NO. 09-17241

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,
Plaintiffs-Appellees,

v.

DENNIS HOLLINGSWORTH, et al.
Defendant-Intervenors-Appellees.

Appeal from United States District Court for the Northern District of California
Civil Case No. 09-CV-2292 VRW (Honorable Vaughn R. Walker)

DEFENDANT-INTERVENORS-APPELLEES' MOTION TO DEFER TIME TO SHOW CAUSE FOR JURISDICTION

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Appellants respectfully move this Court to defer the time for filing their response to the Order of October 20, 2009, which directs Appellants to show cause why this Court has jurisdiction over this interlocutory appeal and/or petition for writ of mandamus.

INTRODUCTION

This interlocutory appeal or, in the alternative, petition for writ of mandamus, arises from a discovery order in a case challenging the constitutionality of California's Proposition 8 ("Prop 8"), an initiative measure providing that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5. Appellants are the "primarily formed ballot committee" and the "official proponents" of Prop 8 (collectively, "Proponents") who were responsible for gathering the requisite number of petition signatures to place Prop 8 on the November 2008 ballot and for developing, organizing, and implementing a statewide political campaign in support of its passage. Proponents were permitted to intervene in this case to defend the initiative because the Governor and the Attorney General declined to do so.

The district court has held that Proponents' private, confidential communications and materials (from one-on-one emails to drafts of campaign ads) relating to their campaign strategy and messaging decisions—information that even Plaintiffs admit is "core political speech and undeniably entitled to broad

First Amendment protection," Doc. 191 at 12—are relevant to the intent of the electorate in passing Prop 8, and it has denied Proponents' motion for a protective order declaring such confidential information categorically protected from compelled disclosure on First Amendment and/or relevance grounds. Proponents promptly noticed this appeal and/or mandamus petition, and simultaneously moved the district court for a stay of Proponents' obligation to produce the disputed information pending this Court's review of the issue. The district court denied the stay, but stated: "Proponents' blanket assertion of privilege was unsuccessful, but whether the privilege might apply to any specific document or information was not finally determined in the October 1 order." Doc. 237 at 4 (Ex. 3).[1] Proponents, accordingly, sought permission to submit a sampling of documents for the district court's *in camera* review and determination of Proponents' claims of First Amendment privilege. The district court agreed, and is now reviewing the documents *in camera*.

Given that the process of *in camera* review now pending in the district court

[1] Attached as exhibits to this motion are: (1) the relevant portion of a hearing held on August 19, 2009; (2) an order of October 1, 2009 (Doc. 214), denying Proponents' motion for a protective order; (3) an order of October 23, 2009 (Doc. 237), denying Proponents' motion for a stay pending appeal and/or mandamus review; and (4) a transcript of a hearing regarding the *in camera* review process, held on November 2, 2009. Citations to the record refer to the district court docket numbers. Pursuant to convention in the Northern District of California, and thus for consistency's sake, page references to docket entries refer to the PACER pagination rather than the original pagination of documents.

yet holds at least some possibility that Proponents' confidential campaign strategy and messaging information will be protected from disclosure—and that this appeal will thus be mooted—Proponents respectfully request that this Court defer the time for filing of Proponents' response to this Court's order to show cause until no later than seven days after the district court rules with regard to a sampling of documents that have been submitted for *in camera* review.

BACKGROUND

Plaintiffs filed this suit on May, 22, 2009, claiming that Prop 8 violates the Fourteenth Amendment. The district court has imposed an expedited discovery schedule, and a full evidentiary trial is scheduled to commence on January 11, 2010. The scope of discovery in this case has been disputed from the outset. In their August 17 case management statement, Plaintiffs stated that they would take document and deposition discovery into "Prop 8's genesis, drafting, strategy, objectives, advertising, campaign literature, and [Proponents'] communications with each other, supporters, and donors." Doc. 157 at 12. Proponents immediately objected that discovery into Proponents' "internal campaign strategies" and communications "would raise the gravest possible First Amendment issues," Hr'g of Aug. 19, 2009, Tr. at 59 (Ex. 1), and unsuccessfully "urge[d] the Court to give us an opportunity to fight this out in briefing to the Court before we get down that road," *id.* at 60. Plaintiffs propounded requests that seek all documents relating to

Proponents' communications among themselves and with any "third party" bearing any relationship to Prop 8, whether created before or after the election. *See* Docs. 187-3, -5, -6, -7. The requests also seek wholly internal drafts, private editorial comment on political communications and strategy, and other political speech that Proponents chose to withhold from public dissemination. *Id.* Plaintiffs have also noticed or served more than twenty subpoenas requesting similar documents from Proponents' political consultants and other third-party vendors. *See, e.g.*, Doc. 197-2.

Proponents agreed to produce, without conceding their relevance, all *public*, nonanonymous materials—*e.g.,* television and radio ads, mailings, "robo" calls, and other materials disseminated to the electorate, including materials disseminated to "target" voter groups. Plaintiffs insisted on production of Proponents' internal campaign documents and communications, and on September 15, 2009, Proponents moved for a protective order barring disclosure of such nonpublic materials on the grounds that they were both irrelevant and privileged under the First Amendment. *See* Docs. 187, 197.

On October 1, the district court denied the motion in relevant part. Noting that Proponents sought protection "from responding to any discovery that would reveal political communications as well as identities of individuals affiliated with the Prop 8 campaign whose names have not already been disclosed," the court

rejected Proponents' claim that "the First Amendment privilege is applicable to the discovery sought by plaintiffs." Doc. 214 at 4, 17 (Ex. 2). The court also held that nonpublic "information about the strategy and communications of the Prop 8 campaign" is relevant to the electorate's intent in passing Prop 8, even though it was never disseminated to the electorate. *Id.* at 15. According to the district court, "some 'nonpublic' communications from proponents to those who assumed a large role in the Prop 8 campaign could be relevant to the voters' understanding of Prop 8 and to the ultimate determination of intent." *Id.* The court thus ruled that Proponents must produce:

- "Communications by and among proponents and their agents … concerning campaign strategy."
- "[C]ommunications by and among proponents and their agents concerning messages to be conveyed to voters, … without regard to whether the messages were actually disseminated or merely contemplated."
- "[C]ommunications by and among proponents with those who assumed a directorial or managerial role in the Prop 8 campaign, like political consultants or ProtectMarriage.com's treasurer and executive committee, among others."
- "[C]ommunications that took place after the election … if they are connected in some way to the pre-election messages conveyed to the voters."

Id. at 16-17.[2]

[2] The court granted the motion in part, on relevance grounds, insofar as it related to discovery requests "directed to uncovering whether proponents harbor private sentiments that may have prompted their efforts." Doc. 214 at 16 (Ex. 2). The court also directed Plaintiffs' to revise their Request No. 8, *id.* at 15-16 to accord with the court's relevance ruling. Plaintiffs' Document Request No. 8 now

On October 8, 2009, Proponents noticed this appeal and/or petition for mandamus and, pursuant to Fed. R. App. P. 8(a)(2)(A)(ii), moved the district court for a stay of discovery pending resolution of the appeal and/or petition. *See* Docs. 220, 233. On October 23, the district court denied the stay motion. The district court reiterated its earlier rejection of the merits of Proponents' categorical claim of First Amendment privilege, Doc. 237 at 8-12 (Ex. 3), but suggested that it "might yet" find specific documents privileged after *in camera* review. *Id.* at 7.

Accordingly, on October 28, 2009, Proponents proposed that they be permitted to submit for the district court's *in camera* review a representative selection of the thousands of documents that they maintain are privileged from disclosure as core political speech irrelevant to the merits of this case. Doc. 238. At a hearing on November 2, the district court approved this proposal. Tr. 42-43 (Ex. 4); Doc. 247. The Proponents have submitted the documents under seal and the district court's *in camera* review is pending. Doc. 251.

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seeks "all versions of any documents … that constitute analyses of, or communications related to, one or both of the following topics: (1) campaign strategy in connection with Prop. 8; and (2) messages to be conveyed to voters regarding Prop. 8, without regard to whether the voters or voter groups were viewed as likely supporters or opponents or undecided about Prop. 8 and without regard to whether the messages were actually disseminated or merely contemplated." Doc. 220-1 at 6. Plaintiffs did not amend any of their other document requests.

ARGUMENT

This Court has ordered Proponents to show cause why the Court has jurisdiction to review the discovery order at issue in this case. While it is true, as the Court notes in its show cause order, that the Court "generally lacks jurisdiction to review discovery orders," Order of Oct. 20, 2009, at 1, the issue here—whether the First Amendment categorically shields Proponents from compelled disclosure of nonpublic confidential political communications and information relating to their strategy and messaging decisions during the Prop 8 campaign—falls squarely within this Court's appellate jurisdiction under the collateral order doctrine, as well as its mandamus jurisdiction under the All Writs Act.

This Court has repeatedly held that orders denying claims of privilege qualify for interlocutory review under the collateral order doctrine. *See In re Napster, Inc.*, 479 F.3d 1078 (9th Cir. 2007); *Wharton v. Calderon*, 127 F.3d 1201, 1203-04 (9th Cir. 1997); *Bittaker v. Woodford*, 331 F.3d 715, 718 (9th Cir. 2003) (en banc); *United States v. Griffin*, 440 F.3d 1138, 1141 (9th Cir. 2006); *Agster v. Maricopa County*, 422 F.3d 836, 838 (9th Cir. 2005). Moreover, the October 1 order also amply qualifies for mandamus review. *See Las Vegas v. Foley*, 747 F.2d 1294 (9th cir. 1984) (issuing writ of mandamus to block depositions of city officials regarding motivation in passing a law because such testimony is irrelevant to underlying merits of constitutional claim); *Admiral Insurance Co. v. United*

States District Court, 881 F.2d 1486, 1490 (9th Cir. 1988) ("review of a discovery order through the exceptional remedy of mandamus may be appropriate in the proper circumstances"); *United States v. Almani*, 169 F.3d 1189, 1193 (9th Cir. 1999) (approvingly citing "'the liberal use of mandamus in situations involving the production of documents or testimony claimed to be privileged'").

Nor can there be any doubt that the district court's October 1 order conclusively (1) denied Proponents' categorical claim of First Amendment privilege, and (2) ruled that Proponents' nonpublic, internal, and confidential communications related to campaign strategy and messaging are relevant to the intent of the electorate in passing Prop 8. However, given the possibility that the district court's *in camera* review of documents may result in an order protecting the disputed communications and information from disclosure, review by this Court of the district court's October 1 order may become unnecessary. And if the district court ultimately orders the production of disputed documents, the October 1 order will presumably be subject to review on a consolidated basis with an appeal and/or petition for mandamus seeking review of the production order. Accordingly, Proponents respectfully submit that the most efficient course at this point is to defer full briefing in response to the order to show cause pending resolution of the *in camera* process in the district court. Proponents propose that within seven days of completion of that process they will either (i) dismiss this

appeal and/or petition, or (ii) appeal an adverse order and seek to consolidate it with this appeal and/or petition.

CONCLUSION

For the foregoing reasons, Proponents respectfully request that this Court grant this motion to defer response to the order to show cause until no later than seven days after resolution of the *in camera* review process pending in the district court.

Dated: November 10, 2009

Respectfully submitted,

s/ Charles J. Cooper

Charles J. Cooper
Attorney for Appellants

9th Circuit Case Number(s) 09-17241

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

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CERTIFICATE OF SERVICE
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