THE HONORABLE BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOHN DOE #1, an individual; JOHN DOE #2, an individual; and PROTECT MARRIAGE WASHINGTON,

Plaintiffs,

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.

No. C:09-cv-05456 BHS

INTERVENOR WAFST'S OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR PROTECTIVE ORDER

NOTED ON MOTION CALENDAR

Friday, November 5, 2010

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

TABLE OF CONTENTS

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

I. INTRODUCTION

As this Court stated in denying Plaintiffs' previous Motion for Protective Order: "This is a public court and its business should be conducted publicly unless there is a specific reason to keep things confidential." Dkt. #152, at p. 2. Indeed, "[o]ne of the most enduring and exceptional aspects of Anglo-American justice" is the openness of judicial proceedings, which enables the public to "have confidence that standards of fairness are being observed." *Phoenix Newspapers, Inc. v. U.S. Dist. Court for Dist. of Arizona*, 156 F.3d 940, 946 (9th Cir. 1998).

Plaintiffs' renewed motion for a protective order should be denied because it betrays a cavalier disregard for the principle that justice in this nation is done in the open and for this Court's clear articulation of both the standard Plaintiffs must meet to justify such an order and the necessary content of any proposed order.

Rule 26 allows a protective order to be entered only "for good cause." Fed. R. Civ. P. 26(c). Trafficking in the same sweeping generalities that the Court previously rejected, Plaintiffs again claim that they need a protective order to hide their witnesses' names because their witnesses will be harassed if their views on same-sex marriage and Referendum 71 become known. Their witnesses, however, have already taken public stands on same-sex marriage and Referendum 71, and nearly all have testified that they have no serious concern about being publicly identified as witnesses in this case. Given these facts, Plaintiffs have come nowhere close to showing that "specific prejudice or harm will result if no protective order is granted." *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002).

For these reasons, intervenor Washington Families Standing Together ("WAFST") respectfully asks that the Court deny Plaintiffs' Renewed Motion for Protective Order.

II. STATEMENT OF FACTS

On September 3, 2010, Plaintiffs moved for a blanket protective order regarding the identities of their witnesses. Dkt. #125. This Court denied the proposed order on October 6,

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

finding that Plaintiffs failed to "provide sufficient specific facts directly related to the people involved in this matter that would require such a blanket protective order." Dkt. #152, at p. 4. The Court outlined the standard for a protective order under Rule 26 and also listed several specific items that any proposed protective order should contain. *Id.* at 3-4.

Since the Court's ruling, discovery has continued apace, and all but one of Plaintiffs' witnesses have now been deposed. In the course of the depositions, it became clear that Plaintiffs' witnesses played a public and highly visible role during the Referendum 71 campaign, speaking at rallies, giving public testimony, announcing their positions during media interviews, standing on public street corners waving signs, gathering signatures in public places, listing their names on campaign materials, making donations to the campaign that they knew would be publicly reported, and in some cases all of the above. *See, e.g.*, Declaration of William B. Stafford ("Stafford Decl."), at pp. 9-13; 18-22; 28-30; 42-53; 58-61; 66-68; 73-78; 100-106; 120-125; 135-143; 152-153; 157-163; 168-169; 176-178; 185-187.[1] Moreover, *virtually every witness expressly testified that they had no concerns about being publicly identified as witnesses in this case*. *Id.* at pp. 22-23; 35; 52-53; 60-61; 66; 83; 87-88; 95; 100; 107-114; 120; 150-151; 174-175; 186-187; 192. Plaintiffs never mention these crucial facts.

Instead, in a Rule 26(c) conference on October 18, Plaintiffs continued to insist that the identity of every witness be kept confidential. *Id.* ¶ 2. WAFST reiterated that it does not object to entry of a reasonable protective order governing particular confidential information upon a particularized showing of harm, but does object to Plaintiffs' request in the absence of any witness-specific showing that a protective order is needed. *Id.* Plaintiffs refused to narrow their request. *Id.*

[1] WAFST does not believe that Exhibits A through R to the Stafford Declaration contain information that should be shielded from public view, but files these exhibits under seal pursuant to the parties' agreement to retain the confidentiality of the identity of Plaintiffs' witnesses until the Court resolves the present motion.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

III. ARGUMENT

"This is a public court and its business should be conducted publicly unless there is a specific reason to keep things confidential." Dkt. #152 at p. 2. Under "Fed. R. Civ. P. 26(c), protective orders can be issued 'for good cause shown,'" and under "Local Civil Rule 5(g), '[t]here is a strong presumption of public access to the court's files and records which may be overcome only on a compelling showing that the public's right of access is outweighed by the interests of the public and the parties in protecting files, records, or documents from public review.'" *Id.* "On the few occasions when protective orders are appropriate, they should be narrowly drawn with a presumption in favor of open and public litigation." *Id.* "For good cause to exist, the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted." *Phillips*, 307 F.3d at 1210-11.

Plaintiffs have failed to show any good cause for hiding the names of their witnesses. These witnesses have taken public positions on same-sex marriage and Referendum 71, and nearly all testified that they had no concern about being publicly identified as witnesses in this case. Indeed, even some of the John Does indicated that there was no need for their identities to remain hidden. Given these facts, Plaintiffs have failed to satisfy the Rule 26 standard. Plaintiffs also failed to comply with basic instructions from this Court.

A. Plaintiffs' Proposed Order Ignores This Court's Instructions

As an initial matter, Plaintiffs' motion should be denied because their proposed protective order violates this Court's clear instructions as to what such an order should include. In denying Plaintiffs' previous motion, the Court provided a list of requirements that any such order would have to meet including, among other things, that:

- The request must be narrow and the terms of the order may not give too much discretion to the parties to designate documents subject to the protective order. Any protective order entered by the Court must be narrowly drawn and clearly identify the class or type of documents subject to the order.
- The proposed order may not be modified by agreement of the parties without the Court's signature of approval.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

- The order must contain a provision that the Court may change the terms of the protective order on its own motion after notice to the parties and an opportunity to be heard.

Dkt. #152, at pp. 3-4.

Though the Court's instructions could not have been clearer, Plaintiffs' proposed order satisfies none of these requirements. First, the proposed order broadly entitles the parties to designate any information that "qualif[ies] for protection under standards developed under Fed. R. Civ. P. 26(c)" as confidential. This does not, to say the least, "clearly identify the class or type of documents subject to the order." The one category specifically listed in Plaintiffs' proposed order—"witness' name, address, occupation, employer, telephone number, email address, and other identifying information"—*was already rejected by the Court* as "not narrowly drawn." Dkt. #137, at p. 6. Moreover, the proposed order does not provide that it can only be modified by the parties with the Court's signature of approval, and does not contain a provision that the Court may change the terms of the protective order on its own motion after notice to the parties and an opportunity to be heard.

The Court should deny Plaintiffs' motion for these threshold deficiencies alone.

B. Rule 26 Requires a Party to Show Good Cause to Obtain a Protective Order

"It is well-established that the fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public." *Phillips*, 307 F.3d at 1210 (quoting *San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1103 (9th Cir. 1999)). Rule 26(c) provides a limited exception where a party shows that particularized harm will occur if information disclosed during litigation is revealed: "The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1).[2]

[2] Something more than the ordinary embarrassment that might adhere to any other litigation in which the public might follow aspects of the case is required to show good cause. *See, e.g., Glenmede Trust Co. v. Thompson*, 56 F.3d 476 (3d Cir. 1995) (general allegations of embarrassment and injury to professional reputations and client relationships do not satisfy the good cause requirement for the issuance of an umbrella protective order).

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

> The showing necessary to demonstrate "good cause" is well established:
>
> To establish good cause for a protective order under Fed. R. Civ. P. 26(c), the courts have insisted on a particular and specific factual demonstration, as distinguished from stereotyped and conclusory statements, revealing some injustice, prejudice, or consequential harm that will result if protection is denied. Broad allegations of harm, unsubstantiated by specific examples of articulated reasoning, do not satisfy the rule.
>
> The party requesting a protective order must make a specific demonstration of facts in support of the request as opposed to conclusory or speculative statements about the need for a protective order and the harm which will be suffered without one. Such party must demonstrate that failure to issue the order requested will work a clearly defined harm.

10A Fed. Proc. Law. Ed. § 26:282. *See also Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) ("'Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.'") (quoting *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986)); *Phillips*, 307 F.3d at 1210-11 ("For good cause to exist, the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted."); *Radiator Exp. Warehouse, Inc. v. Performance Radiator Pacific LLC*, 2010 WL 3222516, at *1 (W.D. Wash. Aug. 13, 2010) (same).

C. Plaintiffs Are Not Entitled to the Protective Order They Seek

1. Plaintiffs Have Made No Showing of Good Cause

Plaintiffs ask the Court to enter a protective order hiding the "identifying information" of all their witnesses. They claim that if their witnesses' names are released, they "will be exposed to . . . threats, harassment, and reprisals," Dkt. #163, at p. 9, because of their support for "traditional marriage and [Referendum] 71," *id.* at 7. There are two fundamental problems with Plaintiffs' argument.

First, Plaintiffs have failed to show that identification of any particular person as a witness in this case will lead to any "*specific* prejudice or harm." *Phillips*, 307 F.3d at 1210-11 (emphasis added). To support their claim of harm, Plaintiffs cite incidents of harassment in

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

California several years ago and a handful of alleged incidents during the Referendum 71 campaign involving a few of their witnesses.[3]

As an initial matter, however, many of these incidents are far from sufficient to show the type of harassment that could serve as good cause for a protective order. For example, one witness testified that while he was collecting signatures for Referendum 71 he experienced "harassment" when a lesbian couple approached him and said: "We have feelings too."[4] *See* Stafford Decl., at pp. 50-51.

Even proof of actual harassment during the Referendum 71 campaign would not necessarily indicate a likelihood of harm to witnesses in this case. For one thing, the witnesses themselves, who presumably have the strongest interest of anyone in protecting themselves from harm, almost uniformly testified that they had no concerns about being publicly identified as witnesses in this matter, and none have submitted declarations in support of this motion.

More generally, there is no inherent connection between a party's witness list and the issues underlying a case. For example, though they have not done so, Plaintiffs could have called objective witnesses who had nothing to do with Referendum 71 to comment on any harassment during the campaign, such as police officers who witnessed such harassment or experts on harassment in political campaigns. Indeed, they could even have called supporters of same-sex marriage who witnessed any alleged harassment of those on the other side. These examples demonstrate the speciousness of Plaintiffs' argument that their witness list must be treated as equivalent to the Referendum 71 petitions because releasing the list of witnesses here

[3] Plaintiffs still have not even attempted to introduce facts relevant to the overwhelming majority of witnesses on their list demonstrating good cause, instead relying on broad and generalized arguments that this Court has already indicated are insufficient.

[4] *Cf. Quair v. Bega*, 232 F.R.D. 638, 641 (E.D. Cal. 2005) (holding that, where movant filed seven supporting declarations documenting "heated verbal exchanges" rather than "specific, credible threats," evidence of intimidation did not exist and good cause had not been shown to justify the issuance of a protective order); *Bryant v. Mattel, Inc.*, 2007 WL 5416684 at *3-4 (C.D. Cal. Feb. 6, 2007) (holding that witness list should not be labeled "Confidential – Attorneys' Eyes Only" when declarations and evidence establishing good cause had not been presented to support such a protective order); *Miller v. Ventro Corp.*, 2004 WL 868202 at *3 (N.D. Cal. Apr. 21, 2004) (notwithstanding movant's "zealous attempts to protect the identities of these individuals . . . without any showing of specific need, a protective order is not warranted").

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

"merely substitutes one list of R-71 supporters . . . with another list of supporters." *See* Dkt. #163, at p. 3. It is thus unsurprising that Plaintiffs have been unable to offer any support for their claim that this motion should be treated as a mini-trial on the merits subject to the "reasonable probability" test articulated in *Buckley v. Valeo*, 424 U.S. 1 (1976). Dkt. #163, at p. 5.

The second problem with Plaintiffs' argument is that their asserted need for a protective order depends on the notion that identifying their witnesses will expose them to harassment because *that identification* will make public their support for "traditional marriage and [Referendum] 71." Dkt. #163 at p. 7. In fact, however, all of their witnesses have already made their views on same-sex marriage and Referendum 71 very well known. Many of their witnesses served as public spokespeople about the referendum, others publicly gathered petition signatures and waved signs about the referendum, others had their names listed as public endorsers of the referendum campaign, still others donated to the petition drive effort even though they knew their names would be disclosed, and many did all of the above. Given that their witnesses' views are already widely known, Plaintiffs have failed to explain why "specific prejudice or harm will result if no protective order is granted." *Phillips*, 307 F.3d at 1210-11.[5]

Plaintiffs claim that "the fact that some individuals might otherwise be identifiable as R-71 supporters does not diminish the need for a protective order." Dkt. #163 at p. 6. To support this proposition, Plaintiffs cite a footnote in *Brown v. Socialist Workers Party*, in which the Supreme Court noted that requiring disclosure of expenditures by an unpopular party could lead to more harassment of campaign workers than would occur because of their mere involvement in the campaign. 459 U.S. 87, 97 n.14 (1982). The Court reasoned: "Apart from the fact that individuals may work for a candidate in a variety of ways without publicizing their involvement, the application of a disclosure requirement results in a dramatic increase in public exposure." *Id.* Neither rationale applies here. Plaintiffs' witnesses were publicly involved in the Referendum 71

[5] Plaintiffs' own "evidence" in support of their motion proves the point. *See, e.g.*, Dkt. #163, at pp. 7-8 (describing alleged incidents of harassment against *campaign manager* and pastor after *The Seattle Times* ran an article about a church's support of R-71).

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

campaign, and Plaintiffs have presented no evidence that disclosing the identities of their witnesses would "result in a dramatic increase in public exposure." *Id.* Indeed, most of Plaintiffs' witnesses have already made their views clear through public statements that were widely disseminated in the media and are permanently available through a simple Google search. To give some specific examples of the type of public figures Plaintiffs have identified as witnesses, one witness described himself as "in the public's eye all the time" and that "there is nothing private about how I feel, how I say, and where I stand", one served as a self-identified "spokesman" regarding Referendum 71, another, in his view, "ran the campaign", and a fourth is an elected official who has made her opposition to marriage equality extremely well-known. *See* Stafford Decl., at pp. 66-68; 143; 157; 177-178. The notion that being listed as a witness in this case would "result in a dramatic increase in public exposure" for these peoples' views is absurd.

2. Plaintiffs Cannot Avoid the Requirement That They Make a Compelling Showing to Hide the Identity of Their Witnesses

Plaintiffs continue to suggest that the Court should leave for a later date a decision on whether to seal court records. Dkt. #163, at p. 9. Plaintiffs cannot skirt a fundamental flaw with the present motion so easily.

Ultimately, some or all of Plaintiffs' witnesses must testify if this case proceeds to trial, and there is no possibility that the parties can engage in dispositive motion practice without relying on the testimony of or documents identifying Plaintiffs' witnesses. At some point in this litigation, then, Plaintiffs must meet the exacting burden required to show that the identity of their witnesses should be sealed in the Court's files.

Under Local Civil Rule 5(g), Plaintiffs can only overcome the "strong presumption of public access to the court's files" by making "a compelling showing that the public's right of access is outweighed by the interests of the public and the parties in protecting the court's files from public review." *See also San Jose Mercury News*, 187 F.3d at 1102 ("We have expressly recognized that the federal common law right of access extends to pretrial documents filed in

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

civil cases . . . ."). Likewise, a courtroom can only be closed to the public if "'(1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest.'" *United States v. Biagon*, 510 F.3d 844, 848 (9th Cir. 2007) (quoting *Oregonian Publ'g Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1466 (9th Cir. 1990)); *see also Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1070 (3rd Cir. 1984) ("[T]o limit the public's access to civil trials there must be a showing that the denial serves an important governmental interest and that there is no less restrictive way to serve that governmental interest."); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1178 (6th Cir. 1983) ("[T]he justifications for access to the criminal courtroom apply as well to the civil trial . . . .").

Unless Plaintiffs intend to present *none* of these witnesses at trial (in which case Defendants would be entitled to a directed verdict) or in conjunction with dispositive motion practice (in which case Defendants would be entitled to summary judgment), Plaintiffs will need to meet these heightened burdens. Plaintiffs cannot simultaneously shrink from meeting their burden of showing that the identity of these witnesses should be sealed under local Civil Rule 5(g) while arguing for a remedy that, as a result, does not address their concern that their witnesses' identities will be disclosed during this litigation.

IV. CONCLUSION

For the reasons stated above, WAFST respectfully requests that this Court deny Plaintiffs' Renewed Motion for Protective Order.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

s/ Kevin J. Hamilton
Kevin J. Hamilton, WSBA No. 15648
Ryan J. McBrayer, WSBA No. 28338
William B. Stafford, WSBA No. 39849
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000
KHamilton@perkinscoie.com
WStafford@perkinscoie.com
RMcBrayer@perkinscoie.com

Attorneys for Intervenor Washington Families Standing Together

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of November, 2010, I electronically filed INTERVENOR WAFST'S OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR PROTECTIVE ORDER in the above-referenced case with the Court via CM/ECF, which system will send notification of such filing to counsel of record.

James Bopp, Jr.
Scott F Bieniek *(admitted pro hac vice)*
Joseph E La Rue *(admitted pro hac vice)*
Bopp Coleson & Bostrom
1 South Sixth Street
Terre Haute, IN 47807-3510
jboppjr@aol.com
sbieniek@bopplaw.com
jlarue@bopplaw.com

Stephen Walter Pidgeon
3002 Colby Avenue, Suite 306
Everett, WA 98201
stephen.pidgeon@comcast.net

Attorneys for Plaintiffs

Anne Elizabeth Egeler
James Kendrick Pharris
William Berggren Collins
Attorney General of Washington
P.O. Box 40100
Olympia, WA 98504-0100
360-753-7085
annee1@atg.wa.gov
jamesp@atg.wa.gov
billc@atg.wa.gov

Attorneys for Sam Reed and Brenda Galarza

Duane M Swinton
Leslie R. Weatherhead
Steven Joseph Dixson
Witherspoon Kelley Davenport & Toole
422 W Riverside, Ste 1100
Spokane, WA 99201
dms@wkdtlaw.com
lwlibertas@aol.com
sjd@wkdtlaw.com

Attorneys for Intervenor Washington Coalition for Open Government

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

I certify under penalty of perjury that the foregoing is true and correct.

DATED: November 3, 2010

s/ Kevin J. Hamilton

Kevin J. Hamilton, WSBA No. 15648
KHamilton@perkinscoie.com
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000