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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN DOE #1, an individual; et al., Plaintiffs - Appellants, v. SAM REED, in his official capacity as Secretary of State of Washington and BRENDA GALARZA, in her official capacity as Public records Officer for the Secretary of State of Washington, Defendants - Appellees, WASHINGTON COALITION FOR OPEN GOVERNMENT and WASHINGTON FAMILIES STANDING TOGETHER, Intervenor-Defendants - Appellees.	No. 11-35854 D.C. No. 3:09-cv-05456-BHS Western District of Washington, Tacoma ORDER

Before: PREGERSON, TASHIMA, and N.R. SMITH, Circuit Judges.

Appellants have renewed their emergency motion for an injunction pending appeal under Ninth Circuit Rule 27-3. They seek to enjoin the Washington Secretary of State from further releasing the R-71 petitions, the Intervenors from distributing the petitions, and the district court from further disclosing the identity

of Protect Marriage Washington's John Doe parties and witnesses in the district court's unredacted order. Because the court preliminarily believes that the appeal is moot due to the release of R-71 petitions, appellants' renewed emergency motion for an injunction pending appeal is denied. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

In addition to all issues the parties wish to brief, the parties shall address the following issues: (1) whether the appeal is moot due to the release of the R-71 petitions and the district court's order identifying the Doe plaintiffs; and (2) whether any plaintiff-appellant has standing to bring this appeal on behalf of R-71 petition signers.

The briefing schedule established previously shall remain in effect.

N.R. SMITH, Circuit Judge, dissenting:

This entire case rests on our determination of whether there should be disclosure of the identities of R-71 petition signers, because of harm the signers may incur from such disclosure. We could have easily granted this injunction to prevent any further disclosures of R-71 petitions and ensure that we had time to

make a careful decision of this issue on appeal. Instead, the majority races to decide the case at this preliminary stage based on incomplete information and without even reviewing the record. Further, the majority makes mootness the basis of their decision, a basis the district court would not use, after considering all of the information in the record. Thus, based on the briefs and after reviewing the district court's order, I cannot join my colleagues.

The district court, which has extensive familiarity with the record, found that "some relief could be given by enjoining [appellees] from disseminating any further R-71 petitions." Injunction Order at 3-4. A preliminary injunction could prevent the State from responding to the pending requests for the petitions, the Intervenors from distributing of the petitions, and the district court from further disclosing the identities of the John Does and witnesses in the Order. Accordingly, the district court concluded that the "threshold jurisdiction[al]" requirement of a "live controversy" remains and the case is not moot. *Id.* (quoting *S. Pac. Transp. Co. v. Pub. Util. Comm'n of Oregon*, 9 F.3d 807, 810 (9th Cir. 1993)).

The appellees argue that the case is moot, because the petitions and district court order are already widely available on the web. Brief in Opp. 5. However, the links that the appellees listed in footnotes 5 and 6 do not clearly display the petitions, *id.*, and it is not certain that the links contain all of the petitions or are

easily accessible by the general public. Further, though organizations have threatened to create searchable databases with the petition-signers names once the organizations obtain the names, *id.* at 9-10, to date no such database appears to exist. Therefore, based on such incomplete information regarding who has confidential information, what exact information they have obtained, and what they plan to do with it, it is a rush to judgment to say this case is moot.

Although the remedy available to the appellants is less than what it could have been if no disclosures were made, "[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 of California v. United States*, 506 U.S. 9, 12-14 (1992)). Because it appears that a partial remedy may still be available to the appellants, we should wait to decide the mootness issue until we have more fully reviewed the case on appeal.

Furthermore, an injunction pending appeal may be granted upon showing that there are "serious questions going to the merits," and "the balance of hardships tips sharply in the plaintiff's favor," but only if "the plaintiff also shows a

likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Under this "sliding scale" analysis, "a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits." *Id.* at 1131.

1. Balance of the hardships and likelihood of irreparable injury if the motion to stay is not granted.

By not granting the injunction, this court will essentially decide the merits of the case and remove the potential for the appellants to receive *any* of the relief they seek from this court on appeal. As legal scholars have noted, "the most compelling reason in favor of entering a [preliminary injunction] is the need *to prevent the judicial process from being rendered futile* by defendant's action or refusal to act." 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §2947 (2d ed. 1995) (emphasis added); *see also Perry v. Schwarzenegger,* 591 F.3d 1126, 1137 (9th Cir. 2009) (explaining that irreparable harm exists where a "post-judgment appeal would not provide an effective remedy"). While it is now debatable whether this case is moot, the majority's decision will foreclose any further debate on the topic. It is therefore ironic that our order directs the parties to address whether the appeal is moot, since the majority's decision will clearly make it so.

Enjoining the appellees will not cause any harm to the State. The State was willing to voluntarily stop releasing petitions, and the State has provided us no reason to suggest why waiting until this matter is resolved on appeal will cause the State any specific harm.

2. Serious questions going to the merits.

The district court found that appellants were not eligible for a harassment-based exemption, because they did not meet the "threshold" requirement of being a minor party. *Doe v. Reed*, 2011 WL 4943952 at *17 (W.D. Wash.). However, it is debatable whether Supreme Court precedent supports such a threshold requirement. The Court in *Buckley* merely said that 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). The Court suggested that it might be *easier* for a minor party to demonstrate this requirement, but it never stated that *only* a minor party could do so. *See id.* at 70. Moreover, when the Supreme Court granted review of this case last time, *Doe v. Reed*, 130 S. Ct. 2811 (2010), it recognized that an as-applied exemption was possible for appellants without any mention of some "minor party" requirement. Instead, it merely required a strong

showing of "threats, harassment, and reprisals." *Id.* at 2821. Had the Supreme Court wanted to strike down appellants' claim based on their lack of minor party status, it could have done so then.

In addition, the question of what evidence of harassment or threats should be required, in a situation that involves an amorphous group of individuals who seek an exemption from a disclosure requirement relating to voting rights, is not governed by clear precedent. *See, e.g., Protectmarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1214-15 (E.D. Cal. Jan. 30, 2009). Precedent is instead unclear whether evidence of harassment or threats made against supporters of traditional marriage initiatives that occurred in other parts of the country should be considered. *Buckley,* 424 U.S. at 74 (suggesting there is no requirement that "chill and harassment be directly attributable to the specific disclosure from which the exemption is sought"); *see also id.* ("New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views."); *Doe v. Reed*, 130 S. Ct. at 2823 (Alito, J., concurring) ("The widespread harassment and intimidation suffered by supporters of California's Proposition 8 provides strong support for an as-applied exemption in the present case.").

It is also not clear what amount of evidence is necessary to establish a "reasonable probability" of threats, harassments, or reprisals—whether the threats or harassment would have to be "serious and widespread," whether it has to be "significant," or courts should be "generous" in granting as-applied relief. As for evidence related to the specific R-71 petition signers who made their support of the petition public, some of the witnesses were "mooned," "flipped off," received angry phone calls, were confronted by individuals in public places, had pictures taken of them to "post on Facebook," received vulgar notes, were pushed and yelled at with expletives in public, had garbage thrown on them, had their children threatened, were called "fascists," and some even received death threats. *Doe v. Reed*, 2011 WL 4943952 at *11-16 (W.D. Wash.). As the Supreme Court did not specifically address the standard for an as-applied challenge to the appellants, there exists a serious question as to what the standard should be and whether the appellants demonstrated sufficient evidence to meet this standard, especially in a situation where there is likely no minor party status.

3. An injunction is in the public interest.

The public interest also lies in favor of an injunction to prevent the dissemination of the petitions, before there has been a full chance for an appeal that may provide relief to appellants on this issue. Certainly, the public has a strong

interest in ensuring that free speech is not allowed to be chilled under incorrect legal standards.