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' Reply to Appellees' Opposition to Emergency Motion for Injunction Pending Appeal

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Appellants John Doe #1, John Doe #2, and Protect Marriage Washington (collectively, "PMW") herein respond to State Appellants (collectively, "State") and Intervenors Washington Coalition for Open Government (WCOG) and Washington Families Standing Together (collectively, "Intervenors") Consolidated Response to PMW's Emergency Motion for Injunction Pending Appeal. The State and Intervenors argue that PMW's Motion should be denied for one of three reasons. First, they argue that the controversy is moot. Second, they claim that the Motion is procedurally deficient under the Federal Rules and the Rules of this Circuit. Third, they argue that the PMW cannot meet the necessary factors for an injunction pending appeal. As will be shown below, the controversy is not moot, the motion is properly before this Court, and PMW can meet the requirements for an injunction pending appeal.

I. The Controversy Is Not Moot Because the State Is Actively Releasing the Petitions in Question.

The State and Intervenors claim this case is moot and "[t]here is no order this Court can make that would afford PMW the relief it seeks." Response at 7. That is not the case. Here, PMW seek an injunction preventing the State from continuing to release the petitions pending the appeal of the denial of their motion for summary judgment. The purpose of this Motion is to prevent the release of the petitions pending the appeal of the very question of whether the release of the petitions is constitutional.

PMW is suffering immediate harm.[1] There is no indication that individuals, perhaps even those seeking to do the most harm, have already obtained the petitions from the Secretary. Indeed, those individuals may very well seek the petitions in the next few weeks. And if PMW prevails in their claim for an exemption from the State of Washington's public records act, they will not be able to recover the harm caused by the State's release of the petitions during the pendency of the appeal.

II. This Motion Is Properly Before This Court.

It is true that "ordinarily," a party must first seek an injunction pending appeal in the district court. Federal Rule of Appellate Procedure 8(a)(1). However, a party is not required to first go to the district court when doing so is "impracticable." Federal Rule of Appellate Procedure 8(a)(2)(A)(I). Here, PMW did first seek an injunction before the district court as soon as possible after the Order was issued.[2] However, it became impracticable to wait for a decision from the district court. The State argues, without citing any case law, that it would have been practical for PMW to seek relief in the district court first. Response at 9. The State argues that PMW

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[1] PMW notes that the State has voluntarily stopped releasing the petitions pending the resolution of this appeal. That does not change the immediacy of PMW's irreparable harm because the State could voluntarily resume at any moment.

[2] The State and Intervenors claim that PMW did not "timely" file their motion in the district court. However, the motion was filed mere hours after the decision was issued, even before the Judgment was released.

should be precluded from relief in this Court because it did not, among other things, move in the district court before the decision was released to stay the decision pending appeal. *Id*.[3]

This is the type of case contemplated by Federal Rule of Appellate Procedure 8(a)(2)(A)(I). Courts have found that:

> When the district court's order demonstrates commitment to a particular resolution, application for a stay from that same district court may be futile and hence impracticable. *See McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir.1996); *see also, e.g., Walker v. Lockhart*, 678 F.2d 68, 70 (8th Cir.1982) (district court's finding, in inmate civil rights action, that prisoner would be "safe" in Arkansas prison system obviated need for requesting stay of transfer order from same district court).

Chem. Weapons Working Group (CWWG) v. Dep't of the Army, 101 F.3d 1360, 1362 (10th Cir. 1996). Here, waiting for the district court to rule on PMW's motion would be futile and this Court should retain this Motion.[4]

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[3] The State also argues that PMW did not properly comply with Advisory Note 5 to Circuit Rule 27-1. Response at 11, n. 6. However, the State ignores the first part of the note. In its entirety, the note for *general* motion practice states: "*Unless precluded by extreme time urgency*, counsel are to make every attempt to contact opposing counsel before filing any motion and to either inform the court of the position of opposing counsel or provide an explanation regarding the efforts made to obtain that position." *Id* (emphasis added). PMW was precluded by extreme time urgency from obtaining the express position of opposing counsel for the State and Intervenors. However, PMW did ensure that opposing counsel was notified of their intention to file the Motion and served the Motion via electronic message to all non-ECF participants immediately upon filing.

[4] Notably, the State did not first seek a stay in the district court when seeking a stay of the district court's granting of a preliminary injunction pending appeal. *See*

The State and Intervenors claim that PMW's Motion is "deficient" because it does not include all "the record evidence that was before the district court when it ruled." Response at 11. While PMW maintains the evidence offered to the district court shows a reasonable probability those who signed the R-71 petition will be subjected to harassment if their identities are made public, the emergency nature of this appeal makes the inclusion of the entirety of PMW's evidence with this motion impractical. Rather than presenting this Court with "1,542 pages of documents," Order at 28, PMW have attached the district court's Order, which provides its conclusion as to what PMW's evidence demonstrates.[5] Order at 33.

Moreover, this Court has before it additional evidence that release of the R-71

Appellants' Emergency Motion, *Doe v. Reed*, No. 09-35818 (9th Cir. Sept. 14, 2009). It found such a measure to be "futile." *Id*. at vi. PMW did not challenge that decision in its opposition to the stay. And, importantly, this Court granted the State's motion. Order, *Doe v. Reed*, No. 09-35818 (9th Cir. Oct. 15, 2009).

[5] The district court limited its consideration of PMW's evidence to that "from among its own number, R-71 petition signers." Order at 18. The district court erred in doing so. The court required the Plaintiffs to prove that the signers of the R-71 petition were themselves subject to harassment. The Supreme Court has "rejected such 'unduly strict requirements of proof' in favor of 'flexibility in the proof of injury.'" *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 101 n.20 (1982) (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)). There is no requirement that "chill and harassment be directly attributable to the specific disclosure from which the exemption is sought." *Buckley*, 424 U.S. at 74.

The court's conclusion as to what the entirety of PMW's evidence establishes is important because it indicates that had the court properly considered all of the evidence before it, PMW would have met its burden of showing a reasonable probability of threats, harassment and reprisals.

petitions will subject the signers to harassment. Immediately following the release of the names, KnowTheNeighbor.org stated they will "publish the 130,000-plus names in an online searchable database." Austin Jenkins, *Gay Rights Group Says It Will Publish R-71 Petition Signers Names*, NPR.org, Oct. 18, 2011 (attached at Exhibit 2). KnowThyNeighbor's Director Tom Lang says "it allows gay people and their allies to search for individual signers they know and confront them." *Id*. This establishes a reasonable probability of threats, harassment, or reprisals exists as to the signers of the R-71 petition.

III. The Court Should Enjoin the State from Continuing to Release the Petitions Pending Appeal.

A. PMW Will Suffer Irreparable Harm Without an Injunction Pending Appeal.

PMW will be irreparably harmed if the State is not enjoined from continuing to release the petitions. The State and Intervenors argue that PMW will not suffer irreparable harm because it is unable a "citation to the record...to support this dramatic claim." Response at 18. PMW points out that, at the time the record was compiled, the petitions had not been released. As described below, the State and Intervenors are requiring PMW to prove an impossibility.

Moreover, PMW will suffer irreparable harm absent an injunction simply because the petitions are being released, as disclosure cannot be undone once it

occurs. *In re von Bulow*, 828 F.2d 94, 98 (2d Cir. 1987). If PMW prevails on their appeal, the petitions cannot be collected and, even if they could, the information cannot be taken back. Therefore, PMW will suffer irreparable harm absent an injunction.

B. The State Will Not Be Harmed By an Injunction Pending Appeal.

Enjoining the State from continuing to release the petitions will not injure the other parties. In fact, today, the State voluntarily stopped the release of the petitions pending a decision on this present motion.[6]

C. PMW Is Likely to Succeed on the Merits of their Claims.

The State and Intervenors argue that "there is no longer a case or controversy." Response at 12. As explained above, an injunction pending appeal is necessary so long as the State has the ability to continue releasing the petitions while this appeal is ongoing. Additionally, an injunction requiring that PMW's Does and witnesses' identities be redacted in the district court's Order remains pressing so long as this appeal is ongoing.

The State and Intervenors next argue that PMW cannot "show a likelihood of success on the merits." Response at 12. They argue that PMW is not eligible for

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[6] Washington Secretary of State Blog, "R-71 petitions sealed as foes appeal," http://blogs.sos.wa.gov/FromOurCorner/index.php/2011/10/r-71-petitions-sealed-as-foes-appeal/ (Halted release even though had "two more pending" requests.) (Attached here as Exhibit 1).

the exemption because they are not a minor party. Response at 13-15. This apparent "threshold" requirement cannot be for two reasons. First, the First Amendment does not allow discrimination among speakers. *Citizens United v. FEC*, 130 S.Ct. 876, 899 (2010). Second, the Supreme Court in *Doe v. Reed*, 130 S. Ct. 2811(2010), recognized that an as applied exemption was possible for PMW without any mention of some "minor party" requirement. Rather, what is required is a strong showing of "threats, harassment, and reprisals," such as PMW made here.[7]

Furthermore, the State and Intervenors claim that PMW's evidence was "insufficient" to proof a reasonable probability of threats, harassments, and reprisals. Response at 17. In so arguing, the State, like the district court, is applying the wrong standard to the case at hand. Here, 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." *Buckley v. Valeo*, 424 U.S. 1, 74 (1976). PMW must not be required to prove that the *signers* of the R-71 petition were *themselves* subject to harassment as this would have been to require an impossibility since, prior to the district court's

[7] The State and Intervenors' arguments about Washington's police being able to control the harassment, Response at 17-18, fail for the same reasons.

Order, the petitions had never been released to the public, so that the public did not know who to target for harassment.

D. An Injunction Pending Appeal Is in the Public Interest.

The State and Intervenors claim that the public interest lies in maintaining an open government. While PMW does not dispute the importance of an open government, the public interest in securing and maintaining important constitutional rights is paramount. *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).

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 21st day of October, 2011.

s/ Noel Johnson

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Certificate of Service

I, Noel Johnson, 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 21, 2011, the foregoing document described as Appellants' Reply to Appellees' Response to 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:

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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:

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And as a courtesy, a copy of the aforementioned document will be sent to counsel at the e-mail addresses set forth above, on Friday, October 21, 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 21st day of October, 2011.

/s/ Noel Johnson
Noel Johnson
Counsel for Appellants

EXHIBIT 1

From Our Corner

R-71 petitions sealed as foes appeal

by David Ammons | October 21st, 2011

Protect Marriage Washington, which is appealing the Doe v. Reed ruling that upheld release of Referendum 71 petitions, has filed an emergency motion with the 9th Circuit Court of Appeals to halt further release of the petitions while the appeal proceeds.

The State Archives in the Office of Secretary of State already has released more than 30 sets of the 137,000 signatures, and has two more pending. But on advice of counsel, further releases are suspended until the court considers the emergency motion on Monday. State Attorney General Rob McKenna's office is preparing a brief today and James Bopp Jr. and attorneys for Protect Marriage Washington have until the end of the day to submit a rebuttal.

Secretary of State Sam Reed said the state will ask the appeals bench to permit continued release of the records, noting that a number of CDs are already in public circulation following the state's victory in U.S. District Court on Monday.

Protect Marriage Washington, part of a national movement opposed to same-sex marriage, sponsored R-71 in 2009 to force a public vote on a newly approved "everything but marriage" law that expanded domestic partner benefits for gay couples and heterosexual couples where one partner is at least 62. Voters upheld the law 53 percent to 47 percent. As of today, there are 9,402 domestic partnerships registered with our office.

After qualifying for the ballot, PMW successfully blocked public release of the petitions, based on contention that signers would be harassed, intimidated or injured. The case went all the way up to the U.S. Supreme Court, which issued an 8-1 decision that release does not violate First Amendment rights. The high court did leave open the possibility of "as-applied" challenges in particular controversial cases where sponsors could try to show that release would likely lead to retaliation against signers. Earlier this week, U.S. District Court Judge Benjamin Settle in Tacoma held that PMW had not made their case, and said release would be permitted.

Washington treats initiative and referendum petitions as releasable under the voter-approved Public Records Act. Secretary Reed and Attorney General McKenna said signing petitions is a public act of citizen legislating, not a private act such as voting. They said voters have a right to know who is attempting to legislate, and to double-check the state Elections Division's review of

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petitions to determine if there are sufficient numbers of valid signatures to get on the statewide ballot.

In a related development, Protect Marriage.com and the National Organization for Marriage have **lost their effort to block** California Proposition 8 donors' names from public view because of alleged harassment. Campaign finance records for Referendum 71 have been online for more than two years, without apparent incident.

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EXHIBIT 2

Gay Rights Group Says It Will Publish R-71 Petition Signers Names

by AUSTIN JENKINS

October 18, 2011 from N3

OLYMPIA, Wash. – Washington voters who signed an anti-domestic partnership petition in 2009 can expect their names to appear on-line within a month. That's the word Tuesday from a Massachusetts-based gay rights group called "Know Thy Neighbor."

Referendum 71 was a failed effort by opponents of gay marriage to repeal Washington's "everything but marriage" domestic partnership law. Now, following a protracted legal battle, a federal judge has ordered the petitions be made public.

"Know Thy Neighbor" plans to publish the 130,000-plus names in an online searchable database. The group has done this before in Arkansas, Florida and Massachusetts.

Director Tom Lang says it allows gay people and their allies to search for individual signers they know and confront them. He gives examples of stories from other states.

"About people who've been in people's weddings parties and they've signed, people in families where the grandmother signed knowing darned well that her grandson was gay," Lang says. "These are the types of conversations that are being had."

Lang denies this is a campaign of intimidation or harassment. But that's exactly what Protect Marriage Washington attorney James Bopp Jr. has argued all along. He's already filed an appeal to the Ninth Circuit Court.

"Well, our plan is to do everything we can do to protect people's right to participate in our democratic process without being subject to death threats and threats of violence and actual violence," Bopp says.

Bopp points to what happened in California around Proposition 8. In court he introduced evidence that opponents of gay marriage were subjected to vitriolic threats, vandalism and other harassment.

Lang counters there's no evidence his online databases have been used to target people maliciously.

On the Web:

Know Thy Neighbor: http://www.knowthyneighbor.org/

Protect Marriage Washington: http://protectmarriagewa.com/

R-71 FAQs from Wash. Secretary of State:

http://wei.secstate.wa.gov/osos/en/initiativesReferenda/Pages/R-71FrequentlyAskedQuestions.aspx

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Derek Williams (DerekWilliams) wrote:
The accusation that homosexual activists will attack heterosexual signatories is beyond absurd. It is we who have been viciously and relentlessly attacked by homophobic heterosexists for centuries. Pervasive attacks have ranged from statutory discrimination, imprisonment and realignment torture, to religious and social disenfranchisement, ostracism, and extreme violence which in a large number of cases has resulted in life-changing injury, even death.

We have far more to fear from the signatories than they ever had, or ever will from us.
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