NO. 16-36038

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANE AND JOHN DOES 1-10, individually and on behalf of others similarly situated, *Plaintiffs-Appellees*,

v.

UNIVERSITY OF WASHINGTON and PERRY TAPPER; and ZACHARY FREEMAN, *Defendants-Appellees*,

and

DAVID DALEIDEN, *Defendant-Appellant*.

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

No. 2:16-CV-01212-JLR
The Honorable James L. Robart
United States District Court Judge

BRIEF OF UNIVERSITY OF WASHINGTON AND PERRY TAPPER

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This dispute arises primarily between the Defendant-Appellant, David Daleiden, and the Plaintiffs-Appellees, Jane and John Does 1-10 (Plaintiffs). The University of Washington (the University)[1] was named as a defendant below as the state agency holding the public records at issue. The University offers this brief to address the University's role, to respond to certain misstatements made in Mr. Daleiden's opening brief, and to clarify the relationship between the Plaintiffs' constitutional claims and the state's public records law.

The University found no statutory exemption applicable to the issues of this appeal that would prevent it from releasing the records.[2] As specifically authorized in the Washington Public Records Act (PRA), Wash. Rev. Code 42.56, the University then provided notice to individuals named in the records that the University intended to release the records unless enjoined from doing so. Plaintiffs, a group of those identified individuals, brought this action to assert that release of the records without redacting their personally

[1] References to the University also include Defendant-Appellee Perry Tapper, the University's public records officer assigned to Mr. Daleiden's request.

[2] The University's production of records to Mr. Daleiden is ongoing. In some instances records have been redacted for reasons unrelated to the issues presented on appeal.

identifying information would violate their constitutional rights. The PRA encompasses constitutional grounds for redacting information, but the Plaintiffs, rather than the University, were the parties tasked with establishing any constitutional basis. This appeal is from the district court's grant of the preliminary injunction the Plaintiffs requested.

The University recognizes that it is obligated by the PRA to disclose public records unless a specific exemption to the disclosure requirement applies. The University also takes seriously the safety of its faculty, staff, and research partners, particularly as to claims for redaction that named individuals could assert even if the University cannot. This is why the University gave notice to the named individuals. While the University is not a primary party of interest in this matter and stands ready to release the records to Mr. Daleiden with such redactions as this Court directs, it does not believe the district court abused its discretion in issuing the preliminary injunction that the individual Plaintiffs sought.

II. STATEMENT OF JURISDICTION

The University does not dispute Mr. Daleiden's jurisdictional statement. For purposes of this action only, the University consents to the jurisdiction of

the federal court for considering issues of declaratory judgment and/or injunctive relief as raised by the Plaintiffs.

III. COUNTERSTATEMENT OF ISSUE

Did the district court abuse its discretion when it concluded that Plaintiffs demonstrated the required elements for the issuance of a preliminary injunction restraining the release of public records that Mr. Daleiden requested without the redaction of personally identifying information?

IV. STATEMENT OF THE CASE

A. Factual Background

The University is an agency of the State of Washington and an institution of higher education with its primary campus in Seattle, Washington.[3] As a state agency, the University is subject to the PRA, which provides open access to public records.

On February 10, 2016, the University's Office of Public Records and Open Public Meetings (OPR) received a public records request from Mr. Daleiden. ER A261. Defendant-Appellee Perry Tapper handled

[3] The Attorney General serves as counsel to the University, as he does for all state agencies. Wash. Rev. Code § 43.10.040. Mr. Daleiden's suggestion that the Attorney General is involved in this case for some other reason is incorrect. *See* Opening Brief of Defendant-Appellant David Daleiden (Opening Br.) at 8 n.2. The Attorney General's role in this litigation is to represent the University as a defendant, not to support "attempts to suppress the information Daleiden has requested." *Id.*

Mr. Daleiden's request, as a compliance officer in OPR. ER A261. Mr. Daleiden requested the opportunity to inspect or obtain copies of "all documents that relate to the purchase, transfer, or procurement of human fetal tissues, human fetal organs, and/or human fetal cell products at the University of Washington Birth Defects Research Laboratory (BDRL) from 2010 to present." ER A264 (emphasis omitted). The request then went on to enumerate nine specific additional requests on the same topic. ER A264-66. The University received a second, similar, request from Zachary Freeman, but he was later dismissed from this case on stipulated motion. ER A002, A523.

The University identified public records responsive to Mr. Daleiden's request, finding that a number of them included information identifying specific individuals. The University determined that the PRA did not contain an exemption that would allow the University, on its own, to redact that identifying information. Recognizing that individuals named in the records might be able to assert an objection that the University could not, it sent notice to 156 persons identified in the records, as authorized in Wash. Rev. Code § 42.56.540. ER A261; *see also, e.g.*, ER A388-91. That notice stated the University's intent to release the records on August 5, 2016, unless a court

order enjoining release was provided to the University by August 4, 2016. ER A388-91.

B. Procedural Background

On August 3, 2016, the Plaintiffs filed this lawsuit, alleging that their personally identifying information is exempt from disclosure pursuant to the PRA. ER A500-09. The Plaintiffs also moved for a temporary restraining order and preliminary injunction to prevent the University from releasing the responsive documents without redaction. The district court granted a temporary restraining order (TRO) that same day, enjoining the University from releasing the documents or disclosing personally identifying information of individuals. ER A317-23. On August 17, 2016, the district court extended the TRO pending resolution of the motion for a preliminary injunction. ER A005.

On November 13, 2016, the district court entered a preliminary injunction that enjoined the University from releasing the requested documents without first redacting all personally identifying information or information from which a person's identity could be derived with reasonable certainty. ER A025-26. The preliminary injunction also identified—but was not limited to—nine specific types of information to be redacted: (1) information that identifies or provides the location of an individual, (2) information that would

allow an individual to be identified or located, (3) information that would allow an individual to be contacted, (4) names of individuals, (5) phone numbers, (6) facsimile numbers, (7) email and mailing addresses, (8) social security or tax identification numbers, and (9) job titles. ER A025-26.

Mr. Daleiden timely appealed.

C. Mr. Daleiden's Recitation Regarding Congressional Reports is Both Irrelevant and Misleading

Mr. Daleiden's statement of the case indulges in a lengthy, but irrelevant, discussion of his interpretation of two Congressional reports. Opening Br. at 5-9. This is not only irrelevant to this Court's review of the preliminary injunction, but misstates the reports Mr. Daleiden cites. This Court should not consider the portions of Mr. Daleiden's opening brief relating to the Congressional reports, but the University offers this clarification to avoid any inference that it accepts Mr. Daleiden's representations of them.

This appeal is about Mr. Daleiden's request for records and the Plaintiffs' constitutionally-based concerns about those requests. Congressional interest in some of the same records is not at issue. Many of the sources Mr. Daleiden relies upon did not exist until after the district court issued the preliminary injunction under review on November 13, 2016. ER A026. For example, Mr. Daleiden cites a letter from Senator Grassley that wasn't written

until a month later, on December 13, 2016. Opening Br. at 5-6. He also cites a partisan staff report to the Senate Judiciary Committee (Senate Staff Report) dated December 2016. *Id.* at 5. Mr. Daleiden relies extensively on the final report of the Select Investigative Panel of the House Energy and Commerce Committee (House Panel Report), which was not issued until December 30, 2016. *Id.* at 6, 8-9. Those documents are obviously not in the record, and played no role in the district court's decision to issue the injunction.

Even if they were relevant, Mr. Daleiden misrepresents the reports. Mr. Daleiden says that "[t]ogether the two congressional investigations yielded more than a dozen referrals to law enforcement agencies, plus another half dozen to regulatory agencies, for further investigation and possible prosecution." Opening Br. at 6. Mr. Daleiden neglects to mention that none of these referrals concerned the University. *Id.* (citing House Panel Report at 33-34, and Senate Staff Report at 55). While Mr. Daleiden didn't expressly say otherwise, his implication is as unmistakable as it is false.

Mr. Daleiden also offers a list of supposed "findings" from the House Panel Report, interspersing a light sampling of quotations with his own mischaracterizations. *Id.* at 8-9 (citing House Panel Report at 253-60). This list

includes Mr. Daleiden's citation to a passage from the report discussing a different entity, which he then attempts to attribute to the University by calling that entity "one of the laboratory's providers." Opening Br. at 8-9 (citing House Panel Report at 253-60). Mr. Daleiden claims that the House panel found that documents the University produced were redacted "so heavily that they were not informative," but the passage cited states merely that they did not support a particular line of inquiry. *Id.* (citing House Panel Report at 258-59).

And Mr. Daleiden attributes to the House panel the view that, in his words, "[t]he Washington attorney general's inquiry into the laboratory had been halfhearted and insufficient." *Id.* at 9 (citing House Panel Report at 259). This mischaracterizes his source in two ways. First, the "inquiry" at issue was not "into the laboratory" (an apparent reference to the University's BDRL), but rather regarded Planned Parenthood. ER A215. It simply has nothing to do with this case, and in any event was undertaken by different attorneys than those who represent the University. ER A215. Second, the phrase "halfhearted and insufficient" appears nowhere in the House panel report, and apparently just reflects Mr. Daleiden's opinion. House Panel Report at 259.

In the only part of this discussion in which Mr. Daleiden cites a document actually in the record, he selectively quotes a single paragraph from

an interim panel report that merely noted that further questions could be asked about the BDRL. Opening Br. at 7 (quoting ER A076-77). Mr. Daleiden returns to this reference in his argument, contending that the House panel "has already documented suspect fetal procurement practices at BDRL and has called for further investigation into the precise subject matter of Daleiden's request." *Id.* at 25 (citing ER A076-77). But the House panel nowhere claims to have "documented suspect fetal procurement practices at BDRL." *Id.* And noting that further questions might be asked about fetal procurement in general hardly qualifies as "call[ing] for further investigation into the precise subject matter of Daleiden's PRA request." *Id.* None of this enlightens this Court's review of a preliminary injunction that relates only to the redaction of personally identifying information.

V. ARGUMENT

A. Standard of Review

This Court engages in a limited and deferential review of a district court's decision to grant or deny a preliminary injunction. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc). The Court reviews a preliminary injunction for abuse of discretion. *Harris v. Bd. of Supervisors*, 366 F.3d 754, 760 (9th Cir.2004). The Court does

not review the underlying merits of the case, but looks only to whether the district court applied the appropriate standard for issuance of a preliminary injunction and correctly construed the law governing the underlying issues. "When the district court is alleged to have relied on an erroneous legal premise, we review the underlying issues of law *de novo*." *Harris*, 366 F.3d at 760.

"The scope of a preliminary injunction is also reviewed for abuse of discretion." *United States v. Schiff*, 379 F.3d 621, 625 (9th Cir. 2004). "A trial court abuses its discretion if it bases its decision on 'an erroneous legal standard or on clearly erroneous factual findings.'" *Id.* (quoting *United States v. Estate Pres. Servs.*, 202 F.3d 1093, 1097 (9th Cir. 2000)).

B. The University Invoked a Statutory Procedure for Giving Notice of a Public Records Request to Individuals Named in the Records

The University invoked a statutory process under the PRA to notify individuals named in the records that the records would be released absent a court order to the contrary. ER A261, A327; Wash. Rev. Code § 42.56.540 ("An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested."); *see also Doe ex rel. Roe v. Wash. State Patrol*, 185 Wash. 2d 363, 386-87, 374 P.3d 63 (2016) (an agency invoking this process does not deny the production of records or violate the PRA).

The option of informing parties named in a record and allowing them a chance to seek an injunction is particularly appropriate when the agency determines that it does not independently have a basis for withholding or redacting records, but others might have such a basis. The University so determined here. ER A388 (advising the individuals named in the records that the records would be released unless enjoined). The Plaintiffs assert, and the district court agreed, that release of the requested records without redacting personally identifying information would violate the Plaintiffs' constitutional rights under the First and Fourteenth Amendments to the United States Constitution, as well as their right of privacy under the Washington Constitution.

The Plaintiffs' constitutional rights to privacy and freedom of association are better asserted by the Plaintiffs than by the University. *See Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc.*, 306 F.3d 806, 814 (9th Cir. 2002) (privacy is a right personal to individuals). Similarly, the Plaintiffs are better situated to establish whether a release of the records at issue would create a danger and risk of harm on their part. The district court agreed that the Plaintiffs have made a sufficient showing to warrant the granting of preliminary injunctive relief.

C. Washington's Public Records Act Provides Access to Public Records While Protecting Constitutional Rights

Mr. Daleiden asked the University for records pursuant to the PRA. ER A264-66, A287. The PRA broadly mandates public disclosure. *Fisher Broad. v. City of Seattle*, 180 Wash. 2d 515, 521, 326 P.3d 688 (2014). It sets forth a number of express exemptions and, crucially for this case, it also allows exemption of information if an "other statute" exempts or prohibits disclosure of specific information or records. Wash. Rev. Code § 42.56.070(1). The Washington Supreme Court has held that this "other statute" exception is broad enough to exempt from disclosure any information that is protected under the federal or state constitutions. *Freedom Found. v. Gregoire*, 178 Wash. 2d 686, 695, 310 P.3d 1252 (2013); *see also Roe v. Anderson*, No. 14–CV–05810, 2015 WL 4724739, at *3 (W.D. Wash. Aug. 10, 2015) (district court sitting in Washington found that the PRA incorporates constitutional protections as exemptions).

Mr. Daleiden is therefore incorrect when he suggests that the Plaintiffs must identify a specific statutory provision that precludes the disclosure of their identifying information. Opening Br. at 19. The Washington Supreme Court has "recognized that the PRA must give way to constitutional mandates." *Freedom Found.*, 178 Wash. 2d at 695. Thus if a party raises a valid

constitutional objection to the release of information, that constitutional objection prevails. *Freedom Found.*, 178 Wash. 2d at 695. Moreover, it prevails under the terms of the PRA itself. Wash. Rev. Code § 42.56.070(1). Recognition that the PRA protects constitutional rights does not undermine the policies of the PRA, because statutory policies cannot overcome constitutional principles. *Id.* Mr. Daleiden and Amicus are thus incorrect. Opening Br. at 19; Amicus Brief of Washington Coalition for Open Government (Amicus Br.) at 11-12.

The Washington Supreme Court reached this conclusion in *Freedom Foundation* based on two earlier cases in which the court recognized that there are constitutional limits on public disclosure under the PRA, even though the PRA does not include an explicit exemption for the protection of constitutional rights or the recognition of constitutional privileges. *Freedom Found.*, 178 Wash. 2d at 695. In the earlier of those cases, the court explained: "There is no specific exemption under the PRA that mentions the protection of an individual's constitutional fair trial rights, but courts have an independent obligation to secure such rights." *Seattle Times Co. v. Serko*, 170 Wash. 2d 581, 595, 243 P.3d 919 (2010) (citing *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 378 (1979)). In that case, the court did not find that the disclosure of

the information at issue would violate a party's constitutional rights, but the court signaled its readiness to order information withheld if necessary to prevent a constitutional violation. *Seattle Times Co.*, 170 Wash. 2d at 595-96.

Shortly after deciding *Seattle Times*, the Washington court addressed a criminal defendant's argument that public disclosure of certain records is prohibited under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. *Yakima Cty. v. Yakima Herald-Republic*, 170 Wash. 2d 775, 808, 246 P.3d 768 (2011). The court reasoned that the argument "has force" that those constitutional provisions are incorporated as exemptions under the "other statute" provision, but it was not necessary to reach the point in that case because another statute authorized the appropriate redaction of the records and incorporated pertinent constitutional protections. *Id.*

In *Freedom Foundation*, the court relied upon *Seattle Times* and *Yakima County* to implicitly construe the "other statute" exemption in Wash. Rev. Code § 42.56.070(1) as sufficiently broad to include exemptions grounded in the federal or state constitutions. *Freedom Found.*, 178 Wash. 2d at 695. Plaintiffs assert that their personally identifying information in requested records is constitutionally protected from public disclosure. If they and the

district court are correct, that protection constitutes an exemption under the PRA even if not stated explicitly in statute.

D. The Plaintiffs' Requests for Redaction of Personally Identifying Information are Predominantly Based on Constitutional Claims

The Plaintiffs sought a preliminary injunction on the basis that release of the records under the PRA would constitute a violation of their First and/or Fourteenth Amendment rights under the United States Constitution, as well as their right of privacy under the Washington Constitution. ER A087-89. The analysis of Plaintiffs' claim must therefore be grounded in constitutional considerations; its substance does not turn upon the PRA or cases construing the PRA.

It is therefore important for this Court, contrary to Mr. Daleiden's argument, to focus on constitutional principles rather than statutory ones. *See* Opening Br. at 19-26. For example, Mr. Daleiden notes that in at least one case Washington courts have declined to redact personally identifying information. *Id.* at 21 (citing *King County v. Sheehan*, 114 Wash. App. 325, 345-46, 57 P.3d 307 (2002)). But the issue in *Sheehan* concerned different facts and a different legal claim—the statutory concept of privacy under the PRA. *Sheehan*, 114 Wash. App. at 335-46. The present case raises a different issue. The district court's order reflects the constitutional nature of the Plaintiffs' claim,

grounding its preliminary injunction in constitutional principles. ER A012-14. Mr. Daleiden's arguments based on statutory privacy under the PRA therefore simply address the wrong legal standard, and misdirect the Court from the constitutional principles at issue in this case. Opening Br. at 23-24; *see also* Amicus Br. at 19 (similarly misdirecting the Court away from the appropriate constitutional analysis by asserting that recognizing constitutional rights would "nullif[y] the PRA's pro-disclosure mandate"). As the Washington court has held, constitutional principles prevail over statutory policy. *Freedom Found.*, 178 Wash. 2d at 695.

One argument *is* properly grounded in statute. Some of the Plaintiffs are University employees. As to those plaintiffs, in addition to their constitutional arguments, Wash. Rev. Code § 42.56.230(3) also allows redaction of "personal information in files maintained for employees" to the extent disclosure would violate their right to privacy. The district court found it unnecessary to reach this issue. ER A010 n.8. The University has not typically applied this exemption to extend to the names, University email addresses, and University phone numbers of its employees. ER A262. But if Plaintiffs have demonstrated the applicable privacy interest, Wash. Rev. Code § 42.56.230(3) nonetheless

provides an additional statutory basis for redacting personally identifying information of University employees.

VI. CONCLUSION

The district court concluded that the PRA protects personally identifying information from disclosure if that disclosure would violate the constitutional rights of individuals identified in the record. The University stands ready to release records as directed, but agrees that the district court did not abuse its discretion in granting injunctive relief to protect the status quo at this preliminary stage.

RESPECTFULLY SUBMITTED this 9th day of March 2017.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule of Appellate Procedure 28-2.6, Defendant-Appellees University of Washington and Perry Tapper, by and through their undersigned counsel, hereby state that there are no related cases to the instant appeal that are currently pending in this Court.

s/*Jeffrey T. Even*
JEFFREY T. EVEN
Deputy Solicitor General

CERTIFICATE OF COMPLIANCE (FRAP 32(a)(7))

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached reply brief is proportionately spaced, has a typeface of 14 points or more and contains 3,424 words.

s/*Jeffrey T. Even*
JEFFREY T. EVEN
Deputy Solicitor General

CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that I electronically filed a true and correct copy of the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 9th day of March 2017, at Olympia, Washington.

s/*Jeffrey T. Even*
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