Roy Herrera (032901)
Daniel A. Arellano (032304)
Austin T. Marshall (036582)
HERRERA ARELLANO LLP
1001 North Central Avenue
Suite 404
Phoenix, Arizona 85004
(602) 567-4820
roy@ha-firm.com
daniel@ha-firm.com
austin@ha-firm.com

Attorneys for the Gallegos

SUPREME COURT OF ARIZONA

In Re the Marriage of: RUBEN GALLEGO, Petitioner/Appellant, and KATHARINE SW GALLEGO, Respondent/Appellant, v. THE WASHINGTON FREE BEACON, Real Party in Interest/Appellee.	Arizona Supreme Court No. ___________________ Arizona Court of Appeals, Division 1 No. 1 CA-CV 24-0527 FC Yavapai County Superior Court No. P-1300-DO-201601004 **PETITIONERS' MOTION FOR STAY** **(Relief requested before October 17, 2024)**

INTRODUCTION

Pursuant to ARCAP 7(c), Ruben Gallego and Katharine "Kate" Gallego respectfully move for a stay to preserve the status quo while they seek review from this Court.

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. The Superior Court ordered the Gallegos to produce a record with proposed redactions, which they did. On July 3, 2024, the Superior Court rejected many of the proposed redactions and ordered that a version of the record without all of the requested redactions be filed publicly. [IR 66.] The Superior Court did not articulate its reasons for rejecting the proposed redactions. The Gallegos appealed to protect their minor child, who is referenced extensively in the divorce record. The record includes intimate details of how the Gallegos planned to raise and co-parent their child. *See Michael M. v. Ariz. Dep't of Econ. Sec.*, 202 Ariz. 198, 200 ¶ 8 (App. 2002) ("A parent's right to 'the companionship, care, custody, and management of his or her children' is a fundamental, constitutionally protected right[.]").

The Court of Appeals stayed the Superior Court's unsealing order on July 30. Ex. A. It then affirmed in a memorandum decision on October 10. Ex. B. The rules give the Gallegos 30 days from then to seek review from this Court, or until November 11. ARCAP 23(b)(2)(A), 5(a). But the Court of Appeals ordered that its stay be lifted on October 17. Ex. C. Without an order from this Court before October 17 further staying the Superior Court's decision 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 and mooting their petition for review. The Court should enter a stay to preserve the status quo while the Gallegos timely seek review and this Court considers the petition.

BACKGROUND

The underlying divorce proceedings in this case began in late 2016. To protect both parties and their soon-to-be-born minor child, Ruben moved to seal the court file and record soon after divorce proceedings began. [IR 9, 10.] 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. [IR 1–41.]

Years later, in January 2024, the Washington Free Beacon intervened to remove that critical layer of protection. [IR 42, 43.] The Free Beacon has repeatedly stated that it seeks to publish the details of the Gallegos' divorce out of political motivations. The Superior Court denied the Gallegos' request to keep the entire record sealed, but it allowed the Gallegos to propose redactions. [IR 56.] The Gallegos did so. [IR 58, 80.] 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. [IR 66 at 3.]

The Gallegos appealed, arguing that: 1) the Superior Court should have made specific findings for rejecting the Gallegos' suggested redactions and unsealing those portions of the record; and 2) the privacy and safety interests of the Gallegos' minor child continue to justify sealing any reference to him in the record, especially when the Gallegos presented unrebutted evidence of the threats they and their minor child faced.

Though the Superior Court denied a stay of its decision pending appeal, the Court of Appeals granted one on July 30. The Court of Appeals, however, subsequently rejected the Gallegos' arguments and affirmed the Superior Court's decision. As of this filing, the Superior Court record remains under seal, but the stay granted by the Court of Appeals is set to expire in two days, on October 17.

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. *Smith*, 212 Ariz. 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 ¶ 15 (App. 2023) (recognizing the "conjunctive pairing test" as sufficient to warrant stay relief rather than solely as a means to establish the balance of hardships).

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).

Wrongly 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, including the right to ask for this Court's review, this Court must issue a stay to allow the Gallegos an opportunity to seek review and for the Court to consider the petition. Without a stay, the damage will be immense and irreparable.

III. The Gallegos advance serious questions about what the Rules of Family Law Procedure require and the scope of their minor child's privacy and safety interests, and the balance of hardships tips sharply in their favor.

In their original response to Free Beacon's motion to unseal the record [IR 48], and to the Court of Appeals, the Gallegos raised serious questions regarding the scope of Supreme Court Rule 123 and ARFLP 13 and 17 and the standards for unsealing previously sealed records in family court. Specifically, the Gallegos have raised serious questions as to what the Superior Court must find to unseal a document. The Gallegos have stridently maintained that their overriding interest in privacy and

safety does not disappear simply because of their jobs as elected officials. The Gallegos have further raised compelling questions about the proper weighing of interests when a party presents ***entirely unrebutted*** evidence to support documents remaining sealed—evidence showing ongoing threats to elected officials and their minor child. [*See* IR 80 at 256.]

No published Arizona appellate cases have addressed findings required to support unsealing a record in family court. And 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 as 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. This is nothing to be said about the Gallegos' minor child, who is not a public official and has strong privacy and safety interests in his own right. *See* ARFLP 13(e)(2) ("[T]he court may find that the

confidentiality or privacy interests of the parties, *their minor children*, or another person outweigh the public interest in disclosure." (emphasis added)).

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.

The Gallegos argued to the Court of Appeals that the Superior Court must be required to give specific findings to unseal records in family court cases as it is in other civil cases. *Compare* ARFLP 17(f), *with* Ariz. R. Civ. P. 5.4(h). Requiring specific findings in one context but not another unnecessarily elevates interests in civil cases while derogating interests in family cases, which often include highly sensitive details. Without such findings, it is impossible for an appellate court to weigh the relevant favors and interests at stake. *See* ARFLP 17(f) ("Any party opposing a motion to unseal must demonstrate why the motion should not be granted. The opposing party must show that overriding circumstances continue to exist or that other grounds provide a sufficient basis for keeping the record sealed."); *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 456 (1982) ("[T]he appellate court may find an abuse of discretion if the record fails to provide substantial evidence to support the trial court's finding."). Courts in other jurisdictions require trial courts to articulate their findings in the record that justify unsealing a

record just as they do for sealing a record in the first instance. *See State v. Richardson*, 302 P.3d 156, 161 (Wash. 2013).

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. Contrary to the Free Beacon's assertions thus far, its interest, let alone any of constitutional magnitude, are not harmed by proceeding with caution and staying the Superior Court's order while the litigation continues. They remain free to criticize the Gallegos as much as they would like, and the Gallegos should not be denied a stay solely because the Free Beacon would prefer to publish the details of the records before the upcoming general election.

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. This is especially true considering actual, reported threats Mayor Gallego and her son have received. [IR 80 at 256.] Meanwhile, the Free Beacon loses nothing by waiting for the appellate process to continue in the normal course to this final stage 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."); *Voter Reference Found., LLC v. Balderas*, 616 F. Supp. 3d 1132, 1212 (D.N.M. 2022) ("The First Amendment does not protect an absolute right to access court documents or court proceedings." (citing *Press-Enterprise Co. v. Super. Ct. of Cal. for Riverside Cnty.*, 478 U.S. 1, 11–12 (1986))).

CONCLUSION

For the reasons above, this Court should grant the Gallegos' Motion for Stay of the Superior Court's July 3 order while they seeks review of the Court of Appeals's decision in this Court. The Gallegos request an order that no bond is necessary, because the Superior Court's 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 15th day of October, 2024.

HERRERA ARELLANO LLP

/s/ Daniel A. Arellano
Roy Herrera
Daniel A. Arellano
Austin T. Marshall
1001 North Central Avenue
Suite 404
Phoenix, Arizona 85004

Attorneys for the Gallegos