No. 08-330

In The
Supreme Court of the United States

THE NEW YORK LAW PUBLISHING COMPANY,
THE LEGAL INTELLIGENCER and
THE PENNSYLVANIA LAW WEEKLY,

Petitioners,

v.

JANE DOE, C.A.R.S. PROTECTION
PLUS, INC. and FRED KOHL,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October 10, 2008

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QUESTION PRESENTED

Should this Honorable Court exercise jurisdiction when the Third Circuit Court of Appeals correctly denied Petitioners' Motion to Intervene without prejudice to raise the matter before the District Court on remand, when the original parties have reached a settlement and have little or no direct interest in the constitutional issues raised by Petitioner, and when there is a limited record below. Respondent Doe respectfully urges the Court to answer in the NEGATIVE.

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COUNTERSTATEMENT OF THE CASE

Respondents C.A.R.S. Protection Plus, Inc. (C.A.R.S.) and Fred Kohl (Kohl) fired Respondent Jane Doe on the day of her son's funeral. This happened a few days after she terminated her pregnancy through an abortion, one necessary to protect her own health. She asserts in her Complaint, filed in 2001, that her decision to undergo the abortion motivated C.A.R.S. to terminate her employment. This case presents an action between an individual and a small business in which Ms. Doe seeks recompense for her wrongful termination pursuant to the Pregnancy Disability Act (PDA), 42 U.S.C. § 2000e(k).

Because Ms. Doe made the very private decision to have an abortion, she requested that she be permitted to proceed under a pseudonym or, alternatively, under seal. The District Court chose to allow both, recognizing that because of the small size of her employer, there was a real possibility she could be identified, even using a pseudonym and therefore both safeguards were necessary.

Following extensive discovery, Respondents C.A.R.S. and Kohl filed a Motion for Summary Judgment, which the Court below granted. Ms. Doe appealed. The Defendants below filed a Cross-Appeal contesting both the sealing of the record and the permission granted to Ms. Doe to proceed by pseudonym. In a Precedential Opinion filed on May 30, 2008, the Third Circuit reversed the grant of Summary Judgment in favor of the Defendants below. It

affirmed the sealing of the record and the Order allowing the Plaintiff to proceed as Jane Doe. (Appendix A to Petition).

Petitioners, upon learning of the May 30, 2008 Opinion, filed Emergency Motions to be permitted to intervene in the action for the limited purpose of seeking access to records, proceedings and the docket. On June 12, 2008, the Third Circuit issued an Order denying Petitioners' Motions. However, the Court stated that "movant may pursue this matter with the District Court upon remand." (Appendix B to Petition). Petitioners' Petition followed.

On September 9, 2008, the printed date of Petitioners' Petition for a Writ of Certiorari, the Third Circuit Court of Appeals issued a plurality Order, again addressing the intervention issue and matters set forth in Petitioners' footnote 1, found at page 4 of the Petition. A copy of the Order is attached to this Brief in Opposition as Appendix A. The Order clarifies "the scope of the remand regarding the sealing Order." The recent Order makes clear that in remanding, the issue to the District Court, it was not

> our intention that the order we entered sealing the record on appeal would prevent the District Court from considering this issue anew; indeed, our order suggesting further pursuit of this issue was intended to reflect our view that the District Court was the better court in which this issue could be litigated, since it could hold a hearing, and had done so previously on this very issue at the

> outset of the case, and since the record on appeal consists in large measure of the record made in the District Court. The issue of the propriety of the continued sealing of the case now that it will proceed to trial is an important one; the District Court should feel free to decide this issue unfettered by our rulings to date.

(footnote noting Judge Nygard's declination to join in the Order omitted). On September 12, 2008, the Third Circuit issued a two sentence Order, unsealing its September 9, 2008 Order. A copy of the former is attached as Appendix B to this Brief in Opposition.

Following remand by the Third Circuit, the District Court set a trial date of November 10, 2008. In addition, since remand, the parties to the underlying action have engaged in substantive settlement negotiations and reached a resolution of their differences before trial.

REASONS FOR REFUSING THE PETITION

I. Based on the June 19, 2008 and September 9, 2008 Orders of the Third Circuit Court of Appeals, Petitioners' Appropriate Remedy is With the District Court and Not This Honorable Court.

Petitioner posits that pursuing its constitutional concerns on remand before the District Court "makes no sense," reasoning that because the Third Circuit's

May 30, 2008 decision "specifically sanctioned the District Court's sealing, it would be futile to ask the District Court to reverse an action the Third Circuit expressly upheld." (Petition for Certiorari at page 4, footnote 1).

While Respondent Doe believes that the June 19, 2008 Order denying Petitioners' Motions also provided them with a *tabula rasa* upon which to present their arguments for access to the District Court, she asserts that any ambiguity was resolved upon issuance of the September 9 Order. Rather than ruling substantively upon the merits of Petitioners' claims, the matter was remanded to the District Court's discretion and determination. Far from making "no sense" or being futile, it is apparent that the Third Circuit decided that the appropriate forum for the initial determination of Petitioners' claims is before the District Court.

The Third Circuit's Order sets forth a practical and appropriate procedure, given the unique facts of this case. Petitioners filed their Motions in the Third Circuit, *after* issuance of the May 30, 2008 Precedential Opinion. Indeed, given that the Opinion allegedly provided Petitioner with their first notice concerning the existence of the underlying action, neither Court had any record upon which to address the merits of this issue of constitutional proportions. The logical, and Respondent Doe believes, proper and practical disposition of these issues requires the "without prejudice" remand to the District Court for its consideration afforded by the Third Circuit.

Should this Honorable Court grant the Petition, it will also operate with a limited record. Certainly, one potential outcome of a hypothesized grant of the Petition would be a remand to the District Court for an evidentiary or other determination, effectively the same relief *already granted* to Petitioners by the September 9, 2008 Order. Such an outcome would result in further delay in this already seven-year-old case, as well as a significant expenditure of time and expense by the underlying parties, Ms. Doe, an individual and C.A.R.S., a small company, whose interests, frankly, lay elsewhere than with whether the courts maintain "secret cases and dockets." (Petition at p. 16).[1]

This Court has stated that if there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, "it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105, 65 S. Ct. 152, 89 L. Ed. 101 (1944). "It has long been the Court's considered

[1] In making this argument, Respondent Doe states that she remains vitally interested in protecting her anonymity and redaction of potentially identifying information contained in the record, issues that Petitioners concede are *not* being disputed. (*See* Petition at p. 5). Nonetheless, Respondent has invited Petitioners to engage in negotiations regarding their First Amendment issues, both directly and through the Third Circuit's Mediation Program which was willing to attempt to facilitate a resolution. Petitioners declined to participate in any resolution that would not result in a reversal or withdrawal of the Third Circuit's decision in the underlying case.

practice not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . or to decide any constitutional question except with reference to the particular facts to which its is to be applied . . . " *Clinton v. Jones*, 520 U.S. 681, 690 n.11, 117 S. Ct. 1636, 1642 n.11, 137 L. Ed. 2d 945 (1997), *quoting*, *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461, 65 S. Ct. 1384, 1389-1390, 89 L. Ed. 1725 (1945). Moreover, it is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case. *Id.*, *citing*, *Burton v. United States*, 196 U.S. 283, 295, 25 S. Ct. 243, 245, 49 L. Ed. 482 (1905).

A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed, may not occur at all. *Texas v. U.S.*, 523 U.S. 296, 300, 118 S. Ct. 1257, 1259, 140 L. Ed. 2d 406 (1998). Ripeness analysis requires the court to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Id.* 523 U.S. at 300-301, 118 S. Ct. at 1260. *See also Renne v. Geary*, 501 U.S. 312, 320, 111 S. Ct. 2331, 2338, 115 L. Ed. 2d 288 (1991) ("justificiability concerns not only the standing of litigants to assert particular claims, but also appropriate timing of judicial intervention"); and *Anderson v. Green*, 513 U.S. 557, 559, 115 S. Ct. 1059,

1060, 130 L. Ed. 2d 1050 (1995) ("ripeness is peculiarly a question of timing and it is the situation now, rather than the situation at the time of the decision under review that must govern").

As recently articulated by the Tenth Circuit Court of Appeals in *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1116 (10th Cir. 2008), the ripeness inquiry focuses not on whether the party was in fact harmed, but rather, whether the harm asserted has matured sufficiently to warrant judicial intervention. The focus is when in time it is appropriate for the court to take up the asserted claim.

Ms. Doe argues that this is not the appropriate time for this Honorable Court's intervention. Despite Petitioners' protestations, the Third Circuit has gone out of its way and made abundantly clear that they may proceed before the District Court with a clean slate and no presumption either way concerning the substantive merits of their claim of a right to intervene or their First Amendment concerns. By filing its Petition, Petitioners ask this Court to intervene *before* the District Court has an opportunity to hear and determine the issues presented. Clearly, such fast tracking of this matter is premature. If Petitioners believe that their arguments for intervention and the First Amendment issue are so compelling, they should welcome the opportunity to present them in the most appropriate forum, and one in which the Third Circuit invited their development – the District Court. Thus, even accepting, *arguendo*, the merits of

Petitioners' arguments, this is not an appropriate time for this Court to become involved.

Petitioners suffer no hardship if the Petition is denied. They are not out of court, and no adverse determination exists concerning the substantive merits of their claims. They are merely remanded to the District Court, where they can present their case in full as to why intervention is appropriate and the sealing of this case was inappropriate. On the other hand, the hardship on Ms. Doe both emotionally and financially would be enormous.

On September 25, 2008, Petitioners filed a letter acknowledging the Orders of the Third Circuit issued subsequent to the filing of their Petition setting forth why they believed that resort to the District Court remained a futile gesture. Petitioners argue that the Third Circuit record remains sealed, regardless of any District Court determination. They also assert that the remand Order does nothing to alter the fact that the underlying action existed without public knowledge of it for seven years.

Ms. Doe acknowledges the obvious fact that the District Court cannot order the unsealing of the Third Circuit record. However, other than the parties' briefs, there is little, if anything, in the Third Circuit that would be of interest to Petitioners or would not already be a part of the record below. Moreover, if the Petitioners would remain unsatisfied with the ultimate disposition below, means would be available to present the issues to the Third Circuit Court of

Appeals. In any case, this Respondent is willing to unseal the record subject with limited redactions to protect her identity. As such, there is no case or controversy.

As to their second argument, the decision upholding the sealing of the record took place based on the interests and arguments of two private parties. The considerations raised by Petitioners were obviously neither presented nor considered below or on appeal. Petitioners, through the remand, would have ample opportunity to argue the merits of public access and the interests of the press, as set forth in their Petition. Their arguments should first be put forth in the District Court as permitted by the Third Circuit remand.

It is apparent that this is not the time for intervention by this Honorable Court. Petitioners must be required to first present their arguments in the appropriate forum, the District Court. Accepting this case for review *at this time*, given its facts and existing record, is clearly inappropriate.

II. In the Alternative, Allowing Intervention Violates Federal Rules of Civil Procedure Rule 24(b)(3)

Rule 24(b) of the Federal Rules of Civil Procedure allows permissive intervention. Upon timely motion, the Court may permit anyone to intervene who "has a claim or defense that shares with the main action a

common question of law or fact." (F.R.Civ.P., Rule 24(b)(1)(B)).[2] Under subsection(b)(3),

> In exercising its discretion, the court must consider whether intervention will unduly delay or prejudice the adjudication of the original parties' rights.

F.R.Civ.P., Rule 24(b)(3).

Ms. Doe argues, alternatively, that on the merits of intervention, Petitioners' request to intervene violates Rule 24(b)(3).[3] The delay resulting from resolution of Petitioners' issues in this Court clearly prejudices the adjudication of the rights of the original parties.

As set forth in the Rule, the decision as to whether to allow permissive intervention is within the discretion of the trial court. This is an area where a court's discretion is broad. *McDonald v. Means*, 309 F.3d 530, 541 n.11 (9th Cir. 2002). Even if the requirements of Rule 24(b) are satisfied, the court may still properly refuse to allow intervention. *South Dakota ex rel. Barnett v. United States Department of Interior*, 317 F.3d 783, 787 (8th Cir. 2003), *quoting*, 7C Wright, Miller & Kane, *Federal Practice and Procedure* § 1913 at 376-377.

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[2] Ms. Doe presumes that this is the section under which Petitioners proceed.

[3] The fact that the District Court has *never* had the opportunity to decide this question is further evidence that review by this Court would not be timely/ripe.

Where settlement may be jeopardized by intervention – even as of right – the interests prejudiced, including the parties' interest in avoiding continuing litigation, will weigh against permitting intervention. *Farmland Dairies v. Commissioner of New York Department of Agriculture*, 847 F.2d 1038, 1044 (2d Cir. 1988). *See also Gallick v. Barto*, 828 F.Supp. 1175, 1178 (M.D. Pa. 1993) (intervention denied in part based on prejudice and delay where parties settled the underlying action).

Applications to intervene for limited purposes are disfavored, since the "rules do not anticipate limited 'special status' intervenors." *New York News, Inc. v. Newspaper and Mail Deliverers Union of New York*, 139 F.R.D. 291, 293 (S.D. N.Y. 1991), *aff'd sub nom., New York News, Inc. v. Kheel*, 972 F.2d 482 (2d Cir. 1992) (intervenor sought intervention for sole purpose of filing a Rule 11 motion). *See also Kamerman v. Steinberg*, 681 F.Supp. 206, 211 (S.D. N.Y. 1988) (denial of application for intervention for purposes of filing motion to stay the federal proceedings).

A court may also properly deny an intervenor's application when its interest is not related to the underlying action. *See Sierra Club v. United States Army Corps of Engineers*, 709 F.2d 175, 176 (2d Cir. 1983), or where disposition of the case without intervention will not impair the movant's ability to protect his interests by other means. *New York News, Inc., supra*, 139 F.R.D. at 293.

Petitioners' Petition should be denied on the merits based on factors of delay and prejudice. This is a seven-year-old case, in which the parties have a settlement agreement in place.[4] Intervention would force Ms. Doe, an individual of limited means, to continue this litigation beyond the settlement, likely for years. Given the nature of Ms. Doe's claim, compassion for her need of closure must be a factor considered by the Court. Intervention by Petitioners would artificially extend the litigation beyond what both original parties desire. Moreover, as a practical matter, continuation of this litigation bears significant financial costs. Petitioners concede that if they are permitted to intervene and are successful in their Petition, Ms. Doe will remain anonymous, and they are agreeable to redacting the record to keep it so. What then is her interest in opposing this Petition, and if unsuccessful, undertaking the expense of a full briefing and argument before this Honorable Court? As will be discussed more fully *infra*, this case, in this posture, is an inappropriate forum through which Petitioners can present their arguments against the so called "secret docket" of the District Court and/or Third Circuit Court of Appeals. Given that other alternatives exist for Petitioners, intervention under Rule 24(b) should not be permitted, based on delay and prejudice. Ms. Doe should be allowed some

[4] As of this writing, this case continues as active on the District Court docket because the agreed upon terms of the settlement will take a few months to consummate.

closure from her dual traumas of losing her son and her job.

III. Although This Case is Not the Proper Vehicle for Presentation of Petitioners' Claims, They are Not Without Remedy

Based upon Petitioners' refusal to proceed before the District Court following the Third Circuit's Orders of June 12, 2008 and September 9, 2008 and its declination to negotiate with Ms. Doe on a resolution in this case (certainly both within their rights), it is apparent that they are after bigger game than this particular litigation. Petitioners have declared war on its perception of judicial secrecy and will be satisfied only by a more global determination. Ms. Doe asserts that for a number of reasons, this case is the wrong vehicle for Petitioners to achieve this larger goal. However, Petitioners are not without remedy, nor does this issue become a recurring one that escapes resolution.

But for the fact of Ms. Doe's abortion, her case was probably not substantively different from the 19,244 other employment discrimination cases filed in 2001. (Kyckelhahn and Cohen, *Civil Rights Complaints in U.S. District Courts, 1990-2006*, Bureau of Justice Statistics, Department of Justice (2008)). This is a case between an individual and her small private corporate employer concerning internal decisions

made by management. The public's interest in this case is minimal.[5] Moreover, after seven years of litigation, the parties have resolved their differences, sought closure and hope to move on through the recent settlement. At this point, neither Ms. Doe nor (she believes) C.A.R.S. have any interest in seeing this case continue, probably for years, at additional financial and emotional expense.

Ms. Doe argues that the parties and Petitioners are best served if Petitioners are left to the remedy of mandamus. Indeed, a review of the authorities cited in the Petition reveals that of the cases relied upon by Petitioners, the following can be identified, in whole or in part, as mandamus actions: *Richmond Newspaper Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980); *Publicker Industries Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *In Re Iowa Freedom of Information Council*, 724 F.2d 658 (8th Cir. 1984); *United States v. Valenti*, 987 F.2d 708 (11th Cir. 1993); *In Re State Record Company*, 917 F.2d 124 (4th Cir. 1990); and *Washington Post v. Robinson*, 935 F.2d 282 (D.C. Cir. 1991). (*See generally*, 28 U.S.C. § 1361 and 28 U.S.C. § 1651).

In *In Re McClatchy Newspapers, Inc.*, 288 F.3d 369 (9th Cir. 2002), *cert. denied*, 537 U.S. 944, 123 S. Ct. 346, 154 L. Ed. 2d 252 (2002), the Sacramento

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[5] To the extent there is public interest in this case, it can be fully satisfied by the Third Circuit's precedential opinion, which sets forth the circumstances of Ms. Doe's claim.

Bee newspaper sought access to unredacted letters offered by a party to reduce his criminal sentence. Since the paper was not a party to the underlying criminal action, it lacked standing to appeal. However, access was permitted under its alternative writ of mandamus argument. In granting access to the information sought, the court applied the five part test from *Bauman v. U.S. District Court*, 557 F.2d 650, 654-655 (9th Cir. 1977): 1) whether the party seeking the writ has no adequate means to attain the desired relief; 2) will petitioners be damaged or prejudiced in a way not correctable on appeal; 3) whether the lower court's order is clearly erroneous as a matter of law; 4) is the order an oft repeated error or manifests a persistent disregard of the federal rules; and 5) whether the order raises new and important problems or issues of law of first impression. *See also Virginia Department of State Police v. The Washington Post; The Virginian Pilot; Richmond Times Dispatch*, 386 F.3d 567, 574 n.4 (4th Cir. 2004), *cert. denied*, 544 U.S. 949, 125 S. Ct. 1706, 161 L. Ed. 2d 526 (2005) (a mandamus petition is the preferred vehicle for review of orders sealing or unsealing records.)

Mandamus is appropriate where the petitioners demonstrate a clear abuse of discretion or conduct amounting to a disruption of judicial power. To ensure that mandamus remains an extraordinary remedy, petitioners must show that they lack adequate alternative means to obtain the relief they seek, and they carry the burden of showing that their

right to issuance of the writ is clear and indisputable. *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 309-310, 109 S. Ct. 1814, 1822, 104 L. Ed. 2d 318 (1989). In addition to the above factors, the petitioners must satisfy the issuing court that the writ is appropriate under the circumstances. Such hurdles, however demanding, are not insurmountable. *Cheney v. United States District Court for the District of Columbia*, 540 U.S. 367, 381, 124 S. Ct. 2576, 2587, 159 L. Ed. 2d 459 (2004).

Ms. Doe argues that rather than dragging her into a protracted First Amendment argument that, by Petitioners' own admission, will not jeopardize her anonymity, the better course is for them to pursue mandamus. Petitioners' constitutional concerns can all be addressed in such litigation, absent the necessity of her participation. Moreover, by following this path, this Honorable Court would have a fully developed record upon which to make a determination in the event a subsequent Petition was filed.

IV. The Respondents' Settlement Precludes a Case or Controversy

With Ms. Doe and Respondent, C.A.R.S. and Kohl having settled the underlying action, she argues that there is no case or controversy present for this Honorable Court's determination. While the original parties' settlement neither includes Petitioners nor covers the issues raised in their Petition,

the underlying controversy has gone away, leaving no one with an incentive to contest their claims, should this Court grant the Petition.

Article III of the Constitution limits the judicial power of the United States to the resolution of cases and controversies, and Article III standing enforces the constitutional case or controversy requirement. No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal court jurisdiction to actual cases or controversies. *Hein v. Freedom From Religion Foundation*, ___ U.S. ___, 127 S. Ct. 2553, 2562, 168 L. Ed. 2d 424 (2007). The case or controversy requirement subsists through all stages of federal judicial proceedings, and it is not enough that a dispute was very much alive when suit was filed. *Lewis v. Continental Bank*, 494 U.S. 472, 478, 110 S. Ct. 1049, 1054, 108 L. Ed. 2d 400 (1990). *See also North Carolina v. Rice*, 404 U.S. 244, 246, 92 S. Ct. 402, 404, 30 L. Ed. 2d 413 (1971) (Federal courts are without power to decide questions that cannot affect the rights of the litigants in the case before them). The parties must continue to have a personal stake in the outcome of the lawsuit. *Lewis*, *supra*, 494 U.S. at 478, 110 S. Ct. at 1254.

A defendant's voluntary cessation of a challenged practice does not necessarily deprive a federal court of its power to determine the legality of the practice. However, the court does not have a license to retain jurisdiction over cases in which one or both parties plainly lack a continuing interest, as when the

parties have settled or plaintiff, pursing a non-surviving claim, has died. *Friends of the Earth, Incorporated v. Laidlaw Environmental Services (TOC) Inc.*, 528 U.S. 167, 189, 192, 120 S. Ct. 693, 708, 710, 145 L. Ed. 2d 610 (2000).

The *Friends of the Earth* case cited (528 U.S. at 192, 120 S. Ct. at 710) two cases as examples in support of its proposition. In *DeFunis v. Odegaard*, 416 U.S. 312, 94 S. Ct. 1704, 40 L. Ed. 2d 164 (1974), (*per curiam*), a non-class action challenge to the constitutionality of a law school's admission process was mooted when plaintiff, admitted pursuant to a preliminary injunction, neared graduation, and, when as a matter of school policy, he would be permitted to complete the term and receive his degree.

Arizonans for Official English v. Arizona, 520 U.S. 43, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997), involved a non-class action challenge to Arizona's English as the official language law. The case became moot when the plaintiff, a state employee, left for private employment. *See also City of Erie v. Pap's A.M.*, 529 U.S. 277, 287, 120 S. Ct. 1382, 1390, 146 L. Ed. 2d 265 (2000) (a case becomes moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome).

The settlement by the underlying parties makes this matter moot. With the resolution and Petitioners' stipulation that Ms. Doe's identity would be protected, in any event, there is no case or controversy for resolution by this Court with these parties.

Petitioners might assert in response that their Petition falls within the established exception to mootness for disputes capable of repetition, yet evading review. This exception applies where the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and there is a reasonable expectation that the same complaining party will be subject to the same action again. *Federal Election Commission v. Wisconsin Right to Life, Inc.*, ___ U.S. ___, 127 S. Ct. 2652, 2662, 162 L. Ed. 2d 329 (2007).

Given the availability of a mandamus action in which to present their constitutional claims, Petitioners' secrecy concerns are unlikely to evade review for very long following denial of their Petition. Indeed, the suggested alternative of mandamus will allow them to fully develop the record, with fully engaged adversaries. *See also DeFunis, supra*, 416 U.S. at 319, 94 S. Ct. at 1707 (if the challenged admissions procedures remain unchanged, there is no reason to suppose that a subsequent case attacking them will not come along with relative speed).

Recent events have changed the dynamic of this matter. The settlement by the Respondents has eliminated the foundation upon which Petitioners hoped to erect their constitutional challenge. No case or controversy exists, thereby dooming their Petition.

CONCLUSION

Petitioners' interests are much larger than this dispute between a woman and her small former employer. They have other means to fully litigate the constitutional issues they present. The recent settlement by the parties below further reinforces the conclusion that Ms. Doe's case is the wrong one for presentation of Petitioners' concerns. For the reasons stated herein, Respondent, Jane Doe, respectfully urges this Honorable Court to deny Petitioners' Petition.

Respectfully submitted,

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