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' Consolidated Response to Emergency Motion for Injunction Pending Appeal

James Bopp, Jr. (Ind. Bar No. 2838-84)
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

Appellants John Doe #1, John Doe #2, and Protect Marriage Washington (collectively, "PMW") herein respond to State Appellees (collectively, "State") and Intervenors Washington Coalition for Open Government and Washington Families Standing Together (collectively, "Intervenors") Consolidated Response to PMW's Emergency Motion for Injunction Pending Appeal ("Response").

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"). *See* Fed. R. App. P. 8(a)(1)(C). PMW also request that the district court be enjoined from further disclosing the names of PMW's John Does and witnesses that are listed in the Order.

The State and Intervenors argue that PMW's Motion should be denied for two reasons. First, they argue that the controversy is moot. Second, 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 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 mischaracterize the district court's determination as to

mootness. They claim that "the district court elected not to dismiss the motion as moot, and instead resolved it on its merits." Response at 6. However, whether a case is moot is a jurisdictional question that the district court cannot simply choose to ignore. *See Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992). If this case was moot, the district court would have dismissed it as such. The district court found that, despite the State's and Intervenors' arguments to the contrary, "some relief could be given" and this issue "remains a live controversy." Injunction Order at 3-4.

Nevertheless, the State and Intervenors try the same mootness claims here, arguing that "no effective relief can be granted" by this Court. Response at 7. They claim that PMW is "seeking to prevent events that have already occurred." *Id.* at 1. However, PMW are asking this Court to enjoin the State from releasing the R-71 petitions, the Intervenors from distributing the petitions, and the district court from continuing to disclose PMW's John Does and witnesses in the Order pending the appeal of the denial of their motion for summary judgment. As the district court found when reviewing the same facts and circumstances, there remains a live controversy. PMW will be harmed by the State responding to the pending requests for the petitions, by the Intervenors distributing of the petitions, and by the district court's continual disclosure of the John Does and witnesses in the Order.

"A case does not become moot simply because an appellate court is unable completely to restore the parties to the *status quo ante*. . . .The ability of the appellate court to 'effectuate a partial remedy' is sufficient to prevent mootness. " *SunAmerica Corporation v. Sun Life Assurance Company of Canada*, 77 F.3d 1325, 1333 (11th Cir. 1996) (quoting *Church of Scientology*, 506 U.S. at 12-14).

If PMW prevail 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 even one more petition, the Intervenors distribution of the petitions, and the district court's continued release of the Order during the pendency of the appeal. Therefore, there is a live controversy and the case is not moot.

III. PMW Satisfy the Requirements for An Injunction Pending Appeal.

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) the district court from further disclosing the names of John Does and PMW's witnesses listed in the Order pending this appeal.

A. PMW Are 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 10. As explained above, this argument already failed before the district court as there is a live controversy.

As to likelihood of success on the merits, State and Intervenors argue that the district court properly dismissed their claim as PMW did not provide evidence that "a reasonable probability of threats, harassment, or reprisals exists as to the signers of R-71." Response at 11 (quoting Order at 33). In so arguing, the State and Intervenors, like the district court, mis-apply the standard for 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 Order, the petitions had never been released to the public, so that the public did not know whom to target for harassment.

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*, 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.

The State and Intervenors next argue that PMW are unlikely to succeed on the merits because "Supreme Court case law provides multiple, alternative bases under which PMW's claims fails." Response at 11. Here, the State and Intervenors believe that only minor parties are eligible for an exposure exemption. As explained in PMW's Motion, this apparent "threshold" requirement is a fallacy that is based on a misconstruing of the Supreme Court's language in *Buckley* when referring to the minor-party plaintiffs in that case. *See* Motion at 9-10. The logic behind this so-called "minor party requirement" cannot stand because the First Amendment does not allow discrimination among speakers. *Citizens United v. FEC*, 130 S.Ct. 876, 899 (2010). Moreover, 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 showing of "threats, harassment, and

reprisals," such as PMW made here. *See* Motion at 11-12.

The State and Intervenors also mischaracterize PMW's argument that the district court erred by sua sponte disclosing the names of PMW's John Does and witnesses in its Order. The State and Intervenors claim that PMW are asserting a "constitutional right to an additional hearing prior to issuance of the order." Response at 16. This is not the case. As discussed in the Motion, PMW claim the district court erred in removing the protective order without giving PMW an opportunity to be heard on why it should remain in place. Prior to the issuance of the Order, the identities of the witnesses and John Does were secured by a protective order. The district court granted PMW's renewed request for a protective order on November 15, 2010, noting that "the issue may be revisited closer to the trial date." Minute Entry Granting Motion for a Protective Order, Dkt. 181 (W.D. Wash. Nov. 15, 2010) (attached as Exhibit 1). The issue of lifting the protective order was not revisited, not in the parties' summary judgment briefing nor brought up at the summary judgment hearing.[1] Nor was the listing of previously-protected information necessary for the

[1] The State and Intervenors claim that PMW should have asked for an injunction pending appeal before, or immediately after the Order was issued. Response at 16. First, PMW did not believe that the protective order would be lifted without notice or an opportunity to revisit the issue, as the district court had previously indicated. Second, PMW could not have effectively requested such an injunction without knowing the reasoning behind the district court's decision. As such, PMW filed the motion at the earliest possible time, mere hours after the Order was released.

district court's opinion. PMW are likely to succeed on its claims of a due process violation as well.

B. 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. In response to this, the State and Intervenors argue that, despite any harm that PMW may suffer, "it is too late to contain it now." Response at 17. As is explained above, Appellees' attempt to dismiss this case on mootness grounds fails as there remains a live controversy.

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.[2]

[2] The State and Intervenors claim this Motion is speculative as PMW has not presented the Court with evidence of harassment that has occurred since the Order was released. Again, the State and Intervenors misunderstand the standard. PMW is not required to show *actual* harassment but a reasonable probability of "threats, harassment, and reprisals." *Buckley*, 424 U.S. at 74

C. The State and Intervenors Will Not Be Harmed by an Injunction Pending Appeal.

Enjoining the State pending the appeal of this case will not injure the other parties, let alone *substantially* injure them. 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 Pending Appeal Is in the Public Interest.

The State and Intervenors claim that the public interest lies in maintaining an open government. Response at 19. 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 (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 15th day of November, 2011.

s/ James Bopp, Jr.

James Bopp, Jr. (Ind. Bar No. 2838-84)
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 November 15, 2011, the foregoing document described as Appellants' Reply to Appellees' Consolidated 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:

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

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

Kevin Hamilton
Perkins Coie LLP
Suite 4800
1201 Third Avenue
Seattle, WA 98101-3099
khamilton@perkinscoie.com
Counsel for Intervenor Washington Families Standing Together

And as a courtesy, I provided an e-mail copy of the aforementioned document to all counsel on Tuesday, November 15, 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 15th day of November, 2011.

s/ James Bopp, Jr.
James Bopp, Jr.
Counsel for Appellants

Exhibit 1

Subject: Activity in Case 3:09-cv-05456-BHS John Doe #1 et al v. Reed et al Scheduling Conference
From: ECF@wawd.uscourts.gov
Date: Tue, 16 Nov 2010 12:21:23 -0800
To: ECF@wawd.uscourts.gov

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court

United States District Court for the Western District of Washington

Notice of Electronic Filing

The following transaction was entered on 11/16/2010 at 12:21 PM PST and filed on 11/15/2010

Case Name: John Doe #1 et al v. Reed et al
Case Number: 3:09-cv-05456-BHS
Filer:
Document Number: 181(No document attached)

Docket Text:
MINUTE ENTRY for proceedings held on 11/15/2010 before Judge Benjamin H. Settle - Dep Clerk: *G. Craft*; Pla Counsel: *Scott Bieniek*; Def Counsel: *Anne Egeler, Kevin Hamilton, Ben Stafford, Steven Dixon*; CR: *Teri Hendrix*; Time of Hearing: *2:00*; Courtroom: *E*; Court grants [163] Motion for Protective Order, but the issue may be revisited closer to the trial date; Court sets this matter for a bench trial on 5/31/2011 at 9:00 am; the clerk will issue a new scheduling order consistent with the new trial date and as discussed on the record. (MGC)

3:09-cv-05456-BHS Notice has been electronically mailed to:

William Berggren Collins (Terminated) wbcollins@comcast.net

James Kendrick Pharris jamesp@atg.wa.gov, sgoolyef@atg.wa.gov

Leslie R. Weatherhead lwlibertas@aol.com, emilyr@wkdtlaw.com, janetj@wkdtlaw.com

Kevin J Hamilton KHAMILTON@PERKINSCOIE.COM, CANDERSON@PERKINSCOIE.COM, docketsea@perkinscoie.com

Jay Douglas Geck JayG@atg.wa.gov, sgoolyef@atg.wa.gov

Anne Elizabeth Egeler annee1@atg.wa.gov, sgoolyef@atg.wa.gov

Stephen Walter Pidgeon Stephen.pidgeon@comcast.net

Duane M Swinton dms@wkdtlaw.com

Ryan McBrayer RMcBrayer@perkinscoie.com, NReynolds@perkinscoie.com, docketsea@perkinscoie.com

Steven Joseph Dixson sjd@wkdtlaw.com, collettr@wkdtlaw.com

James Bopp, Jr jboppjr@aol.com

William B. Stafford WStafford@perkinscoie.com, dburge@perkinscoie.com, docketsea@perkinscoie.com

Scott F Bieniek sbieniek@bopplaw.com

Joseph E La Rue jlarue@bopplaw.com

Rhonda L Barnes rbarnes@perkinscoie.com, kleach@perkinscoie.com

Arthur S West (Terminated) awestaa@gmail.com

3:09-cv-05456-BHS Notice will not be electronically mailed to: