MELINDA HAAG (CSBN 132612)
United States Attorney
ALEX G. TSE (CSBN 152348)
Chief, Civil Division
NEILL T. TSENG (CSBN 220348)
Assistant United States Attorney

450 Golden Gate Avenue, Box 36055
San Francisco, California 94102-3495
Telephone: (415) 436-7155
FAX: (415) 436-6748
neill.tseng@usdoj.gov

Attorneys for Respondents

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

FOUR DIRECTIONS, ET AL., Petitioners, v. COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ET AL., Respondents.	CASE NO. C 14-03022 YGR **RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED PRE-COMPLAINT PETITION TO PRESERVE EVIDENCE** Date: January 13, 2015 Time: 2:00 p.m. Place: Courtroom 1, 4th Floor, 1301 Clay Street, Oakland, California Honorable Yvonne Gonzalez Rogers

I. INTRODUCTION. [1]

The subject motion (Doc. #35) should be granted and the Amended Petition (Doc. #34) should be dismissed or denied. The requested information is statutorily prohibited from disclosure and Petitioners have not met the requirements of Rule 27 in any event.

II. ARGUMENT.

A. The Amended Petition Should Be Dismissed or Denied Because the Requested Information is Confidential and Prohibited From Disclosure by Statute.

The emails at issue are barred from disclosure by the plain language of 28 U.S.C. § 360(a). First, the statute makes no distinction between documents created before the investigation and documents created during the investigation. It makes confidential and prohibits from disclosure "all papers, documents, and records of proceedings ***related to*** investigations conducted under [Title 28, chapter 16]." 28 U.S.C. § 360 (emphasis added). Petitioners do not and cannot reasonably argue the emails are not "related to" the investigation.

Second, Petitioners' suggestion that the emails were or are "public" is wrong. Documents of the judicial branch are not public for the precise reason that the court has the "authority to control the dissemination of its documents to the public." Warth v. Dep't of Justice, 595 F.2d 521, 523 (9th Cir. 1979) (explaining that courts are exempt from the Freedom of Information Act's disclosure requirements); see also Doc. #19 at 7 n.2. Petitioners' argument that the emails are public because they were sent and received from a public computer from a court email address proves too much. If that argument were to be accepted, then all of this court's emails, and all federal judges' emails, would be available to the public. There is no authority supporting such a result.

Third, Petitioners' First Amendment argument is misguided. Respondents have not prohibited or restrained Petitioners from publishing or speaking about anything. Petitioners are trying to twist the First Amendment into a tool that allows them to obtain documents. But they have cited no legal authority for such a novel use, and their argument proves too much. For example, if Petitioners'

[1] In this reply, Respondents specially appear for the purpose of contesting the Amended Petition on the merits. Respondents do not concede they have been properly served and do not waive service, personal jurisdiction or venue and expressly reserve the right to contest those issues as necessary in the future.

argument were accepted, it would render the Freedom of Information Act ("FOIA") a nullity. Any plaintiff who had documents lawfully withheld from him under FOIA could simply argue he wished to publish or speak about those documents and thereby use the First Amendment to circumvent FOIA and obtain the documents. Just as a plaintiff cannot make such an end-run around FOIA, Petitioners cannot make an end-run around § 360 under the auspices of the First Amendment.

B. The Amended Petition Should Be Dismissed or Denied Because Petitioners Have Not Shown Any Future Action Would Be Cognizable in Federal Court.

Petitioners have failed to meet their burden of showing there would be federal jurisdiction over any future action. First, they concede 42 U.S.C. § 1981 and 42 U.S.C. § 1983 do not apply. Second, they have not shown they would have standing to sue under any other law. They cannot make this showing because they do not yet know if they will have a cause of action. That is the whole reason they seek the emails, to determine if the emails will support a cause of action. Petitioners' own language in their opposition continues to prove this and reinforces the speculative nature of any future claim:

- "The emails that Petitioners seek to preserve then ***could be*** direct evidence of actual bias by Judge Cebull. ***Were*** Petitioners able to prove this through the actual emails, their members could file claims that they were denied Due Process in their sentencing procedures or where Judge Cebull ruled in a bench trial." Doc. #38 at 6:20-25 (emphasis added).
- " . . . Judge Cebull ***may have*** been emailing racist and bigoted emails about minorities, including Native Americans. These examples – among others – of questionable judicial action, raise the actionable ***possibility*** Judge Cebull sentenced Petitioner Birdinground based on a bias against American Indians. Accordingly, Petitioner would like the emails preserved so that he can later determine ***if*** there is evidence of an actual bias in his particular case or ***whether*** there is evidence of a general bias that ***might have*** impacted his case." Id. at 7:13-19 (emphasis added).

Third, Petitioners' argument about associational standing misses the mark. Petitioners refer to the Creek Tribe and COLT, but neither the Creek Tribe nor COLT is a Petitioner in this matter.

C. The Amended Petition Should Be Dismissed or Denied Because It Constitutes an Improper Attempt to Obtain Pre-Complaint Discovery.

In the Amended Petition, Petitioners requested "that the Court in the instant case expand the scope of Rule 27 to permit ***pre-complaint discovery*** of the File." Doc. #34 ¶ 15 (emphasis added). Now, in their opposition, Petitioners say that "[t]he current petition before this Court ***does not seek any discovery*** as to the contents of the racist emails that Judge Cebull sent." Doc. #38 at 8:12-13 (emphasis added). Petitioners say they "merely seek an order from the Court preserving the emails contained in the File." Id. at 2:14-15. Petitioners' confused position is self-defeating. If Petitioners merely preserve and do not discover the emails, then there is no way they can use them to establish any cause of action. Likewise, if Petitioners do not discover the emails, then there is no way they can publish anything about them or speak about them and their First Amendment rights are not implicated.

Finally, Rule 27 does not authorize the mere preservation of documents. Rule 27 is titled "Depositions to Perpetuate Testimony." For pre-complaint petitions like the Amended Petition, the rule specifies what a court "must" order if the requirements of the rule are met. See Fed. R. Civ. P. 27(a)(3). If a court finds that testimony should be perpetuated, then it must issue an order designating or describing the deponent, specifying the subject matter of the examination, and stating whether the deposition will be taken orally or by written interrogatories. See id. The court may also issue an order like those authorized by Rule 34. See id. Rule 34 permits requests for the production, not preservation, of documents. See Fed. R. Civ. P. 34. Petitioners have not cited a single case in which a court ordered documents to be preserved under Rule 27. Nor have Petitioners cited a single case in which a court ordered the preservation of documents in response to a pre-complaint petition using its inherent authority.

D. The Amended Petition Should Be Dismissed or Denied Because Petitioners Have Not Shown Justice Would Be Delayed or Denied.

Petitioners confuse the burden of proof. Petitioners bear the burden of proving the emails are in imminent danger of being lost or destroyed; it is not Respondents' burden to prove the opposite. See Doc. #19 at 11:27-12:7, 12:16-27. Because Petitioners have not met their burden, the Amended Petition should be dismissed or denied.

III. CONCLUSION.

For the foregoing reasons, and for the reasons stated in the subject motion (Doc. #35), the Amended Petition should be dismissed or denied.

Respectfully submitted,

MELINDA HAAG
United States Attorney

DATED: December 30, 2014

/s/
NEILL T. TSENG
Assistant United States Attorney
Attorneys for Respondents