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

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

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

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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 witnesses and John Does.

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 November 8, 2011, Counsel Kaylan L. Phillips attempted to reach Counsel for State Appellees and Intervenors by telephone and left voice mail messages for Ms. Anne Egeler, Mr. William B. Stafford, and Mr. Leslie Weatherhead, representing State Appellees, Intervenor Washington Families Standing Together, and Intervenor Washington Coalition for Open Government, respectively. In the message, Ms. Phillips informed Counsel that Appellants would file this motion on November 9th, seeking relief prior to the expiration of this Court's temporary injunction. On November 8, 2011, Ms. Phillips sent an electronic mail message to all Counsel listed above stating that this motion would be filed on November 9, 2011. Counsel agreed upon a shortened briefing schedule, and State Appellees agreed not to release any petitions until Thursday, November 17, 2011, in order to give this Court an opportunity to rule on this Motion.

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. On October 20, 2011, PMW filed the first Emergency Motion for Injunction Pending Appeal before this Court. On October 24, 2011, this Court denied PMW's Motion, without prejudice, pursuant to Fed. R. App. P. 8(a) and stated that the Motion may

be renewed after the district court ruled on the pending motion. This Court issued a temporary injunction preventing the State from releasing the petitions that remains in effect until five days after the district court's ruling.

On October 25, 2011, PMW contacted Appellees and Intervenors regarding asking the district court to expedite consideration of its motion to October 28, 2011. Due to scheduling needs, the parties filed an agreed motion to expedite consideration of the motion to November 2, 2011. The district court denied PMW's motion on November 8, 2011. Order Denying Plaintiffs' Motion for Injunction Pending Appeal (W.D. Wash. Nov. 8, 2011) (hereinafter "Injunction Order") (attached as Exhibit 1).

I. Motion for Injunction Pending Appeal

PMW respectfully request that the State and Intervenors be enjoined from disclosing the R-71 petitions 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 2). *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. Immediately after the Order, the State began releasing petitions.[1]

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

[1] Notably, one of the original requestors is Toby Nixon, President of Intervenor Washington Coalition for Open Government.

> 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, this Court should enjoin 1) the State from releasing the R-71 petitions and Intervenors from publicizing the petitions, and 2) enjoin the district court from further disclosing the names of John Does and PMW's witnesses listed in the Order pending this appeal[2]

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

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[2] Below, the State argued that PMW's motion is moot as the court could not grant effective relief. The district court acknowledged "that the effectiveness of any relief now given would be less than that available" before the Order and before the State released some petitions, it found that "some relief could be given" and this issue "remains a live controversy." Injunction Order at 3-4.

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 district court erred in denying PMW an exemption for three broad reasons. First, it erred by determining that PMW needed to show that it is a minor party or a fringe organization. Order at 11-16. In so doing, the district court refers to the "minor party rule in *Buckley* [*v. Valeo*, 424 U.S. 1 (1976)]." Order at 14. However, there is no such minor party requirement. *Buckley* involved claims by "major" and "minor" political parties and the Supreme Court used the phrase "minor party" when referring to those plaintiffs. Fundamentally, there cannot be a "minor party" threshold requirement because the First Amendment does not allow discrimination among speakers. *Citizens United v. FEC*, 130 S.Ct. 876, 899 (2010). Also, relevant to the case at hand, 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 a "minor party" requirement. Rather, what is required is a reasonable probability of "threats, harassment, and reprisals," such as PMW has shown.

Second, the district court erred by determining that PMW's evidence regarding threats, harassment, and reprisals was insufficient. In so doing, the court would

have required PMW to prove that the *signers* of the R-71 petition were *themselves* subject to harassment. 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. 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*, 424 U.S. at 74). 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.[3]

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*, 130 S. Ct. 876, 915 (2010); *McConnell v. FEC*, 540 U.S. 93, 198 (2003).

[3] Along the same lines, the district court erred by considering whether PMW's evidence involved harassment that was criminal in nature and whether the police were able to mitigate any of the harassment.

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.[4] 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,

[4] The district court found that PMW "failed to show a likelihood of success on the merits" for the same reasons as explained in its Order. Injunction Order at 4.

against some who have engaged in that advocacy." *Id*. Under the standard articulated by the Supreme Court, PMW should qualify for and should receive the requested exemption.

Moreover, there is now additional evidence that the release of the R-71 petitions will subject the signers to harassment. Immediately following the Order, 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 3). 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.

Finally, the district court erred by disclosing the names of the John Does and PMW's witnesses sua sponte. This is a violation of PMW's due process rights as they were not given notice or an opportunity to be heard before the district court lifted the protective order that has previously protected that information. U.S. Const. amend. V.

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, and if Intervenors are not enjoined from releasing the information it received from the State, 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).

The district court stated that PMW "failed to show how they would be irreparably harmed by Defendants releasing further R-71 petitions when copies have already been posted on the internet." Injunction Order at 4. However, PMW will be irreparably harmed by the release to even one more requestor and by the Intervenors publicizing the petitions they received from the State. PMW is irreparably harmed by the continued publication of the district court's unredacted

Order. If PMW were to prevail on appeal, there would be no way to undo the damage that would be caused absent the requested injunction pending appeal.

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. Granting the requested injunction pending appeal will not injure the other parties, let alone *substantially* injure them. The State will not be injured by temporarily ceasing to release the petitions pending the appeal of the question of whether the petitions should be released. If, indeed, it is not constitutional to release the petitions, the State will benefit from the fact that it did not continue to release the petitions pending the appeal. 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. The district court found that the "balance of equities tips in favor of denying the injunction where the Court has decided the merits of the case in favor of disclosure." Injunction Order at 5. However, as is explained above, the district court erred in allowing disclosure. Furthermore, PMW's constitutional rights are at stake 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.

Conclusion

PMW respectfully request that this Court enjoin 1) the State from releasing the R-71 petitions and the Intervenors from distributing the petitions and 2) the district court from disclosing PMW's John Does and witnesses in the unredacted order.

Respectfully submitted this 9th day of November, 2011.

s/ James Bopp, Jr.

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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 November 9, 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:

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And as a courtesy, I provided an e-mail copy of the aforementioned document to all counsel at the e-mail addresses listed in the above certificate, on Wednesday, November 9, 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 9th day of November, 2011.

/s/ James Bopp, Jr.
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