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ARIZONA COURT OF APPEALS

DIVISION ONE

In re the Marriage of: RUBEN GALLEGO, Appellant, v. KATHARINE "KATE" GALLEGO, Appellant, and THE WASHINGTON FREE BEACON, Real Party in Interest–Appellee.	No. _____ Yavapai County Superior Court No. P-1300-DO-201601004 **APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL** **(Relief requested before July18, 2024)**

INTRODUCTION

Pursuant to Rule 7(c) of the Arizona Rules of Civil Appellate Procedure ("ARCAP"), Ruben Gallego and Katharine "Kate" Gallego respectfully move for an emergency stay pending appeal to preserve the status quo.

At the beginning of this year, the Washington Free Beacon inserted itself into the Gallegos' long-dormant divorce proceedings to unseal the underlying record. The Gallegos opposed unsealing any portion of the record. The Superior Court ordered the Gallegos to produce a record with proposed redactions, which they did. The Superior Court then rejected many proposed redactions and ordered that an alternative record be unsealed on July 18, 2024, "unless otherwise ordered by an Appellate Court." *See* Ex. B at (July 3, 2024 Order) at 3.

Without an order from this Court staying the Superior Court's decision pending appeal while the Gallegos seek review, the sealed record in this case will become public, thereby irreparably harming the privacy and safety rights they have sought to preserve for themselves and their minor child.

BACKGROUND

The underlying divorce proceedings in this case began in late 2016. To protect the Gallegos' respective privacy interests and safety, the Superior Court properly sealed the record. The divorce was finalized in 2017, and the record has remained sealed since, providing the Gallegos—two elected officials, and their minor child—with protection as to sensitive information regarding their private lives and whereabouts.

Years later, in January 2024, the Washington Free Beacon intervened to remove that critical layer of protection. The Free Beacon has repeatedly stated that it seeks to publish the details of the Gallegos' divorce out of political motivations. The Gallegos have maintained—and continue to maintain—that their privacy and safety interests counsel against unsealing the record.

The Superior Court denied the Gallegos' request to keep the entire record sealed, but it allowed the Gallegos to propose redactions. *See* Ex. A (March 26, 2024 Minute Entry). The Gallegos did so. But the Superior Court ruled, in its July 3, 2024 order, that it would publicly file a public version of the record on July 18, 2024, that does not include all of the redactions the Gallegos had requested. *See* Ex. B.

The Gallegos have appealed. *See* Ex. C (Notice of Appeal). The Gallegos moved for a stay from the Superior Court, which it denied on July 16, 2024. *See* Ex. D (July 16, 2024 Order). As of this filing, the Superior Court record remains under seal.

ARGUMENT

I. The Gallegos meet the minimum burden for a stay.

"Arizona courts have applied to such stay requests the traditional criteria for the issuance of preliminary injunctions . . . ." *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410 ¶ 9 (2006) (citing *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1991); *Burton v. Celentano*, 134 Ariz. 594, 595 (App. 1982)) (applying framework for injunctive relief to stays on appeal). As such, a party seeking a stay must establish: 1) a strong likelihood of success on the merits; 2) irreparable harm if the stay is not granted; 3) that the harm to the requesting party outweighs the harm to the party opposing the stay; and (4) that public policy favors the granting of the stay. *Id.* at 411 ¶ 10.

But critically, this analysis in not an "absolute" scale or an analysis turning on "counting the factors that weigh on each side of the balance." *Id.* Rather a party may merit a stay by establishing either: "1) probable

success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and that the balance of hardships tips sharply in favor of the moving party." *Id.* (alterations and internal quotation marks omitted) (citing *Shoen*, 167 Ariz. at 63); *see also City of Flagstaff v. Ariz. Dep't of Admin.*, 255 Ariz. 7, 12 ¶ 16 (App. 2023) (analyzing the two "conjuntive pairing[s]" as "extremes of a single continuum" rather than as "separate tests").

II. Unsealing the record is irreparable.

"The greater and less reparable the harm, the less the showing of a strong likelihood of success on the merits need be. Conversely, if the likelihood of success on the merits is weak, the showing of irreparable harm must be stronger." *Fann v. State*, 251 Ariz. 425, 432 ¶16 (2021) (citation omitted).

Unsealing any portion of the underlying divorce record is irreparable and cannot be later cured if any decision was made in error. This Court, or any court, cannot "unring" the proverbial bell once previously sealed information is unsealed; even if this Court were to reverse the Superior Court's decision, the Gallegos' rights to keep parts of the record sealed or redacted would have been rendered moot without

a stay. *See*, *e.g.*, *Fire Sec. Elecs. & Commc'ns Inc. v. Nye*, CV-23-02730, 2024 WL 620813, at *6–7 (D. Ariz. Feb. 14, 2024) (finding that disclosure of confidential information would create likely irreparable injury); *Walmart Inc. v. Synchrony Bank*, No. 18-CV-05216, 2020 WL 475829, at *5 (W.D. Ark. Jan. 29, 2020) ("The Court agrees that any appellate review of its prior Order unsealing the Complaint will be rendered toothless if the Court denies a stay pending appeal and immediately unseals the sealed Complaint. The Court acknowledges that unsealing the sealed Complaint is a bell that cannot be unrung and that denying Synchrony meaningful appellate review may qualify as an irreparable harm." (citations omitted)); *Joint Stock Soc. v. UDV N. Am., Inc.*, 104 F. Supp. 2d 390, 406–07 (D. Del. 2000) ("[O]nce these materials are unsealed, any rights or interests which the defendants are seeking to protect will evaporate."); *Oryon Techs., Inc. v. Marcus*, 429 S.W.3d 762, 765 (Tex. App. 2014) ("[I]n cases where access to potentially confidential documents is in question, preliminary disclosure would compromise the effectiveness of any later sealing order, possibly even mooting the controversy. . . . [F]ailing to stay the trial court's order will prevent this Court from taking effective action should it determine that the trial court

has erred in concluding that the documents at issue are not properly subject to a sealing order.").

To give full effect to the judicial process and the Gallegos' appellate rights, this Court must issue a stay to allow itself enough time to consider this dispute's merits after full briefing. Without a stay, the damage will be immense and irreparable.

III. The Gallegos advance serious questions about their privacy rights, and the balance of hardships tips sharply in their favor.

In their original response to Free Beacon's motion to unseal the record, the Gallegos raised serious questions regarding the scope of Supreme Court Rule 123 and ARFLP 13 and 17. The Gallegos are elected officials, and they have stridently maintained that their overriding interest in privacy does not disappear simply because of their jobs.

Strikingly few courts in Arizona have defined the bounds between an elected official's public and private life for the purposes of access to records such those here. While "privacy rights are absent or limited in connection with the life of a person in whom the public has a rightful interest," courts have not gone "so far as to say, however, that a public official has no privacy rights at all." *Cf. Godbehere v. Phx. Newspapers,*

Inc., 162 Ariz. 445, 343 (1989). These boundaries, particularly when the records are entirely unconnected with their official duties, present serious questions under Arizona law.

Other courts across the county have sought to clarify these issues. *See Nixon v. Warner Comms. Inc.*, 435 U.S. 589, 598 (1978) ("[T]he common-law right of inspection has bowed before the power of a court to insure that its records are not used to gratify private spite or promote public scandal through the publication of the painful and sometimes disgusting details of a divorce case" (internal quotations omitted)); *Gawker Media, LLC v. Bollea*, 129 So.3d 1196, 1201 (Fla. Dist. Ct. App. 2014) (While a public figure's expectation of privacy may be diminished in certain respects, "we do not suggest that every aspect of his private life is a subject of public concern"); *Brinkley v. Casablancas*, 80 A.D.2d 428, 433 (N.Y. App. Div. 1981) ("A public figure does not, however, surrender all right to privacy. Although his privacy is necessarily limited by the newsworthiness of his activities, he retains the independent right to have [his] personality, even if newsworthy, free from commercial exploitation at the hands of another" (internal quotation omitted)). For these reasons

and others, allowing time for this Court to grapple with these serious questions is necessary.

Further, the balance of hardships, as it has since Free Beacon moved to unseal, tips sharply in the Gallegos' favor. Sensitive details about the Gallegos' and their minor child's life stand to be published if Free Beacon succeeds. In a polarized era in which the details of elected officials are incessantly tracked, the risk of wrongful disclosure that could give a lead to bad actors is high. Meanwhile, the Free Beacon loses nothing by waiting for the appellate process to continue in the normal course while the underlying record remains sealed. *See Oryon Techs., Inc.*, 429 S.W.3d at 764 ("There is no paramount right to immediate access to court records.").

CONCLUSION

For the reasons above, this Court should grant the Gallegos' Emergency Motion for Stay Pending Appeal. The Gallegos request an order that no bond is necessary, because the July 3 order does not involve an award of money or recovery of an interest in property. *See* ARCAP 7(a)(6).

RESPECTFULLY SUBMITTED this 16th day of July, 2024.

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