Kristin Perry, et al v. Dennis Hollingsworth, et al Doc. 22

NOS. 09-17241, 09-17551

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

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

APPELLANTS'/PETITIONERS' REPLY IN SUPPORT OF (1) MOTION FOR A STAY AND (2) 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 Appellants/Petitioners

Dockets.Justia.com

TABLE OF AUTHORITIES

Cases **Page**

ACLU of Nevada v. Heller, 378 F.3d 979 (9th Cir. 2004) 9, 10

Berger v. City of Seattle, 569 F.3d 1029 (9th cir. 2009) 7

Campbell v. Gerrans, 592 F.2d 1054 (9th Cir. 1979) 11

Center for Biological Diversity v. Office of Management & Budget,
No. 07-04997, 2009 U.S. Dist. LEXIS 38169 (N.D. Cal. May 5, 2009) 11

Chevron Corp. v. Pennzoil Co., 974 F.2d 1156 (9th Cir. 1992)................... 11

Commonwealth of Puerto Rico v. United States, 490 F.3d 50
(1st Cir. 2007) 12

DeGregory v. Attorney Gen. of New Hampshire, 383 U.S. 825 (1966)......... 9

Dole v. Service Employees Union, 950 F.2d 1456 (9th Cir. 1991) 8, 9

FEC v. Machinists Non-Partisan Political League, 655 F.2d 380
(9th Cir. 1981)... 7

Grandbouche v. Clancy, 825 F.2d 1463 (10th Cir. 1987).............................. 7

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,
515 U.S. 557 (1995).. 10

In re Canter v. Canter, 299 F.3d 1150 (9th Cir. 2002) 1

In re Napster Copyright Litig., 479 F.3d 1078 (9th Cir. 2007)...................... 3

In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997) 12

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) 9

Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) 10, 11

Milner v. United States Dep't of the Navy, 575 F.3d 959 (9th Cir. 2009) ... 11

Mobil Oil Corp. v. EPA, 879 F.2d 698 (9th Cir. 1989) ... 11

PG&E Co. v. Public Util. Comm'n of California, 475 U.S. 1 (1986) ... 10

Seattle School Dist. No. 1 v. Washington, 633 F.2d 1338 (9th Cir. 1980) ... 14

Seattle School Dist. No. 1 v. Washington, 473 F. Supp. 996 (W.D. Wash. 1979) ... 14

Stein v. Dep't of Justice, 662 F.2d 1245 (7th Cir. 1981) ... 12

Tigue v. United States Dept. of Justice, 312 F.3d 70 (2d Cir. 2002) ... 12

United States v. Griffin, 440 F.3d 1138 (2006) ... 5

Washington v. Davis, 426 U.S. 229 (1976) ... 13

Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) ... 13, 15

Watchtower v. Bible & Tract Soc'y of N.Y., Inc. v. Stratton, 536 U.S. 150 . (2002) ... 11

Will v. Hallock, 546 U.S. 345 (2006) ... 5

Wooley v. Maynard, 430 U.S. 705 (1977) ... 10

Rules

FED. R. APP. 8 ... 6

Other

Janet Kornblum et al., *Hundreds of gay couples enjoy 'dream come true' in Calif.*, USA TODAY, June 18, 2008, *available at* http://www.usatoday.com/news/nation/2008-06-17-gay_N.htm ... 13

Jessica Garrison et al., *Voters approve Proposition 8 banning same sex marriages*, LA TIMES, Nov. 5, 2008, *available at* http://www.latimes.com/news/local/la-me-gaymarriage5-2008nov05,0,1545381.story 13

Mike Swift, *Same-sex marriage battle brings large, committed armies on both sides*, SAN JOSE MERCURY NEWS, Oct. 10, 2008........................ 13

I. THIS COURT HAS JURISDICTION PURSUANT TO BOTH THE COLLATERAL ORDER DOCTRINE AND THE ALL WRITS ACT.

1. As an initial matter, Plaintiffs do not refute—indeed *they do not even address*—Proponents' demonstration that this Court may review the disputed discovery orders pursuant to a writ of mandamus even if it does not have jurisdiction under the collateral-order doctrine. *See* Defendant-Intervenor-Appellants' Brief in Response to Order to Show Cause ("Show Cause Br.") at 20-28 (citing cases); *see also In re Canter*, 299 F.3d 1150, 1153 (9th Cir. 2002) (granting alternative request to treat appeal as a petition for a writ of mandamus). Accordingly, the Court may choose to proceed through its mandamus power without even reaching Plaintiffs' collateral-order doctrine arguments.

2. Plaintiffs' argument that this Court lacks jurisdiction to review the disputed discovery orders under the collateral-order doctrine rests on their contention that the issues resolved by those orders are "inextricably intertwined with the merits of this case." Appellees' Opposition to Appellants' Emergency Motion for Stay ("Pl. Stay Opp.") at 14. That contention is incorrect.

First, Plaintiffs' misconstrue our privilege claim. "Proponents['] claim of privilege rises or falls," they assert, "entirely upon their core merits contention that discriminatory intent is irrelevant to the analysis of Plaintiffs' constitutional claims." *Id.* at 19. Not so. Proponents' First Amendment rights bar

the forced production of their internal political communications *regardless of whether* the intent of the electorate is relevant to the merits of Plaintiffs' constitutional claims. Even if voter intent is relevant as Plaintiffs contend, information never publicly disclosed to the voters could not possibly reveal *anything* about the intent of the electorate. *See* Motion for Stay at 14-17 (citing cases).[1] This point is entirely distinct from the underlying merits issue regarding the proper level of Fourteenth Amendment scrutiny to be applied to Prop. 8.[2]

Second, plaintiffs attempt to denigrate the critically important First Amendment issues presented in this appeal by asserting that our claim of privilege is nothing more than a thinly-disguised effort to appeal the denial of our summary judgment motion on the merits. But the question whether proponents of an initiative must produce their internal political communications in response to discovery requests in a post-election challenge to the constitutionality of the

---

[1] Plaintiffs raise other theories for why the material they seek is relevant, *see* Pl. Stay Opp. at 33, but the district court did not embrace any of those theories. *See* Doc. No. 252 at 3.

[2] Plaintiffs also mischaracterize Proponents summary judgment arguments with respect animus by wrenching quotes from Proponents' brief and presenting them out of context. *See* Pl. Stay Opp. at 17. While Proponents did argue that an independent judicial inquiry into whether Proposition 8 was motivated by animus was unnecessary, Proponents supported that argument not by asserting that the presence or absence of animus is irrelevant but rather by explaining that the manner in which the Supreme Court determines if a law is tainted by animus is by examining whether it is rationally related to a legitimate government interest. For the same reason, Plaintiffs' contention that one of Proponents' "core merits contention[s]" is that "discriminatory intent is irrelevant," *id.* at 19, is grossly misleading.

initiative is obviously quite distinct from the merits of the question whether the initiative is constitutional. Plaintiffs acknowledge the settled law of this Circuit permitting "some potential overlap" between the merits and a claim of privilege. *In re Napster*, 479 F.3d 1078, 1088-89 (9th Cir. 2007). Nothing in this Court's precedents limits this rule to "absolute" privilege claims as Plaintiffs argue, *see* Pl. Stay Opp. at 19; to the contrary, the collateral order doctrine is routinely applied to assertions of qualified immunity, which is by definition not absolute. Plaintiffs offer no explanation for why a qualified constitutional privilege should be treated differently.

Third, plaintiffs emphasize that "Proponents cite ***not one case*** in which this Court or another court of appeals has treated a denial of a claim of privilege under the First Amendment as a collateral order appropriate for interlocutory review." Pl. Stay Opp. at 18 (emphasis in original). Of course, it is equally true that Plaintiffs cite ***not one case*** in which this Court or another court of appeals has *refused* to apply the collateral order doctrine to review an order denying a First Amendment privilege claim. What Plaintiffs' charge demonstrates is not the faultiness of Proponents' position but rather the rarity of trial courts approving discovery requests that require a party to produce core private political speech such as that at issue here.

3. Plaintiffs half-heartedly suggest that the disputed discovery orders conclusively determine "only that the First Amendment did not absolutely preclude any and all disclosure of the 60 documents Proponents hand-picked for *in camera* review." Pl. Stay Opp. at 14-15. Not so. The court below has indisputably determined conclusively that Proponents must produce 21 specifically identified documents (of the 60 documents reviewed *in camera*) by November 30. Moreover, Chief Judge Walker expressly viewed the 60 documents as "a sample of the hundreds of documents in proponents possession" – and indeed there are thousands – and intended his order to "affor[d] proponents sufficient and specific enough guidance to cull their inventory of documents and other materials in order to respond to plaintiffs' document request." Doc. 252 at 9. And Magistrate Judge Spero plainly so understood the order, stating that "Proponents shall be guided by the November 11 order . . . in determining which documents are responsive to plaintiffs' request" and directing production of "the additional documents" "on a rolling basis to conclude not later than . . . November 30, 2009." Doc. 259 at 6. Any suggestion that appellate review of Proponents' privilege claims must await further piecemeal litigation plainly lacks merit.[3]

---

[3] Plaintiffs also contend that "[t]he district court did not consider any contention by Proponents that a protective order governing disclosure of Proponents' documents was insufficient to protect Proponents' First Amendment interests or activities." Pl. Stay Opp. at 15. Proponents have repeatedly raised precisely this point with the district court, however, *e.g.*, Doc. 197 at 9-10, and in

4. Finally, Plaintiffs claim that permitting collateral review of the First Amendment privilege issue here "would leave the final order requirement of § 1291 in tatters." Pl. Stay Opp. 20 (quoting *Will v. Hallock*, 546 U.S. 345, 350-51 (2006)). This claim is gross hyperbole. Indeed, the very lack of precedent trumpeted by Plaintiffs regarding whether the collateral-order doctrine applies to the First Amendment privilege, *see id*. at 18, belies Plaintiffs' suggestion that applying that doctrine here would flood this Court with "garden-variety" relevance disputes "framed in terms of the First Amendment." *Id*. at 21. And in all events, there is nothing "garden-variety" about the privilege at issue here: Plaintiffs' attempt to discover the internal communications of a successful initiative campaign—communications that even Plaintiffs' have conceded is "core political speech and undeniably entitled to broad First Amendment protection," RR 222 – is unprecedented.

II. PROPONENTS ARE ENTITLED TO A STAY.

5. Plaintiffs urge this Court to deny a stay of the November 11 order because Proponents filed a letter request, rather than a formal stay motion in the district court. Pl. Stay Opp. at 21-23. First, Plaintiffs fail to note that Proponents did move, unsuccessfully, for a stay of the October 1 order, and several of the

---

all events the district court has finally resolved the question of whether the Plaintiffs (or at least their attorneys) may read Proponents' private communications. *See United States v. Griffin*, 440 F.3d 1138, 1141 (2006).

district court's dispositive grounds for denying a stay were undisturbed when the court ordered production of specific documents in the November 11 order. Accordingly, putting in a formal motion following the prior formal motion and letter request, both unsuccessful, not only would have been futile but "impracticable" under Fed. R. App. P. 8 given the exceedingly short timeframe left in the discovery period. *See The Populist Party v. Herschler*, 746 F.2d 656, 657 n.1 (10th Cir. 1984). Indeed, within hours following the entry of the November 11 order (on a Saturday morning), Plaintiffs cited the November 30 discovery cutoff (as they have here) in demanding that Proponents begin producing "immediately" within "minutes or hours." *See* Ex. 1 (Decl. of N. Moss). Second, Plaintiffs concede that Proponents did specifically request by letter that the Court stay its November 11 ruling compelling disclosure. *See* Doc. 238. And there is nothing to Plaintiffs' argument that this request had to be made via a formal motion, for Chief Judge Walker has repeatedly emphasized that he is "prepared to rule on any discovery disputes that you have, [and] to do so informally." Hr'g of Aug. 19, 2009, Tr. 68. Indeed, Plaintiffs themselves have repeatedly moved the district court for relief via letter, including the very order of November 19 that requires completion of production by November 30. *See* Docs. 259, 256.

6. Plaintiffs claim that Proponents' voluntary intervenor status in this litigation constitutes a waiver of all First Amendment privilege. Plaintiffs cite no

case, and all the precedent is to the contrary. *See* Stay Mot. at 9 (listing cases). Moreover, given that Plaintiffs have noticed more than 20 non-party subpoenas seeking the very same type of information sought from Proponents, *see, e.g.*, Doc. 197-2, it is hard to take seriously their contention that Proponents' can "withdraw their intervention" and avoid Plaintiffs' sweeping probe of their core political speech. Plaintiffs cannot have it both ways.

7. Plaintiffs claim that their document requests are garden variety civil discovery and thus recognition of a privilege here would undermine the permissive scope of discovery. As Plaintiffs themselves have admitted, however, they seek Proponents' "core political speech … undeniably entitled to broad First Amendment protection." Doc. 191 at 12. But "First Amendment case law demonstrates that we afford varying degrees of protection to different *types* of speech. Political speech, for example, is at the core of First Amendment protection and any restrictions placed upon it must weather an exacting, strict scrutiny." *Berger v. City of Seattle*, 569 F.3d 1029, 1091 (9th cir. 2009). This is true even in the government investigation context, as has been recognized by the Supreme Court in *NAACP* and *DeGregory*, and by this Court in *Dole*. And the First Amendment's protection is not suspended in the civil litigation context. *See Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987); Proponents' Stay Mot. at 10 n.2 (listing cases). As the D.C. Circuit has explained in a related

context, "the highly deferential attitude which courts usually apply to business related subpoena enforcement requests from agencies … has no place where political activity and association … [are] being investigated." *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (9th Cir. 1981).

8. As we have already explained, an attorneys-eyes-only protective order would not protect Proponents' First Amendment expressive and associational rights. *See* Stay Mot. 19 n.11. At most, it would shield documents from broad public disclosure only until Plaintiffs sought to introduce them at trial. Moreover, Plaintiffs have left no doubt that such an order would govern *only* until Proponents' privilege claims were resolved.[4] In this regard, Plaintiffs misread *Dole v. Service Employees Union*, 950 F.2d 1456 (9th Cir. 1991). *Dole* found that a union had made out a *prima facie* case that its meeting minutes were protected from disclosure by the First Amendment, but explained that the Court is "willing to tolerate some chilling effect *if it is necessary* to do so in order to protect a *compelling* governmental interest." *Id.* at 1461 (emphasis added). The Court had "little doubt" that the requested minutes would serve a compelling government investigatory interest in that case. *Id.* at 1461-62. Here, however, Plaintiffs have not shown a compelling need for the documents—i.e., nonpublic, confidential

[4] Hr'g of Nov. 19, Tr. 6-7 ("[W]e have offered to the defendant intervenors … that we would agree to accept the documents on an attorneys' eyes only basis, *until such time* as their privilege claims were litigated in the District Court and their sta[y] claims were litigated").

communications wholly irrelevant to the intent of an electorate that never had access to them.

9. *Dole* also rebuts Plaintiffs' claims regarding First Amendment chill. *Dole* accepted as sufficient evidence of chill two letters from union members who objected solely on privacy grounds to having their internal comments revealed. *See* 950 F.2d at 1460 (quoting one letter from a member stating that he considered disclosure an " 'invasion of privacy' " and another letter stating that the member would not attend meetings if his comments were disclosed because he felt his "'opinions and thoughts belong to [him] and [his] union'"). This Court held that these assertions—that disclosure caused members to "no longer feel free to express their views on controversial issues"—were "precisely the sort of 'chilling' " that threatens First Amendment freedoms. *Id.*[5]

10. Plaintiffs rely on the district court's limitation of the First Amendment privilege to rank and file membership lists. Pl. Stay Opp. at 29. They fail to mention that *DeGregory v. Attorney Gen. of New Hampshire*, 383 U.S. 825 (1966), completely rebuts this notion.[6] They also fail to even cite *McIntyre v. Ohio*

---

[5] Plaintiffs claims regarding Proponents' declarations, *see* Pl. Stay Opp. at 28, ignore the actual content of the declarations submitted. *See, e.g.*, Mot. for Stay at 18 n.10.

[6] *Dole* also squarely rebuts the district court's central holding. *See* 950 F.2d at 1459-60 (holding that a union made a *prima facie* case of First Amendment privilege over meeting minutes that "record discussions of a highly sensitive and political character").

Elections Comm'n, 514 U.S. 334 (1995), which this Court forcefully reaffirmed in *ACLU of Nevada v. Heller*, 378 F.3d 979 (9th Cir. 2004).[7]

11. Plaintiffs argue that because Proponents' chief political consultant commented publicly about some aspects of messaging strategy after the election, *all* pre-election nonpublic communications and information about the campaign's messaging lose First Amendment protection.[8] First, Plaintiffs' "all or nothing" theory of the First Amendment would wholly negate a political speaker's right to choose "what not to say." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (quotation marks omitted).[9] An "author is free to include or exclude" whatever she pleases from public political

---

[7] Indeed, *ACLU* completely undermines the district court's limitation of *McIntyre* to individuals. *See id.* at 989-90 ("[N]othing in the [*McIntyre*] decision indicates that if she had been allied with other individuals, or with a business or social organization, the result would have been different …. Like other choice-of-word and format decisions, the presence or absence of information identifying the speaker is no less a content choice for a group or an individual cooperating with a group than it is for an individual speaking alone.")

[8] Plaintiffs state: "Plaintiffs argued that several pieces of publicly available evidence … suggest that elements of the Yes on 8 campaign were in fact designed to appeal to the hostility of some voters toward gay and lesbian individuals." Pl. Stay Opp. at 17. We are unaware of any time or place where Plaintiffs have ever made this argument before now. Nor are we aware of any "evidence" supporting Plaintiff's claim. They cite to a YouTube video that they brought to the district court's attention in a letter, and only that one time. Doc. 256. They made no such argument in that letter.

[9] *See also PG&E Co. v. Public Utilities Comm'n of California*, 475 U.S. 1 (1986); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

speech. *McIntyre*, 514 U.S. at 348. *See also ACLU of Nevada v. Heller*, 378 F.3d 979, 988, 990 (9th Cir. 2004). The snippets left on Ms. McIntyre's editing room floor fell from the very leaflet she ultimately disclosed to the public. If disclosure of the leaflet strips protection from the snippets, or from her private communications about them with political confidants, then the First Amendment right not to speak becomes nothing more than the right to choose whether to say all or say nothing. *See Miami Herald*, 418 U.S. at 257 (explaining that speech would be reduced if newspapers are forced with the choice of compelled speech versus no speech at all on a particular topic). *Cf. Watchtower v. Bible & Tract Soc'y of N.Y., Inc. v. Stratton*, 536 U.S. 150, 167 (2002). A waiver rule along these lines would drastically chill public speech, for those solicitous of their privacy will invariably choose to say nothing at all. (" "[t]he fact that [petition] circulators reveal[] their physical identities d[oes] not foreclose … the circulators' interest in maintaining their anonymity.") Second, in highly related contexts, both this and other Circuits have squarely rejected the notion that release of some otherwise privileged information or documents results in waiver of privilege over related documents or information. *See Milner v. United States Dep't of the Navy*, 575 F.3d 959, 971 (9th Cir. 2009); *Mobil Oil Corp. v. EPA*, 879 F.2d 698, 699-701 (9th Cir. 1989); *Campbell v. Gerrans*, 592 F.2d 1054 (9th Cir. 1979); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992); *Center for Biological Diversity v. Office*

of Management & Budget, 2009 U.S. Dist. LEXIS 38169, at *30-31 (N.D. Cal. 2009).[10]

Third, a holding that post-election analysis by campaign insiders waives any and all privilege and confidentiality with respect to internal communications would have startling implications. For example, suppose Congress passes a healthcare reform bill later this year and a constitutional challenge to it is filed. Suppose further that Rahm Emanuel or Senator Harry Reid soon after appears on *Meet the Press* and discusses the strategy behind the successful Senate vote. Under Plaintiffs' waiver theory, neither the President nor any Senator who voted for the bill could claim privilege over their internal communications with regard to that strategy. Needless to say, no authority supports this startling proposition.

Fourth, as a factual matter, the public disclosures that Plaintiffs trumpet—a magazine article and video recording of a conference presentation—do not reveal much, if anything, that was not already publicly known or readily ascertainable from that which was already publicly known. Indeed, most of the article and

---

[10] *See also In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997); *Tigue v. United States Dep't of Justice*, 312 F.3d 70 (2d Cir. 2002) (Sotomayor, J.) (explaining that "editorial decisions such as determining which parts, if any, of a confidential document to include in a public record are precisely the type of internal agency decisions" protected by a FOIA exemption for the deliberative process privilege and holding that references to a confidential document in a public report did not constitute a waiver of privilege over the nondisclosed document); *Commonwealth of Puerto Rico v. United States*, 490 F.3d 50 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1738 (2008); *Stein v. Department of Justice*, 662 F.2d 1245, 1259 (7th Cir. 1981).

conference presentation are simply recaps of well-known history surrounding the passage of Prop 8. Where strategy decisions are discussed, the "disclosures" are essentially recaps of the strategy that was actually adopted—i.e., that which was readily ascertainable simply by observing what the campaign was publicly doing. For example, during the conference presentation, Mr. Schubert reported the main advertising themes and then replayed the television ads that reflected those themes. In another example, the magazine article reports that the campaign "urged [its] supporters to refrain from demonstrations, protests or rallies opposing [same-sex] marriages" following the California Supreme Court's legalization of the practice. Doc. 191-2 at 2. This position was open and public and was widely reported in the news media at the time.[11] Likewise, the article reports the well-known fact that the campaign focused on building a large grassroots support network.[12]

12. Plaintiffs cite *Washington v. Davis*, 426 U.S. 229 (1976), and *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982), in support of their relevance argument. These cases, however, hold that the lawmakers' intent is relevant *only* for the purpose of determining whether a facially neutral law was

---

[11] *See, e.g.*, Janet Kornblum, et al., *Hundreds of gay couples enjoy 'dream come true' in Calif.*, USA TODAY, June 18, 2008, *available at* http://www.usatoday.com/news/nation/2008-06-17-gay_N.htm.

[12] *See, e.g.*, Jessica Garrison, et al., *Voters approve Proposition 8 banning same sex marriages*, LA TIMES, Nov. 5, 2008, *available at* http://www.latimes.com/news/local/la-me-gaymarriage5-2008nov05,0,1545381.story; Mike Swift, *Same-sex marriage battle brings large, committed armies on both sides*, SAN JOSE MERCURY NEWS, Oct. 10, 2008.

nevertheless intended to discriminate on the basis of race. In this case, however, Proponents are not disputing that Prop. 8 can be viewed as creating a classification based on sexual orientation for purposes of the Equal Protection Clause. *See* Doc # 172-1 at 55. Plaintiffs ignore that in constitutional challenges to referenda, including those subjected to strict scrutiny, the Supreme Court has *never* cited or examined the private communications or subjective opinions of referendum sponsors or voters. Indeed, in *Seattle School* the Court examined the text of the statute and its effect and—as in every other referendum case finding an unconstitutional purpose—ascribed a discriminatory purpose to the electorate *only* by concluding that the *effects* of the law precluded any other purpose. 458 U.S. 471. In confirming this holding, the Court stated that "[n]either the initiative's sponsors, nor the District Court, nor the Court of Appeals had any difficulty perceiving the racial nature" of the challenged initiative. *Id.* This is telling because the Court of Appeals "f[ound] it unnecessary" to address whether the law "was motivated by a discriminatory purpose," *Seattle School Dist. No. 1 v. Washington*, 633 F.2d 1338, 1342 (9th Cir. 1980), and thus cannot be said to have looked to *any* evidence of such purpose, much less nonpublic statements. And the district court in *Seattle* flatly stated that "[i]t is, of course, impossible to ascertain the subjective intent of those who enacted [the] Initiative" because "the secret ballot raises an impenetrable barrier." *Seattle School Dist. No. 1 v. Washington*,

473 F. Supp. 996, 1013-14 (W.D. Wash. 1979). Thus that court "look[ed] elsewhere" to publicly known information of which voters "were well aware" of, most especially "[t]he very words of the initiative," which "reveal[ed] the intent." *Id.* at 1014-15. As for the Court's citation to the "initiative's sponsors" statements—the Court cited a *public* statement about the what would be "affected" by the law. 458 U.S. at 471 (quotation marks omitted). None of this is support for the notion that the nonpublic statements of initiative sponsors or campaign volunteers could reveal the intent of the electorate.

CONCLUSION

For the foregoing reasons, and those stated in our previous filings, we respectfully submit that the Court should grant the stay.

Dated: November 23, 2009

Respectfully submitted,

s/ Charles J. Cooper
Charles J. Cooper

9th Circuit Case Number(s) 09-17241; 09-17551

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 23, 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

<u>**SERVICE LIST**</u>

Attorney for Defendant Clerk-Recorder Patrick O'Connell:	**Attorney for Defendant Registrar-Recorder Dean C. Logan:**
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	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