
Office of the Attorney General of Washington
Counsel for Appellees Sam Reed and Brenda Galarza

And, pursuant to Fed. R. App. P. 25(c)(1)(B) & 25(c)(1)(B)(3), I served the foregoing documents by placing a true and correct copy of the document in sealed Federal Express envelope, priority overnight, at Terre Haute, Indiana, addressed to the following non-CM/ECF participants:

Steven J. Dixson
sjd@wkdlaw.com
Duane M. Swinton
dms@wkdlaw.com
Leslie R. Weatherhead
lwlibertas@aol.com
Witherspoon, Kelley, Davenport & Toole
422 Riverside, Suite 1100
Spokane, WA 99201
Telephone: (509) 624-5265
Counsel for Intervenor Washington Coalition for Open Government

Kevin J. Hamilton
khamilton@perkinscoie.com
Ryan McBrayer
rmcbrayer@perkinscoie.com
William B. Stafford
wstafford@perkinscoie.com
Rhonda L. Barnes
rbarnes@perkinscoie.com
Perkins Coie Barnes & Bain
1201 3rd Ave, Suite 4800
Seattle, WA 98101-3099
Telephone: (206) 359-8000
Counsel for Intervenor Washington Families Standing Together

And as a courtesy, I provided an e-mail copy of the aforementioned document to counsel at the e-mail addresses set forth above, on Thursday, October 20, 2011.

I declare under the penalty of perjury under the laws of the State of Indiana that the above is true and correct. Executed this 20th day of October, 2011.

/s/ James Bopp, Jr.
James Bopp, Jr.
Counsel for Plaintiffs/Appellees