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-INTERVENOR-APPELLANTS' BRIEF IN RESPONSE TO ORDER TO SHOW CAUSE

Andrew P. Pugno
LAW OFFICES OF ANDREW P. PUGNO
101 Parkshore Drive, Suite 100
Folsom, California 95630
(916) 608-3065; (916) 608-3066 Fax

Brian W. Raum
James A. Campbell
ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020; (480) 444-0028 Fax

Charles J. Cooper
David H. Thompson
Howard C. Nielson, Jr.
Nicole J. Moss
Jesse Panuccio
Peter A. Patterson
COOPER AND KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 220-9600; (202) 220-9601 Fax

Attorneys for Defendant-Intervenors-Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Other

Corporate Disclosure Statement

Fed. R. App. P. 26.1

Defendant-Intervenors-Appellee is not a corporation but a primarily formed ballot committee under California Law. See CAL. GOV. CODE. §§ 82013 & 82047.5

INTRODUCTION

These interlocutory appeals or, in the alternative, petitions for writ of mandamus, arise from discovery orders in a case challenging the constitutionality of California's Proposition 8 ("Prop 8"), an initiative amendment measure providing that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5.[1] Appellants are a "primarily formed ballot committee" and the "official proponents" of Prop 8 (collectively, "Proponents"), who 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 directed Proponents to produce to the Plaintiffs copies of internal confidential communications and materials (from one-on-one emails to drafts of campaign ads) relating to Proponents' "advertising or messaging strategy and themes," RR 4 (Doc. 252 at 4),[2] during the Prop 8 campaign—material that even Plaintiffs admit is "core political speech and undeniably entitled to broad First Amendment protec-

[1] This appeal is of the district court's order dated October 1, 2009. Proponents have also now filed an appeal of the district court's order dated November 11, 2009. In a separately filed motion, Proponents respectfully request that the two appeals be consolidated. As is explained below, the two orders relate to the same issue.

[2] In a separately filed motion, Proponents respectfully seek a stay in these cases and, pursuant to Fed. R. App. P. 8(2)(B)(iii), have filed "relevant parts of the record," including all docket entries cited except for memoranda of law, in four volumes of exhibits ("RR") filed concurrently. This brief also cites to those volumes. Citations to page numbers refer to internal pagination of the volumes of exhibits. Where a memorandum of law is cited, pagination refers to the district court's PACER pagination.

tion." RR 222 (Doc. 191 at 12). Proponents promptly noticed this interlocutory appeal.

In an Order dated October 20, 2009, this Court directed Proponents to show cause as to why this Court has jurisdiction over this matter. As this Court's precedent makes clear, the orders below are subject to interlocutory appeal under the collateral order doctrine first enunciated in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Moreover, even if interlocutory appeal is unavailable, this Court has held that denials of privilege in the discovery context are subject to mandamus review under the factors enunciated in *Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977). *See Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486 (9th Cir. 1989). Furthermore, in a highly analogous context, this Court has exercised its mandamus jurisdiction to determine whether a district court erred in failing to grant a protective order on relevance grounds. *See City of Las Vegas v. Foley*, 747 F.2d 1294, 1296 (9th Cir. 1984).

BACKGROUND

On November 4, 2008, California's electorate approved Prop 8 as an amendment to the State Constitution. Plaintiffs filed this suit on May, 22, 2009, claiming that Prop 8 violates the Fourteenth Amendment. The State defendants declined to defend Prop 8, and Proponents were allowed to intervene as defendants. 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 an issue 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." RR 630 (Doc. 157 at 12). Proponents objected to this discovery from the start. Proponents' August 17 case management statement emphasized that "the subjective motivations of voters and other political participants for supporting Proposition 8 are both legally irrelevant and are protected from discovery by the First Amendment." RR 612 (Doc. 159 at 9). And at a case management hearing on August 19, Proponents' counsel specifically objected that discovery into Proponents' "internal campaign strategies" and communications "would raise the gravest possible First Amendment issues." RR 593 (Tr. at 59). Counsel argued that requiring disclosure of such nonpublic political speech would inevitably chill the exercise of First Amendment rights in future initiative campaigns, *id.* at 596 (Tr. at 62), and "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 594 (Tr. at 60). Plaintiffs' counsel responded that the parties should "try to work out among themselves" any discovery disputes, and "if there's a problem, bring [it] to the court." *Id.* at 597 (Tr. at 63). The district court agreed. *Id.* at 599-603 (Tr. at

65-69).

Two days later, 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* RR 261-67, 290-301 (Docs. 187-3, -5, -6, -7). For example, Plaintiffs' original Request No. 8 sought "[a]ll versions of any documents that constitute communications relating to Proposition 8, between [Proponents] and any third party…." RR 265-66 (Doc. 187-3 at 5-6). The requests also seek wholly internal drafts, private editorial comment on political communications and strategy, and other 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.*, RR 180 (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 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." RR 27, 40 (Doc. 214 at 4, 17). 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 38 (15). According to the district court, "communications considered but not sent [to voters] appear to be fair subjects for discovery, as the revision or rejection of a contemplated campaign message may well illuminate what information was actually conveyed to voters." *Id.* at 39 (16). The court also determined that "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.* at 38 (15). The court thus ruled that Proponents must produce:

- "[C]ommunications 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 39-40 (16-17).[3]

On October 8 Proponents noticed this appeal and/or petition for mandamus and 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, RR 17-22 (Doc. 237 at 7-12), but suggested that it "might yet" find specific documents privileged after *in camera* review. *Id.* at 14 (4); *see also id.* at 17 (7) ("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 or-

[3] 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." RR 39 (Doc. 214 at 16). The court also directed Plaintiffs' to revise Request No. 8, *id.* at 15-16 to accord with its ruling on relevance. Plaintiffs' Document Request No. 8 now 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." RR 104 (Doc. 220-1 at 6).

der."). Accordingly, on October 28 Proponents proposed to submit for the court's *in camera* review a sampling of documents drawn, according to Plaintiffs' requested prioritization, from the thousands of documents that constitute privileged core political speech. RR 97 (Doc. 238). Proponents requested that if the court concluded the documents must be disclosed, it stay the ruling pending appeal of that order. *Id.* At a hearing on November 2, the district court accepted this proposal. RR 146-47 (Tr. 42-43); RR 49 (Doc. 247) (minute order). The Proponents submitted a selection of 60 documents under seal for *in camera* review on November 6. RR 42-44 (Doc. 251).

Pursuant to this Court's October 20 order, Proponents were to show cause for jurisdiction over this appeal by November 10. Because the district court's *in camera* review process was still pending on that date, Proponents filed a motion requesting that this Court defer the time for responding to the October 20 order until the district court completed its *in camera* review process. *See* Appellants'/Petitioners' Motion to Defer Time to Show Cause for Jurisdiction (Nov. 10, 2009).

On November 11 the district court issued an order stating that it had completed its review and that the First Amendment does not "protect the disclosure of campaign communications or the identities of high ranking members of the campaign" and, at most, protects only "the identities of rank-and-file volunteers and

similarly situated individuals." RR 3 (Doc. 252 at 3). The court further specified its relevance ruling of October 1, stating that internal "communications discussing campaign messaging or advertising strategy" are discoverable and must be produced. *Id.* at 3-4. The court also stated, however, that "communications regarding fundraising strategy, polling information or hiring decisions are generally not responsive, unless the communications deal with themes or messages conveyed to voters in more than a tangential way." *Id.* at 4.

The court "analyzed each of the sixty documents" and held that while none of them qualified for First Amendment protection, only 21 of them fell within the court's definition of relevance and thus must be produced. *Id.* at 4-6. Though the court did not reveal the content of assertedly privileged documents, its order did describe the general nature of those documents. *Id*. at 4-6. For example, under the ruling, Proponents must produce:

- Doc 4 [which] discusses edits to a television advertisement….
- Doc 17 [which] discusses voter reaction to a theme in campaign advertising….
- Doc 29 [which] is a draft of a campaign flyer….
- Doc 50 [which] discusses focus group responses to various campaign themes….
- Doc 55 [which] discusses a potential message to be conveyed in response to an opposition advertisement.…
- Doc 58 [which] is a post-election summary of successful themes conveyed to voters.
- Doc 60 [which] is a draft of a television commercial.

Id. at 4-6.

Though Proponents had requested that the court stay any requirement that they produce the assertedly privileged documents pending review by this Court, RR 98 (Doc. 238 at 2), the court below did not do so, directing the parties instead to work out a production schedule that applies court's ruling on the sample to the "hundreds" (indeed, there are thousands) of documents in Proponents' possession, RR 9 (Doc. 252).

Proponents have today noticed an appeal of the November 11 order (which, in the alternative, we ask the Court to treat as a petition for writ of mandamus). In a concurrently filed motion, Proponents ask the Court to consolidate the appeal of the November 11 order with Appeal No. 09-17241.

ARGUMENT

This Court has directed Proponents to show cause why it has jurisdiction to review the district court's October 1 discovery order. Again, Proponents have moved to consolidate this interlocutory appeal and/or petition for mandamus with their interlocutory appeal and/or petition for mandamus from the district court's order rejecting a claim of privilege over specific documents. With respect to each order, this Court has jurisdiction twice over. First, jurisdiction lies under the collateral order doctrine, which this Court has regularly applied to hear interlocutory appeals involving important claims of privilege that, like Proponents' First Amendment claim, would become moot if not immediately reviewed. Second, this

Court has jurisdiction over Proponents' alternative petition for a writ of mandamus under the All Writs Act, which this Court has often exercised in similar circumstances.

I. THIS COURT HAS JURISDICTION UNDER THE COLLATERAL ORDER DOCTRINE.

To be reviewable under the collateral order doctrine, a decision must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *In re Napster Copyright Litig.*, 479 F.3d 1078, 1088 (9th Cir. 2007) (brackets omitted). This Court has regularly applied the collateral order doctrine to review discovery-related decisions involving claims of privilege. *See, e.g.*, *id.*; *Wharton v. Calderon*, 127 F.3d 1201, 1203-04 (9th Cir. 1997) (attorney-client privilege); *Bittaker v. Woodford*, 331 F.3d 715, 718 (9th Cir. 2003) (en banc) (attorney-client privilege); *United States v. Griffin*, 440 F.3d 1138, 1141 (9th Cir. 2006) (marital privilege); *Agster v. Maricopa County*, 422 F.3d 836, 838 (9th Cir. 2005) (peer-review privilege involving medical files). Here, where a claim of First Amendment privilege is at issue, the result should be the same.

A. The District Court Conclusively Denied Proponents' Claim of First Amendment Privilege.

This Court has "repeatedly held that where … a district court holds, following full development of the issues by the parties, that a privilege [does not apply],

its order constitutes a conclusive determination." *Napster*, 479 F.3d at 1088. The district court has issued just such a conclusive determination, both with respect to Proponents' categorical claim of privilege and with respect to their claims of privilege over specific documents.

The district court's October 1 order unequivocally determined: "Proponents have not shown that the First Amendment privilege is applicable to the discovery sought by Plaintiffs." RR 40 (Doc. 214 at 17). Elsewhere in its order, the court stated: "Proponents have not shown that responding to Plaintiffs' discovery would intrude further on Proponents' First Amendment associational rights beyond the intrusion by the numerous disclosures required under California law." *Id.* at 28 (5). *See also id.* at 31 (8) (court finds "scant support for refusing to produce information other than rank-and-file membership lists which plaintiffs, in any event, do not seek"). In sum, the court conclusively rejected Proponents' claim that the First Amendment categorically bars the disclosure of Proponents' nonpublic internal communications relating to political strategy and messaging made during the course of the Prop 8 referendum campaign.

In arguing against a stay in the court below, Plaintiffs tried to introduce ambiguity into this holding by contending that the district court's order did "not conclusively den[y] a protective order as to any particular document, or set of documents" and "does not exclude the possibility that … the Court might find particular

documents subject to a privilege warranting the imposition of some manner of protective order." Doc. 223 at 8.[4] Despite the district court's unequivocal denial of Proponents' claim—a denial of the claim as it relates to "the discovery sought by Plaintiffs"—the court adopted a form of this argument in denying Proponents' motion for a stay. The court stated:

> [T]he October 1 order was not a conclusive determination because proponents had not asserted the First Amendment privilege over any specific document or communication. 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.

RR 14 (Doc. 237 at 4).

In response to this ruling, Proponents promptly sought leave to submit for *in camera* review a representative sample of the documents over which they claim privilege. As previously noted, the district court accepted this proposal and reviewed 60 documents over which Proponents had asserted a First Amendment privilege. In accordance with its October 1 order, the district court denied Proponents' claim of a First Amendment privilege over all of the documents, but found

[4] Notably, Plaintiffs advanced this peculiar reading of the October 1 order only in opposing a stay. Simultaneously, Plaintiffs insisted that Proponents have *no* First Amendment rights and that, under the October 1 order, production had to begin *immediately*. *See* RR 222-23, 226 (Doc. 191 at 12, 13, 16); RR 158 (Tr. of Hr'g of Sept. 25, 2009 at 54); Decl. of Nicole J. Moss (attached as Exhibit 1) (Plaintiffs' counsel has stated that "our position is that you must produce all relevant documents" immediately); Doc. 242 (letter to district court from Plaintiffs' counsel objecting to *in camera* review process and stating that production is required under the October 1 and October 23 orders).

that only 21 of the documents were sufficiently related to Proponents' "advertising or messaging strategy and themes" to be discoverable. The court ordered Proponents to produce these 21 documents and all others like them. RR 4 (Doc. 252). Accordingly, it cannot be denied that the district court has conclusively determined that the First Amendment privilege does not protect these documents, and Proponents must produce them.

In any event, the district court's invitation to consider Proponents' First Amendment privilege on a document-by-document basis should not have affected this Court's jurisdiction over the October 1 order. Part and parcel of Proponents' categorical claim of First Amendment privilege is that Proponents and third-party vendors and agents of the campaign ought not be required to undertake the onerous burden of reviewing, sorting, and logging tens of thousands of documents where the entire discovery inquiry is out of bounds under the First Amendment. Indeed, quite apart from the chilling specter of compelled disclosure of confidential campaign communications, if such expense and burden can be imposed on referendum sponsors and their vendors in post-election litigation by losing parties in a referendum campaign, the willingness of citizens to sponsor such measures, and their ability to engage vendors and political consultants, will be greatly diminished. In short, political speech and association protected by the First Amendment would be profoundly chilled.

The district court also pointed to the October 1 order's statement that "[t]he Court stands ready to … assist the parties in fashioning a protective order where necessary to ensure that disclosures through the discovery process do not result in adverse effects on the parties or entities or individuals not parties to this litigation." RR 15 (Doc. 237 at 5). That offer was not, however, a recognition of privilege, but was merely an indication that the court might be willing to enter a protective order (different in kind from the one sought by Proponents) designed to limit some "adverse effects" of broad *public* disclosure while still providing for disclosure to Plaintiffs. Thus, the possibility of such a protective order (which, we contend, is not sufficient to guard against First Amendment harm) does not render nonconclusive the district court's rejection of a categorical shield against disclosure of the nonpublic information at issue. *See Griffin*, 440 F.3d at 1141 ("Although the district court's order leaves open the possibility of Griffin's raising an evidentiary objection in future judicial proceedings, the disputed question before us is whether the government may read the letters.").[5]

[5] The district court also stated in its October 23 order that "proponents have failed to serve and file a privilege log, a prerequisite to the assertion of privilege." RR 15 (Doc. 237 at 5). This in no way renders the district court's October 1 and October 23 rulings nonconclusive. Proponents' decision not to complete a privilege log before seeking a protective order was entirely proper. As an initial matter, Proponents objected to Plaintiffs' requests not only on privilege grounds but also on the basis that they sought wholly irrelevant, and hence non-discoverable, information. The requirement to log privileged documents under Rule 26(b)(5), however, applies only to withheld information that is "*otherwise discoverable*." (em-

B. Proponents' First Amendment Privilege Claim Is a Critically Important Issue that Is Separable from the Underlying Merits.

The second prong of the collateral order doctrine asks if a " 'claim of right' is 'too important to be denied review and too independent of the cause itself' to require that [this Court] wait until the underlying dispute is fully resolved." *Napster*, 479 F.3d at 1089 (quoting *Cohen*, 337 U.S. at 546). Proponents' claim of First Amendment privilege clearly satisfies this test.

First, an issue is "important" for collateral-order doctrine purposes if it is "weightier than the societal interests advanced by the ordinary operation of final judgment principles." *United States v. Austin*, 416 F.3d 1016, 1021 (9th Cir. 2005). *See also In re Ford Motor Co.*, 110 F.3d 954, 959 (3d Cir. 1997). This Court has repeatedly found that requirement satisfied when claims of privilege are at issue; after all, evidentiary privileges exist to protect activities and relationships that society has deemed more important than other interests in litigation. *See Napster*, 479 F.3d at 1088-89; *Griffin*, 440 F.3d at 1142; *Austin*, 416 F.3d at 1021; *Agster*, 422 F.3d at 838 ("[I]t suffices to conclude that under the specific circum-

---

phasis added.) Accordingly, "if a party's pending objections apply to allegedly privileged documents, the party need not log the document until the court rules on its objections." *United States v. Philip Morris, Inc.*, 347 F.3d 951, 954 (D.C. Cir. 2003) (quotation marks omitted). Moreover, application of the factors established in *Burlington North & Santa Fe Ry. Co. v. United States Dist. Court for the District of Montana*, 408 F.3d 1142, 1150 (9th Cir. 2005), makes clear that logging thousands of responsive but privileged documents was not a necessary prerequisite to assertion of the privilege by Proponents. Finally, Proponents provided a privilege log covering the representative sample submitted for *in camera* review.

stances of this case, including the nature and importance of the privilege at issue, jurisdiction lies.").

If anything, the interests at stake here are even weightier than those implicated by ordinary attorney-client communications. *See* Appellants' Mot. for a Stay (Nov. 13, 2009). The materials at issue, as Plaintiffs concede, RR 222 (Doc. 191 at 12), implicate core political speech that is subject to utmost constitutional solicitude and serves vital societal functions. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-47 (1995) (finding that political speech relating to a referendum campaign was "the essence of First Amendment expression"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (finding that "[t]he First Amendment … serves significant societal interests," and that speech in a referendum campaign "is at the heart of the First Amendment's protection").[6]

Second, the First Amendment privilege question, like other privilege questions that this Court has addressed on interlocutory appeal, is " 'too independent of

[6] In the court below, Plaintiffs suggested that that "[t]he status of interloctuory appeals in [this Circuit] is very much in doubt" because the Supreme Court is currently considering the case of *Mohawk Industries, Inc. v. Carpenter*, 541 F.3d 1048 (11th Cir. 2008) *cert. granted* Jan. 26, 2009 (No. 08-678). But *Mohawk Industries* concerns interlocutory appeals of common law attorney-client privilege issues, not the constitutional question of whether First Amendment rights may be irreparably harmed through sweeping civil discovery. Moreover, the practical considerations undergirding the argument against interlocutory appeals of attorney-client privilege—namely, that because of the frequency of attorney-client privilege disputes, courts will be inundated with thousands of such appeals—can hardly be said to apply to the much less frequently asserted First Amendment privilege.

the cause itself.' " *Napster*, 479 F.3d at 1089 (quoting *Cohen*, 337 U.S. at 546). The district court concluded that Proponents' First Amendment privilege claim is not sufficiently separable from the merits of Plaintiffs' Equal Protection and Due Process claims because the former inquiry involves some analysis of the relevance of the requested material to the Plaintiffs' claims. RR 29 (Doc. 214 at 6). But as this Court explained in *Napster*, where a claim of privilege is at issue, the separability prong is satisfied "even where there is some potential overlap between questions in the interlocutory appeal and those involved in the underlying suit." 479 F.3d at 1088-89. Thus, in *Napster*, this Court had jurisdiction even though "application of the crime-fraud exception to the attorney-client privilege depend[ed] upon the characterization of [a] loan to Napster [and] the outcome of the underlying suit may depend upon this characterization." *Id.* at 1088. And in *Bittaker*, this Court had jurisdiction "even though the content of the attorney-client communications was directly relevant to the underlying habeas proceeding and might well be relevant (if admissible) on retrial." *Napster*, 479 F.3d at 1089 (citing *Bittaker*, 331 F.3d at 717-18).

The Supreme Court has likewise never woodenly applied the separability prong, and has found that jurisdiction lies for claims of qualified privilege that necessarily involve some potential overlap with the merits of the underlying suit. For example, in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Court held that deni-

als of claims of qualified immunity "easily meets" the separability requirement because all the court need determine is "a question of law"—namely, whether the actions at issue violated "clearly established" law. *Id.* at 527-28. Here, the only question even remotely related to the underlying merits that the Court need answer is also one of law: under controlling precedent, is the requested material relevant?

The Supreme Court has noted that "orders denying certain immunities are strong candidates for prompt appeal." *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 871 (1994). In such cases, the overriding concern "is that unless [the denial of immunity claim] can be reviewed before [the proceedings terminate], it never can be reviewed at all." *Mitchell*, 476 U.S. at 524 (second alteration in original and quotation marks omitted); *see Will v. Hallock*, 546 U.S. 345, 350-51 (2006) ("unless the order to stand trial was immediately appealable, the right would be effectively lost"). This Court has repeatedly applied this reasoning to the analogous context of privileges, *Napster*, 479 F.3d at 1088-89 (collecting cases), explaining that, as with immunities, "the practical effect" of an order denying privilege is "irreparable by any subsequent appeal," *id.* at 1088. For "once the cat is already out of the bag, it may not be possible to get it back in." *Napster*, 479 F.3d at 1088 (quotation marks omitted). *Compare Alaska v. United States*, 64 F.3d 1352, 1356 (9th Cir. 1995) ("Because federal sovereign immunity is a defense to

liability rather than a right to be free from trial, the benefits of immunity are not lost if review is postponed.").

Lastly, the Supreme Court has noted that in cases like *Forsyth*—where some overlap with merits was inevitable—there was "something further" that "merits appealability under *Cohen*"—a "judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." *Will*, 546 U.S. at 351-52 (quotation marks omitted). For example, "fear of inhibiting people from exercising discretion in public service," is sufficient to merit interlocutory appeal of denials of qualified immunity. Is there any question that the potential of inhibiting people from exercising core First Amendment rights of political association and expression during elections is equally, if not more, important?

C. Proponents' First Amendment Privilege Claim Is "Effectively Unreviewable" on an Appeal from Final Judgment.

Proponents' claim is that the First Amendment protects them from having to disclose to Plaintiffs internal confidential communications and documents that constitute core political speech during an initiative campaign (and that bear no relevance to the issues in the case). As this Court has recognized, "once privileged materials are … disclosed, the practical effect … is often 'irreparable by any subsequent appeal.'" *Napster*, 479 F.3d at 1088 (citation omitted). Indeed, this Court has recognized that once a party produces despite its claim of privilege, it is "impossible for [this Court] to provide effective relief." *In re Mortgage Equity Corp.*

Mortgage Pool Certificates Litig., 821 F.2d 1422, 1424 (9th Cir. 1987). *See also Agster*, 422 F.3d at 838-39; *Ford Motor Co.*, 110 F.3d at 963 ("[O]nce putatively privileged material is disclosed, the very right sought to be protected has been destroyed.") (quotation marks omitted).

II. THIS COURT HAS JURISDICTION OVER PROPONENTS' PETITION FOR A WRIT OF MANDAMUS.

Should interlocutory appeal be unavailable, Proponents seek, in the alternative, a writ of mandamus.[7] This Court has long held that "review of a discovery order through the exceptional remedy of mandamus may be appropriate in the proper circumstances." *Admiral*, 881 F.2d at 1490. *See also Mortgage Pool Certificates Litig.*, 821 F.2d at 1425; *Foley*, 747 F.2d at 1297; *United States v. United*

[7] In the court below, Proponents posed both a relevance objection and a First Amendment objection to Plaintiffs' document requests. Relevance is a factor in the First Amendment inquiry; however, to the extent this Court may seek to avoid answering the constitutional question, *e.g.*, *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 808 (9th Cir. 2003), it would be appropriate for the Court to issue the writ based on the district court's erroneous rejection of Proponent's relevance claim. *See City of 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); *Navel Orange Admin. Comm. v. Exeter Orange Co.*, 722 F.2d 449, 454 (9th Cir. 1983) (protective order appropriate where requested discovery was "irrelevant and immaterial"); *Hoffart v. United States Gov't*, 24 Fed. Appx. 659, 665-66 (9th Cir. 2001) (refusal to issue subpoena for information not reasonably calculated to lead to the discovery of admissible evidence); *Barcenas v. Ford Motor Co.*, 2004 U.S. Dist LEXIS 25279, at *6 (N.D. Cal. 2004) (" 'some threshold showing of relevance must be made before parties are required to open wide the doors of discovery' ") (quoting *Hofer v. Mack Trucks, Inc.* 981 F.2d 377, 380 (8th Cir. 1992)).

States Dist. Court, 717 F.2d 478 (9th Cir. 1983). Indeed, this Court has approvingly cited " 'the liberal use of mandamus in situations involving the production of documents or testimony claimed to be privileged.' " *United States v. Almani*, 169 F.3d 1189, 1193 (9th Cir. 1999) (citation omitted).

Five "guidelines" aid this Court's determination of whether mandamus relief is appropriate: "(1) whether the petitioner has no other means such as an appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests a persistent disregard of the federal rules; [and] (5) whether the district court's order raises new and important problems or issues of first impression." *Admiral*, 881 F.2d at 1491 (citing *Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977)). These factors are a "starting point," *Mortgage Pool Litig.*, 821 F.2d at 1425, and "[s]atisfaction of all five … is not required," *Admiral*, 881 F.2d at 1491. For example, "[t]he fourth and fifth … factors are rarely, if ever, present at the same time." *Id.* Thus, "it is unlikely that all of the guidelines will be met in any one case, and the decision often requires balancing of conflicting factors." *Star Editorial, Inc. v. United States Dist. Court*, 7 F.3d 856, 859 (9th Cir. 1993).

A. In the Absence of Interlocutory Review, No Other Means of Review Are Available

If interlocutory appellate review of the district court's order is not available, a writ of mandamus is the only other means of obtaining the desired relief. As the Court explained in *Admiral* (where denial of a claim of attorney-client privilege by a party was at issue), a contempt-and-immediate-appeal procedure is not an option in cases like this because "[c]ivil contempt of a party … generally is not immediately appealable. Thus, a party to litigation normally must await final judgment to seek review of a discovery order. Accordingly, mandamus is the only method available to … obtain review, prior to final judgment." 881 F.2d at 1491 (citation omitted). *See also Medhekar v. United States Dist. Court*, 99 F.3d 325, 326 (9th Cir. 1996) ("Petitioners have satisfied the first *Bauman* factor, in that the district court's published opinion denying their motion to stay the disclosure requirements under the Act is not immediately appealable…. Consequently, there is no avenue for immediate review of the district court's opinion except by mandamus.") (citing *Admiral*); *Amlani*, 169 F.3d at 1194 (finding first prong satisfied where claim of attorney-client privilege was at issue); *Star Editorial*, 7 F.3d at 859 (first factor satisfied where discovery order denies claim of First Amendment reporter's privilege).[8]

[8] In denying a stay pending mandamus review, the district court reasoned that mandamus was not the only adequate remedy available because it "might yet

B. Proponents Will Be Irreparably Harmed Absent Immediate Review by this Court

The second factor also weighs heavily in favor a mandamus jurisdiction. As explained in Proponents' Motion for a Stay, filed concurrently with this brief, absent review from this Court, Proponents will be forced to disclose to Plaintiffs their internal, confidential core political speech. Mot. for Stay 17-19. Once that threshold is crossed, there is no undoing the First Amendment harm. *See Star Editorial*, 7 F.3d at 859 (finding the second factor satisfied because "if the district court erred in compelling disclosure" over a First Amendment privilege claim, then "any damage the Star suffered would not be correctable on appeal"). This Court explained as much in *Admiral*: "In view of the irreparable harm a party likely will suffer if erroneously required to disclose privileged materials or communications, courts have recognized the propriety of using mandamus …. Because maintenance of the

---

apply proponents' purported privilege in the manner described in *Kerr* [*v. United States District Court*, 426 U.S. 394 (1976)]." RR 17 (Doc. 237 at 7). Unlike *Kerr*, however, where document-by-document *in camera* review was "relatively costless and eminently worthwhile," 426 U.S. at 405, here such a process for thousands of internal communications would impose an extraordinarily costly and onerous burden on Proponents and will inevitably chill future participation in referendum campaigns by both citizens and campaign vendors, who will not want to shoulder, as the price of success and at the whim of their litigious political opponents, such burdens. In any event, Proponents have now availed themselves of the *in camera* review procedure suggested by *Kerr*, and this potential avenue of relief is no longer available for the documents the district court has ordered to be produced or for documents reflecting the same types of communications as those ordered to be produced.

attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privileged communication is an inadequate remedy, the extraordinary remedy of mandamus is appropriate." 881 F.2d at 1491 (quotation marks omitted). *See also id.* (citing *In re von Bulow*, 828 F.2d 94, 98 (2d Cir. 1987), for the proposition that "compliance with [a] discovery order against a claim of privilege destroys [the] right sought to be protected"). *See also Amlani*, 169 F.3d at 1194 ("This Court has held that … an appeal after privileged communications are disclosed is an inadequate remedy.").[9]

C. The District Court's Order Is Clearly Erroneous as a Matter of Law.

As explained in Proponents Motion for a Stay, the district court's October 1 and November 11 orders denying Proponents' claims of First Amendment privilege were clearly erroneous as a matter of law, thus satisfying the third *Bauman* factor. In holding the privilege to be limited only to "rank-and-file membership lists," Doc. 214 at 8; Doc. 252 at 3, the district court ignored Supreme Court and Ninth Circuit precedent and numerous other federal cases. *See* Mot. for Stay 8-14 (collecting and discussing cases); *see also, e.g.*, *DeGregory v. Attorney Gen. of New Hampshire*, 383 U.S. 825, 829 (1966) (applying First Amendment privilege to

[9] The Proponents will also suffer other irreparable harms absent review from this Court, such as "the burden and cost of providing … disclosures, [which] cannot be corrected in a subsequent appeal from a final judgment in the absence of mandamus relief." *Medhekar*, 99 F.3d at 326.

request to "disclose information relating to [an individual's] political associations of an earlier day, the meetings he attended, and the *views expressed and ideas advocated at any such gatherings*") (emphasis added); *Dole v. Services Employees Union, AFL-CIO*, 950 F.2d 1456, 1459 (9th Cir. 1991) (finding that a prima facie case of First Amendment privilege had been made by a union with regard to meeting minutes that revealed "discussions of a highly sensitive and political character"); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981) (where "sweeping" subpoena served on political association called for "all documents" and "internal communications" relating to a political campaign, "heightened judicial concern" is warranted because "the release of such information … carries with it a real potential for chilling the free exercise of political speech and association").

The Court also ignored or misconstrued principles enunciated in a number of Supreme Court cases, such as *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), which emphasized that the First Amendment protects not merely the identity of the speaker, but the *content of any information* that the speaker chooses not to reveal:

> Insofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document, we think the identity of the speaker is *no different from other components of the document's content that the author is free to include or exclude*…. The simple interest in providing voters with additional relevant information does not jus-

> tify a state requirement that a writer make statements or disclosures she would otherwise omit.

Id. at 348 (emphasis added) (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974)).

And most compellingly, the court erroneously concluded that the documents in question are relevant to Plaintiffs' Equal Protection and Due Process challenges, even though this Court's precedents hold otherwise and the Supreme Court has *never* relied on such material in cases dealing with initiative and referendum elections. *See SASSO v. City of Union City*, 424 F.2d 291 (9th Cir. 1970); *Bates v. Jones*, 131 F.3d 843, 846 (9th Cir. 1997) (en banc); *Foley*, 747 F.2d at 1297-98; *Equality Found. of Greater Cincinnati v. City of Cincinnati*, 128 F.3d 289, 293 n.4 (6th Cir. 1997); *Arthur v. Toledo*, 782 F.2d 565, 573-74 (6th Cir. 1986); Mot. for Stay 14-17.[10]

[10] The district court cited two cases in support of its view of relevance. In *City of Los Angeles v. County of Kern*, 462 F. Supp. 2d 1105 (C.D. Cal. 2006) *vacated*, 581 F.3d 841 (9th Cir. 2009), a district court looked solely to the text of a challenged referendum to deny an equal protection claim. *Id.* at 1111. And in determining that the referendum was intended to discriminate against interstate commerce, the court looked solely to the referendum text and to the *public* advertising supporting it. *Id.* at 1113-14. So *Los Angeles* hardly supports the regime adopted below. In any event, this Court recently vacated *Los Angeles*. *See* 581 F.3d 841 (9th Cir. Sept. 9, 2009). In the second case, *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003), the Eighth Circuit turned to the state's official ballot materials as the "most compelling" evidence of intent. *Id.* at 594. No First Amendment issue was raised with respect to the nonpublic materials that were cited in the decision. In any event, *SASSO* and *Foley* control in this Cir-

D. At the Very Least, the Precise Question Presented Here Is one of First Impression. [11]

This Court will also still take jurisdiction of a mandamus petition presenting "a new and important question of first impression." *Medhekar*, 99 F.3d at 327. Thus, even if the district court's distinctions of controlling Supreme Court and Ninth Circuit precedent were tenable, the most that could then be said is that the specific question at issue here—whether the First Amendment protects from compelled disclosure private, core political speech when such speech is irrelevant to a constitutional challenge to a popularly enacted law—is one of first impression. *See Admiral*, 881 F.2d at 1491

The district court has sanctioned wide-ranging discovery into private and confidential political speech and associational activities relating to "advertising or messaging strategy and themes" in a political campaign supporting an initiative election. This is, to say the least, a novel and startling proposition, the importance of which cannot be overestimated. If the mere filing of a post-election civil suit is

---

cuit and, along with the Sixth Circuit's decision in *Arthur v. Toledo*, 782 F.2d 565, 573 (6th Cir. 1986), are the better reasoned cases.

[11] The fourth *Bauman* factor—whether the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules—need not, and usually cannot, be met where the fifth factor is present. *Admiral*, 881 F.2d at 1491. Of course, if immediate review is not conducted, this could become "an error capable of repetition but without an opportunity for review." *United States v. United States Dist. Court*, 717 F.2d at 481 (issuing writ of mandamus where a district court's order allowing certain discovery would cause "substantial" harm in the present "and later cases").

enough to strip citizens of their First Amendment rights, political campaigns in this country will never be the same. This particular discovery dispute is not about Prop 8 or the issue of same-sex marriage generally—it is about the most basic right of citizens to speak or not speak, to associate or not associate, to publish publicly or speak privately, without unjustified interference by the government.

Thus, as in *Admiral*, the First Amendment privilege question at issue here, if not controlled by binding precedent, is "a significant issue of first impression in this circuit that would elude review absent [this Court's] exercise of supervisory mandamus authority." 881 F.2d at 1491. *See also Medhekar*, 99 F.3d at 327 ("Given the fact that this is an important question of first impression, and the likelihood that this court will not have the opportunity to address the issue in the context of a later appeal from the judgment, mandamus is an appropriate vehicle for review in this situation.").

CONCLUSION

For the foregoing reasons, Proponents have shown cause for this Court to exercise jurisdiction over their interlocutory appeals or, in the alternative, their petitions for a writ of mandamus.

Respectfully submitted,

/s/ Charles J. Cooper
Charles J. Cooper
Attorney for Appellants

STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Local Rule 28-2.6, Appellants-Petitioners hereby advise the Court that there is currently a related case pending in this Court. Appeal No. 09-16959 was filed on August 26, 2009, by Campaign for California Families regarding an August 19, 2009 order of the District Court denying their motion to intervene. Appellant/Petitioners here are Appellees in Case No. 09-16959.

Dated: November 13, 2009

/s/ Charles J. Cooper
Charles J. Cooper

Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 09-16959

I hereby certify that pursuant to Fed. R. App. (a)(7)(C) and Ninth Circuit Rule 32-1, the attached answer brief is proportionally spaced, has a typeface of 14 points or more, and contains 7,291 words.

Dated: November 13, 2009

s/Charles J. Cooper
Charles J. Cooper

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*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) _____.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) _____

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Nov 13, 2009 .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

See attached Service List.

Signature (use "s/" format) s/ Jesse Panuccio

SERVICE LIST

Attorneys for Plaintiff-Intervenor City and County of San Francisco: Dennis J. Herrera, City Attorney Therese Stewart, Chief Deputy City Attorney Danny Chou, Chief of Complex and Special Litigation Vince Chhabria, Deputy City Attorney Erin Bernstein, Deputy City Attorney Christine Van Aken, Deputy City Attorney Mollie M. Lee, Deputy City Attorney CITY AND COUNTY OF SAN FRANCISCO OFFICE OF THE CITY ATTORNEY 1 Dr. Carlton B. Goodlett Place Room 234 San Francisco, CA 4102-4682 (415) 554-4708 Fax: (415) 554-4655 Therese.stewart@sf.gov.org	**Attorney for Defendant Registrar-Recorder Dean C. Logan:** Elizabeth Cortez Judy Whitehurst OFFICE OF COUNTY COUNSEL – COUNTY OF LOS ANGELES 500 West Temple St Los Angeles, CA 90012 (213) 974-1845 JWhitehurst@counsel.lacounty.gov
Attorney for Defendant Clerk-Recorder Patrick O'Connell: Lindsey G. Stern Claude Franklin Kolm COUNTY OF ALAMEDA 1221 Oak Street, Suite 450 Oakland, CA 94612-4296 (510) 272-6710 claude.kolm@acgov.org	