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,

Respondents.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

No. C09-5456BHS
The Honorable Benjamin H. Settle
United States District Court Judge

CONSOLIDATED RESPONSE OF DEFENDANTS AND INTERVENORS TO RENEWED MOTION FOR INJUNCTION PENDING APPEAL

ROBERT M. MCKENNA
Attorney General

Anne E. Egeler, WSBA # 20258
Deputy Solicitor General

Kevin Hamilton, WSBA #15648
Perkins Coie LLP
Washington Families Standing Together

Leslie Weatherhead, WSBA #11207
Witherspoon Kelley
Washington Coalition for Open Government

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I. INTRODUCTION

Plaintiffs again come before the Court seeking to prevent events that have already occurred. On October 17, 2011, the district court granted summary judgment to the State defendants and Intervenors, denied the Doe plaintiffs' and Protect Marriage Washington's (collectively PMW) motion for summary judgment, and dissolved the preliminary injunction.[1] The order was posted on numerous websites, and can no longer be made confidential.

After the district court lifted the injunction, Wash. Rev. Code § 42.56.520 mandated that the State release the petitions. Copies were provided to thirty-three organizations and individuals who had requested the public records. PMW moved the district court for an order enjoining further release, and then prematurely filed an identical motion before this Court. The Court denied PMW's motion, but temporarily enjoined further release of the petitions while Plaintiffs pursued the motion below. Since the Court entered its order, private parties who earlier received the petitions began posting them on the internet. Internet links to the petitions have rapidly multiplied. No effective

[1] Dkt. 319, Order Granting Summary Judgment in Favor of Defendants and Intervenors and Denying Plaintiffs' Motion for Summary Judgment, *Doe v. Reed*, No. C09-5456BHS (U.S.D.C. W.D. Wash., Oct. 17, 2011) (Order).

relief can be granted now to conceal the signed petitions. As a result, the relief sought in the pending motion is unattainable and the matter is now moot.

Even if there were a remaining case or controversy, as the district court has now found, PMW cannot establish *any* of the factors necessary to obtain an injunction. PMW cannot show a likelihood of success on the merits. Nor can PMW demonstrate that irreparable injury would occur in the absence of an injunction, given that copies of the petition have already been posted on the internet and given to private individuals and organizations whose activities cannot be reached through the injunction sought. Finally, as the district court found, the balance of equities tips sharply in favor of the important interest of the State and its citizens in open government.

II. STATEMENT OF FACTS

This case concerns Referendum 71 (R-71), a ballot measure that sought a statewide vote to overturn a domestic partnership law. The law that was the subject of R-71 was narrowly affirmed by the voters in November 2009.

PMW commenced this action in July 2009. PMW brought both a facial and as-applied challenge to Washington's Public Records Act, alleging that if the signed petitions were ever released to the public, it would result in threats,

harassment, and reprisals to the petition signers.[2] PMW obtained a preliminary injunction on its facial challenge, the State appealed, and this Court reversed. *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009). The Supreme Court affirmed this Court's decision. *Doe v. Reed*, 130 S. Ct. 2811 (2010).

On remand, the district court considered PMW's as-applied challenge. On October 3, 2011, the district court heard oral argument on cross motions for summary judgment and advised the parties it intended to rule within two weeks. At no time did PMW ask the district court to impose a temporary injunction or stay pending appeal, if it were to grant the State's and Intervenors' motions for summary judgment.

On October 17, 2011, the district court granted summary judgment to the State and Intervenors and dissolved the preliminary injunction. The order identified the individual plaintiffs (who had up to that point proceeded under the "Doe" pseudonym) and PMW's other witnesses. Consistent with the decision on the merits, the order was not sealed. The order is now in the public domain, and many media and other websites, including the Seattle Times and

[2] PMW has from time to time purported to act for all 138,000 signers of the R-71 petition. However, it never sought certification of the petition signers as a class; only the "Doe" plaintiffs sought relief as parties to the litigation, and their identities are now fully available to the public.

Los Angeles Times, have posted it online.[3] Moreover, some of PMW's witnesses publicly identified themselves as witnesses subsequent to issuance of the district court's order.[4]

The R-71 petitions are public records under Washington law. Wash. Rev. Code § 42.56.010(2). Once the preliminary injunction was dissolved, Washington law required the State to respond to disclosure requests for the petitions. Wash. Rev. Code § 42.56.520. Pursuant to long-pending requests and new requests made shortly after entry of summary judgment, the State provided the R-71 petitions to thirty-three organizations and individuals.

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[3] *See, e.g.,* The Seattle Times http://seattletimes.nwsource.com/html/edcetera/2016531125_referendum_signers_names_have.html; The Los Angeles Times http://latimesblogs.latimes.com/nationnow/2011/10/gay-marriage.html; The Tacoma News Tribune http://blog.thenewstribune.com/politics/2011/10/17/u-s-district-court-judge-benjamin-settle-says-protect-marriage-washington-not-entitled-to-disclosure-exemption/; The Bellingham Herald http://www.bellinghamherald.com/2011/10/17/2232340/judge-release-r-71-names-gay-rights.html; http://www.keprtv.com/news/local/132023628.html; The Everett Herald http://heraldnet.com/article/20111017/NEWS01/710179864; The Stranger http://slog.thestranger.com/slog/archives/2011/10/17/judge-orders-names-on-r-71-petitions-to-be-released ; Ballotpedia http://ballotpedia.org/wiki/index.php/Doe_v._Reed; http://thinkprogress.org/lgbt/2011/10/17/346055/washington-anti-gay-group-must-finally-disclose-referendum-71-ballot-signatures/.

[4] http://pamshouseblend.firedoglake.com/2011/10/23/why-is-protect-marriage-washington-filing-an-emergency-motion-for-secrecy-after-theyve-divulged-their-own-identites/.

On October 17, 2011, PMW filed a notice of appeal and a motion in the district court for injunctive relief pending appeal. Three days later, PMW filed an emergency motion in this Court, requesting that 1) the State be enjoined from releasing the petitions pending appeal, and 2) the district court be enjoined from disclosing the identities of the plaintiffs and their witnesses in the court's order. The Court denied the motion for failure to comply with the court rules. Order, *Doe v. Reed*, No. 11-35854 (9th Cir., Oct. 24, 2011). However, a temporary injunction was entered to prevent disclosure of the petitions (but not the identities of the plaintiffs and their witnesses) while the district court considered the duplicative motion filed in the lower court. *Id.*

After briefing on the emergency motion was filed with this Court, the signed petitions were posted on the internet.[5] Links to the signed petitions can now be found on multiple websites, including Wikipedia.[6] The media has

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[5] Scribd http://www.scribd.com/HaxoAnglemark; Torrents.net http://www.torrents.net/torrent/1939006/R71-Names.zip/.

[6] *E.g.* Wikipedia http://en.wikipedia.org/wiki/Washington_Referendum_71_%282009%29 ; Seattle Weekly http://blogs.seattleweekly.com/dailyweekly/2011/10/ref_71_washington_anti-gay_mar.php ; The Stranger http://slog.thestranger.com/slog/archives/2011/10/17/judge-orders-names-on-r-71-petitions-to-be-released ; Publicola http://publicola.com/2011/10/21/anti-gay-rights-group-appeals-r-71-decision-ag-mckenna-defends-release-of-names/ ; Pam's House Blend website

indicated that "Know Thy Neighbor," a gay rights group, plans to publish the signatures in a searchable, online database.[7] Know Thy Neighbor has previously posted petition signatures from Arkansas, Florida, and Massachusetts.[8] The petitions were also received by Brian Murphy, who operates the website "WhoSigned.Org." Mr. Murphy also has indicated that he is creating a searchable database, which will be posted on his website.[9]

After entry of this Court's Order, the district court roundly rejected PMW's motion. The district court recognized that widespread disclosure lessened its ability to grant effective relief. Dkt. #331 at 3-4. It determined that PMW could not establish irreparable injury in the absence of an injunction because the information it sought to shield was already publicly available. *Id.* at 4-5. Nonetheless, the district court elected not to dismiss the motion as moot, and instead resolved it on its merits. *Id.* at 3-4.

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http://pamshouseblend.firedoglake.com/2011/10/23/why-is-protect-marriage-washington-filing-an-emergency-motion-for-secrecy-after-theyve-divulged-their-own-identites/ ; ThinkProgress website http://thinkprogress.org/lgbt/2011/10/21/350353/washington-state-halts-release-of-referendum-71-signatories-nom-asks-supporters-to-pray-over-loss/.

[7] National Public Radio http://www.kuow.org/northwestnews.php?storyID=141486412.

[8] www.KnowThyNeighbor.org.

[9] The Seattle Times http://seattletimes.nwsource.com/html/localnews/2010072420_webref7115m.html;

On the merits, the district court held that PMW did not meet *any* of the factors required for imposition of an injunction. *Id.* at 4-5. It found that PMW failed to show any likelihood of success on the merits. *Id.* at 3. Even if such a likelihood existed, PMW failed to show how further disclosure could cause irreparable harm "when copies of such petitions have already been posted on the internet and given to individuals and organizations whose activity cannot be reached by the injunction." *Id.* at 4. The district court concluded that the balance of equities tips against an injunction when it has ruled in favor of disclosure and the "names and petitions have already been disclosed." *Id.* Finally, the court ruled that disclosure is in the public interest. *Id.*

III. ARGUMENT

A. Disclosure Is A Moot Issue

Since the petitions and summary judgment order at issue are already available to anyone, anywhere in the world with an internet connection, no effective relief can be granted. Article III of the United States Constitution confers jurisdiction to the federal courts only when there is a case or controversy. As the Supreme Court has repeatedly stressed, "it is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment" is under review. *Burke v. Barnes*, 479 U.S. 361,

363 (1987). "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v. Newkirk,* 422 U.S. 395, 401 (1975)).

The issue presented to the district court was whether disclosure of the R-71 petitions should be permitted. *Doe*, 130 S. Ct. at 2821 (2010). When the injunction was lifted, the petitions were released, and the controversy ended. The order and the petitions were widely broadcast on the internet, and each day more links to the documents appear. There is no relief possible that would remove the documents from the internet and restore confidentiality.

This Court has consistently recognized that when it cannot grant effective relief, a live controversy no longer exists. In *Feldman v. Bomar*, 518 F.3d 637 (9th Cir. 2008), the Court considered a challenge to eradication of feral pigs in a national park. Because the pigs were killed during the pendency of the case, the case no longer presented a live controversy. *Id.* at 644. The Court explained that "'[t]he basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted.'" *Id.* at 642 (quoting *NW. Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988)). Although the appellants argued that it was unclear whether *every* pig

had been killed, the Court ruled that they no longer faced a remediable harm, and the Court therefore lacked jurisdiction. *Id.* 642-43; *see also In Def. of Animals v. U.S. Dep't of the Interior*, 648 F.3d 1012 (9th Cir. 2011) (challenge to wild horse roundup moot after the initial stage of the roundup); *Headwaters, Inc. v. Bureau of Land Mgmt*, 893 F.2d 1012 (9th Cir. 1990) (challenge to timber sale moot after the timber was cut and some logs were removed).

When secrecy is at issue, disclosure renders the case moot. *C&C Prods., Inc. v. Messick*, 700 F.2d 635, 636 (11th Cir. 1983). In *Messick*, the Eleventh Circuit ruled that a request for modification of a protective order to prevent access to discovery materials was rendered moot by disclosure. After noting that a third party had obtained the confidential documents, the Eleventh Circuit stated that "no order from this court can undo that situation." *Id.* at 637. This case presents the same issue. The Court cannot undo disclosure that has already occurred, or the internet sharing of that information by private parties.

The only way a disclosure claim can remain viable after disclosure is if the court is somehow still able to provide relief. For example, the Fifth Circuit held that a case involving disclosure of documents is not moot if the court can protect against *use* of the documents, such as admission at trial. *In re Avantel*, 343 F.3d 311, 324 (2003). In this case, PMW has not requested effective

relief. PMW worries that KnowThyNeighbor.org has announced that it is posting a searchable database on its website, which will allow people to search for individual signers. Pl's Br. at 12. But the injunction they seek will not address their concern. The documents are now in the public domain. The relief requested will not address the public's ability to disseminate the information and exercise their right to speak about the names on the petitions.

B. None Of The Factors Required For An Injunction Exists

Even if the case were not moot, as the district court found, PMW cannot meet any of the requirements for an injunction. The standard for granting a stay pending appeal is the same as the standard for determining whether to grant a preliminary injunction. *Golden Gate Rest. Ass'n v. City and Cnty. of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008). PMW has the burden to show: 1) a likelihood of success on the merits; 2) that irreparable harm is likely to be suffered in the absence of preliminary relief; 3) that the balance of equities tips in its favor; and, 4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

1. PMW is unlikely to succeed on the merits of the case.

As stated above, there is no longer a case or controversy. Since the case is moot, PMW has no possibility of success on the merits. Even if the case

were not moot, PMW could not show a likelihood of success. PMW has the ultimate burden of establishing "a reasonable probability" that disclosure of the signed petitions will subject petition signers to threats, harassment, or reprisals. *Doe v. Reed*, 130 S. Ct. at 2820 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)). Although the petitions were signed in public, and PMW had two years to gather evidence, no such evidence was presented to the district court. Order at 30. The district court properly dismissed PMW's claim, holding that it had "failed to supply sufficient, competent evidence" and that the facts "do not rise to the level of demonstrating that a reasonable probability of threats, harassment, or reprisals exists as to the signers of R-71, now nearly two years after R-71 was submitted to the voters in Washington State." *Id.* at 30, 33.

The district court did not rest its decision on one line of analysis. Rather, it recognized that Supreme Court case law provides multiple, alternative bases under which PMW's claim fails. The Supreme Court has suppressed public disclosure only in cases involving a persecuted minor party that has demonstrated that disclosure would result in significant threats, harassment, and reprisals that would seriously undermine its members' ability to associate for First Amendment purposes. In each case, the minor party established a likelihood that the state would be unwilling to address the harm.

The seminal case is *NAACP v. Alabama*, 357 U.S. 449 (1958). The NAACP was challenging Alabama's official Jim Crow policies in the 1950s. The Supreme Court held that the NAACP "made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 462. With overwhelming evidence of private and state harassment of members of this minor party, the Supreme Court held that compelled disclosure was directly related to the right of NAACP members to associate freely. *Id.* at 466.

Similarly, significant evidence of harassment of a minor party by the government and the public was addressed in *Brown v. Socialist Workers*, 459 U.S. 87 (1982). The Ohio Socialist Workers Party (SWP) was a minor group of just sixty members, whose unpopular goal was "the abolition of capitalism and establishment of socialism." *Id.* at 88. Party members suffered destruction of their property, police harassment of a party candidate, and the firing of shots at the party's office. *Id*. at 99. The FBI planted informants in the tiny group. *Id*. at 100. Numerous party members were fired as a result of their membership. *Id*. Given the party's minor status, and overwhelming

evidence of government and private harassment, the Supreme Court held that application of state disclosure laws would be unconstitutional. *Id.* at 102.

As the district court noted, "'*Brown* and its progeny each involved groups seeking to further ideas historically and pervasively rejected and vilified by both this country's government and its citizens.'" Order at 13 (quoting *ProtectMarriage.com v. Bowen,* 599 F. Supp. 2d 1197, 1215 (E.D. Cal. 2009)). Petition signers merely agreed that the measure should be placed on the ballot. They did not join PMW or any other organization. Even if PMW could claim affiliation with the signers, their claim would fail. PMW is a well-funded, established political organization, not an ostracized minor party. PMW successfully gathered over 130,000 signatures on the R-71 petitions. *Doe,* 130 S. Ct. at 2816. They obtained 838,842 votes in the election, and lost by a fairly narrow margin of 53% to 47%. Losing a close election does not make PMW a minor party comparable to the NAACP or Socialist Workers Party. As the district court held, PMW has failed "in all material respects" to establish minor party status. Order at 16.

The district court did not end its analysis there. It held that even if PMW were a minor party, its anecdotal speculation of possible harm "does not rise to the level or amount of uncontroverted evidence" provided in *NAACP* or *Brown*.

Order at 29. Although PMW had over two years to gather evidence, it had no evidence that a single petition signer experienced threats, harassment, or reprisals. PMW claims acquiring such evidence would be "an impossibility" prior to disclosure of the R-71 petitions en masse. Pl's Br. at 10. In reality, signatures were collected in highly public locations, such as Wal-Mart and supermarket parking lots. Order at 18-20, 30. Countless people across the state had the opportunity to observe others signing R-71 petitions. Recognizing this, PMW "solicited R-71 signers to share any experiences they had with harassment." Order at 28. Yet PMW "has not supplied any evidence to the Court [of harassment] nor informed it that such evidence exists." *Id.* at 29.

PMW's inability to succeed on appeal is also supported by the lack of any harassment of PMW's contributors. For over two years, the State has publicly disclosed the names and addresses of 857 of PMW's campaign contributors. Order at 30. Although PMW had ample time to contact the donors, it offered no evidence that any of them were harassed or threatened. Order at 30. The Supreme Court rejected a similar as-applied challenge in *Citizens United v. Fed. Elec. Comm'n*, 130 U.S. 876 (2010). Order at 30. Like PMW, Citizens United had disclosed its donors for years, but was unable to

identify any instance of harassment. Order at 30-31 (citing *Citizens United*, 130 S. Ct. at 916).

To the extent PMW offered any evidence, it pertained not to petition signers or similarly situated donors, but rather to the spokespersons who eagerly sought to publicize their support of the Reject R-71 campaign through media appearances, public rallies, and demonstrations. Evidence of harassment unrelated to the petition signers is not relevant to a claim alleging that disclosure will subject the signers to harassment. Despite this, the district court carefully considered the testimony of each witness. As the order reflects, even if evidence regarding these highly public individuals were relevant, the scant evidence offered was insufficient to show a reasonable probability of threats, harassment, and reprisals two years after the election concluded.

As an additional alternative basis for its ruling, the district court also properly held that PMW's claim failed because PMW could not establish a reasonable probability of serious and widespread harassment the State is unwilling or unable to control through its laws addressing violent or hostile acts. PMW baldly asserts that the district court erred by considering this factor. Pl's Br. at 10, fn. 3. PMW neglects to mention that in *Doe,* five justices indicated that the First Amendment will not be used to prohibit

distribution of information to the public unless there is a showing that the harassment will not be mitigated by law enforcement measures. *Doe*, 130 S. Ct. at 2829 (Sotomayor, J., concurring, joined by Stevens, J. and Ginsburg, J.), 2831 (Stevens, J., concurring, joined by Breyer, J.), and 2832, 2837 (Scalia, J., concurring). The district court found that the minimal testimony supplied by PMW "stated either that police efforts to mitigate reported incidents was sufficient or unnecessary." Order at 32. This stands in sharp contrast to the pervasive evidence of government harassment presented in *NAACP* and *Brown*.

Finally, PMW's new contention that the district court violated PMW's due process rights when its summary judgment order discussed the evidence Plaintiffs presented in support of their motion (i.e. the testimony of their witnesses) is absurd. Pl's Br. at 12. This argument, which was not raised in the district court, is unsupported by any legal citation. This is because there is no constitutional right to an additional hearing prior to issuance of the order. If PMW wanted to prevent disclosure in the event the district court ruled against it on the merits of the cross-motions for summary judgment, it had two avenues available to it. First, in response to the State and Intervenors' cross motions for summary judgment, or during the oral argument, PMW could have asked that the district court impose an injunction pending appeal if it ruled against PMW.

Plaintiffs chose not to do so. Second, PMW could have had a motion ready to file the moment the order was issued. At the oral argument, Judge Settle indicated the date by which he expected to rule. But PMW waited nearly four hours before filing a motion for injunction, and did not ask the district court for an expedited ruling. By the time the motion was filed, the State had disclosed the petitions as required by state law, and the district court's summary judgment order was electronically available to the media and the public. PMW may regret its legal strategy, but this does not excuse an unsupported argument that the district court violated its due process rights.

PMW has no chance of success on the merits. This alone is sufficient basis for denial of the requested stay.

2. PMW cannot show it will suffer irreparable harm.

PMW claims that failure to grant the injunction it seeks will "forever deprive PMW of their First Amendment rights." Pl's Br. at 13. To the extent that disclosure creates any risk to PMW, it is too late to contain it now. The order and the petitions have been widely available for weeks. An injunction cannot prevent the harm PMW speculates might occur some time in the future. The speculative nature of PMW's motion is powerfully illustrated by the evidence PMW has *not* brought to the Court. Although it has now been nearly a

month since the district court issued its summary judgment order and the petitions were released, PMW presents no evidence in its motion that any of its witnesses or a single R-71 petition signer has suffered any harm as a result of disclosure.

Even if the information were not already publicly available, PMW has not shown that it will be irreparably injured absent an injunction. As the district court's summary judgment order states, PMW's claim is "based on a few experiences of what [it] believes constitute harassment or threats, the majority of which are only connected to R-71 by speculation." Order at 32. PMW's sweeping, unsupported speculation is insufficient. The Supreme Court has cautioned that the "'possibility' standard is too lenient." *Winter*, 129 S. Ct. at 375. The *Winter* standard "requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Id.* (emphasis added).

3. An injunction is directly contrary to the public interest in open government.

As the Supreme Court emphasized in *Doe v. Reed*, the State's interest in disclosure is "undoubtedly important." *Doe*, 130 S. Ct. at 2819. The State has a particularly strong interest in disclosure as a means of allowing citizens to root out fraud, which "'drives honest citizens out of the democratic process and

breeds distrust of our government.'" *Id.* at 2819 (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)).

Washington's concern with the integrity of the electoral process did not end with the election. The integrity of the state's election system is a matter of continuous concern. *E.g., Porter v. Bowen*, 496 F.3d 1009, 1013 (9th Cir. 2007) (review of legality of State's actions after election not moot, because State could act similarly in future elections). Since PMW is still registered as a PAC in Washington, investigating possible fraud and the State's response to fraud continues to be a matter of public interest. The purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions." *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 884 P.2d 592, 597 (Wash. 1994).

4. The balance of equities tips in favor of open government.

The balance of equities clearly tips in favor of the State and public interest in open government. In contrast to PMW's dwindling interest in secrecy, the Supreme Court has recognized that the State has a "particularly strong" interest in preserving the integrity of the electoral system by promoting systemic transparency and accountability. *Doe*, 130 S. Ct. at 2819. "A State

indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) (citing *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973)). The public continues to have a significant interest in determining whether its public servants properly carried out the law.

IV. CONCLUSION

PMW's motion for injunction should be denied.

RESPECTFULLY SUBMITTED this 14th day of November, 2011.

ROBERT M. MCKENNA
Attorney General

s/
Anne E. Egeler, WSBA # 20258
Deputy Solicitor General

s/
Kevin Hamilton, WSBA #15648
Perkins Coie LLP
Washington Families Standing Together

s/
Leslie Weatherhead, WSBA #11207
Witherspoon Kelley
Washington Coalition for Open Government