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November 30, 2009

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Client Matter No.
T 36330-00001

DELIVERED VIA ECF FILING AND HAND DELIVERY

Ms. Molly C. Dwyer
Clerk of the Court
United States Court of Appeals
for the Ninth Circuit
James Browning Courthouse
San Francisco, CA 94103

Re: *Perry et al. v. Hollingsworth et al.*, Nos. 09-17241, 09-17551

Dear Ms. Dwyer:

I represent Plaintiffs-Appellees ("Plaintiffs") in the above-captioned cases, and I write in response to the November 27, 2009, letter submitted by the American Civil Liberties Union of Northern California ("ACLU") as *amicus curiae* in support of the motion of the official proponents of Proposition 8 ("Proponents") for a stay pending appeal.

As an initial matter, Plaintiffs oppose the ACLU's informal request for leave to file its letter brief. The ACLU's letter, filed on November 27 in support of Proponents' November 13 motion for a stay pending appeal, is untimely. *See* Fed. R. App. P. 29(e) ("An amicus curiae must file its brief . . . no later than 7 days after the principal brief of the party being supported is filed"). Nothing in the ACLU's letter suggests good cause for the untimeliness of its filing, and that untimeliness has prejudiced Plaintiffs by depriving them of any opportunity to respond to the ACLU's arguments in Plaintiffs' November 23 opposition brief.

If the Court is inclined to grant the ACLU's motion for leave to file its untimely letter brief, Plaintiffs respectfully request that the Court also consider the following points and authorities in response.

1. The ACLU disclaims interest in the question of whether this Court has appellate jurisdiction, but nonetheless observes that "there are particularly strong reasons to permit interlocutory review" of a "non-frivolous claim of privilege," and that "this Court may treat the present appeals as petitions for a writ of mandamus" in any event. ACLU Ltr. 1 n.2. With respect to the appellate jurisdictional point, it bears noting that the Supreme Court is currently considering precisely the question whether the "importance" of the attorney-client privilege to the administration of justice "outweighs the finality rule." *Mohawk Indus. v. Carpenter*, No. 08-678, Oral Arg. Tr. 20 (question of Sotomayor, J.). If the Supreme Court holds that a denial of the *absolute* attorney-client privilege is not a "collateral order"—or even if it holds that the attorney-client privilege, alone among privileges, outweighs the finality rule—then, *a fortiori*, the denial of a *qualified* privilege could not be viewed as a collateral order.

And the ACLU is wrong that this Court, at its option, may construe Proponent's appeal a petition for mandamus "[i]n all events."[1] ACLU Ltr 1 n.2. This Court will exercise its discretion to convert a failed collateral order appeal into a petition for mandamus (as Proponents have requested) only when "the order qualifies for extraordinary relief under the guidelines set forth in *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650 (9th Cir. 1977)." *Unified Sewerage Agency v. Jelco., Inc.*, 646 F.2d 1339, 1343 (9th Cir. 1981). In other words, this Court may treat an improvident appeal as a petition for mandamus only if the appellant is entitled to that extraordinary relief. For at least three reasons, Proponents are not so entitled.

First, mandamus may issue only where the applicant has a "clear and indisputable" "right" to the relief she seeks. *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004). Here, the relief Proponents seek is a sweeping protective order that bars ***any*** discovery into their "nonpublic" communications, which is to say, not just "internal strategy documents," (ACLU Ltr. 6) but ***all*** of Proponents' communications except those that Proponents themselves have designated as "public." *See* RR 123 (asserting claim of privilege as to any communication between any Proponent and any person with whom the Proponents have established an "associational bond"); RR 46-48 (setting forth 10 categories and 23 sub-categories of assertedly privileged documents).

Neither Proponents nor the ACLU cite *any* decision from the Supreme Court or this Court that even remotely supports the existence of a "clear and indisputable" right to a protective order of the breadth sought by Proponents. Even the out-of-circuit district court decision that the ACLU finds "particularly instructive," *In re Motor Fuel Temperature Sales Practices Litig.*, 258 F.R.D. 407 (D. Kan. 2009), rejected the "conten[tion] that all internal communications of trade

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[1] In compliance with Circuit Rule 21-4, Plaintiffs, in their opposition brief, did not respond to Proponents' arguments for mandamus relief. On November 25, however, this Court ordered the parties to "be prepared to address the propriety of the issuance of a writ of mandate."

associations . . . are subject to the associational privilege." *Id.* at 415. And the magistrate judge there upheld the defendant trade associations' claim of privilege as to a narrower class of communications relating to lobbying and legislative strategies only after (1) acknowledging that "caselaw provides little guidance" as to whether such communications were covered by the First Amendment privilege at all, (2) finding that, in this consumer class action, the information sought had only attenuated relevance to the extent it reflected defendants' knowledge of the allegedly deceptive marketing practice, and (3) defendants agreed to allow plaintiffs to inquire directly into such knowledge through interrogatories and in depositions. *Id.* at 413, 416-18.

That decision does not square with this Court's precedent, which, when confronted with a labor union's claim of First Amendment privilege against disclosure of minutes of union meetings—information that is as much core political speech as the information sought by Plaintiffs in this case—held that a protective order satisfied the First Amendment. *See Dole v. Serv. Employees Union Local 280*, 950 F.2d 1456, 1462-63 (9th Cir. 1991); *see id.* at 1459 (the "minutes record discussions of a highly sensitive and political character").

Against this background, it cannot be said that Proponents had a "clear and indisputable right" to a protective order banning *all* discovery into their nonpublic communications. At most, under *Dole*, they could claim a right to a protective order limiting disclosure, which is precisely the relief the district court awarded them.

Second, this Court has held that where an applicant fails to timely produce a privilege log in compliance with Fed. R. Civ. P. 26(b)(5), that itself "put[s] [the denial of the claim of privilege] well outside the realm of clear error." *Burlington Northern & Santa Fe Ry. Co. v. U.S. Dist. Ct.*, 408 F.3d 1142, 1147 (9th Cir. 2005) (denying mandamus petition).

As the district court observed in its October 1 order denying Proponents' motion for a protective order, "Proponents have failed to aver that they have prepared a privilege log that would comply with the requirement of FRCP 26(b)(5)(A)(ii)." RR 32 (citing *Burlington Northern*, 408 F.3d at 1149); *see also* RR 19-20 (denying stay on waiver grounds). For that reason alone, the district court's October 1 denial of the Proponents' motion for a protective order cannot be described as clearly erroneous.[2]

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[2] The Proponents' submission of a privilege log for the 60 documents they submitted to the district court *in camera* after the October 1 order does not cure this deficiency, even with respect only to those 60 documents. The belated "privilege log" Proponents submitted with those documents (Doc #250-1) manifestly failed the requirements of Rule 26 because it did not "enable other parties to assess the claim" of First Amendment privilege. Fed. R. Civ. P. 26(b)(5)(A)(ii). A description such as "nonpublic document reflects discussion of campaign messaging" does not enable Plaintiffs to intelligently argue whether they have a need for the

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Third, a mandamus writ may issue only when the applicant "ha[s] no other adequate means to attain the relief he desires," *Cheney*, 542 U.S. at 380, but here Proponents never sought interlocutory review of the district court's denial of their summary judgment motion under 28 U.S.C. § 1292(b). If Proponents had sought it, that interlocutory review might have enabled them to bring to this Court the merits contentions that are necessary predicates to their claim that the discovery sought by Plaintiffs is irrelevant. As this Court aptly put it more than 30 years ago, "[b]efore a writ in the nature of mandamus is issued in a case of this kind, . . . the district judge should be given an opportunity to rule under 28 U.S.C. § 1292(b)." *See Mohasco Indus., Inc. v. Lydick*, 459 F.2d 959, 960 (9th Cir. 1972).

2. The ACLU argues that, where a discovery request implicates high First Amendment interests, "the proponent of discovery must demonstrate that the materials requested are highly pertinent to issues that are central to the controversy," and that the district court erred by requiring only a "simple showing of ordinary litigation relevance" to defeat Proponents' claim of First Amendment privilege. ACLU Ltr. 4, 6. The ACLU is wrong on both the law and the facts.

a. As the absence of supporting citations fairly indicates, the ACLU's proposed enhanced relevance standard has no mooring to the law of this Circuit. This Court's decision in *Dole* sets forth the analytical framework for testing claims of First Amendment privilege: To invoke the First Amendment privilege, the party resisting disclosure must sustain a prima facie burden of coming forward with "objective and articulable facts, which go beyond broad allegations or subjective fears[,]" demonstrating that the requested disclosures will result in "(1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Dole*, 950 F.2d at 1459-60 (internal quotation marks omitted). If the party resisting disclosure sustains that burden, the party seeking disclosure must demonstrate "(1) that the information sought . . . is rationally related to a compelling governmental interest, and (2) that the government's disclosure requirements are the 'least restrictive means' of obtaining the desired information." *Id.* at 1461 (emphasis added and internal quotation marks omitted).

If a party sustains its prima facie burden, this Circuit's established relevance requirement is that the discovery be "rationally related to a compelling governmental interest."[3] If

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document or whether its disclosure under an attorneys' eyes only protective order could harm Proponents' associational interests.

[3] The ACLU quotes *Dole* as requiring a "'compelling need' for the information." ACLU Ltr. at 7 (quoting *Dole*, 950 F.2d at 1461). The ACLU misquotes *Dole*; the phrase "compelling need" never appears in that decision.

investigating potential violations of the Labor-Management Reporting and Disclosure Act suffices as a compelling state interest—and *Dole* holds that it does, *see* 950 F.2d at 1461—then permitting investigation of violations of the Fourteenth Amendment of the United States Constitution certainly also suffices. Under *Dole*, the question then is whether Plaintiffs' discovery is rationally related to the investigation of their Fourteenth Amendment claims. The ACLU's assertedly "strong line of cases that has . . . reject[ed] discovery requests that intrude into [] associational and expressive interests," are either inapposite or do not control in this Circuit.[4] *Dole*, on the other hand, is directly relevant and controlling and mandates rejection of Proponents' arguments.

b. In claiming that, in the district court's First Amendment analysis, "the usual relevance standard" dictated the outcome of Proponents' First Amendment claim, ACLU Ltr. 4, the ACLU badly mischaracterizes the district court's October 1 and November 11 orders.

Proponents lodged two separate objections to Plaintiffs' discovery. They argued it was legally irrelevant and, separately, that it was privileged by the First Amendment. The district court initially rejected Proponents' First Amendment claim of privilege because they failed to "explain[] why the discovery sought by plaintiffs increases the threat of harm to Prop 8 supporters or explain[] why a protective order strictly limiting the dissemination of such information would not suffice to avoid" harm to Proponents' associational interests. RR 29. Similarly, after a painstaking and meticulous review of the 60 documents submitted *in camera*, RR 2-9, the district court concluded that, given the robust disclosures already required of the Proponents by state law, Proponents had failed to "identif[y] a way in which the qualified [First Amendment] privilege could protect the disclosure of campaign communications or the identities of high ranking members of the campaign." RR 3. That analysis is entirely consistent with *Dole*'s requirement that, before balancing the relevance of the evidence against the harm of disclosure, the party resisting disclosure must sustain a prima facie burden that the disclosures sought will impair associational activities.

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[4] That "strong line" consists entirely of a decision that involved the imposition of a civil penalty for anonymous leafleting, not discovery requests (*McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995)), two decisions of magistrate judges in Kansas, neither reviewed by the referring district judge (*In re Motor Fuel Temp. Sales Practices Litig.*, 258 F.R.D. 407 (D. Kan. 2009) and *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, 2007 WL 852521 (D. Kan. Mar. 16, 2007)), one decision which dealt only with "names and email addresses of many of [the plaintiff's] email correspondents[,]" (*Beinin v. Ctr. for Study of Popular Culture*, 2007 WL 1795693, at *2 (N.D. Cal. June 20, 2007)) and one decision that *rejected* the claim of First Amendment privilege (*Wyoming v. USDA*, 239 F. Supp. 2d 1219, 1243-44 (D. Wyo. 2002)).

Where the district court did apply, appropriately, "the usual relevance standard," was in analyzing Proponents' objections to the legal relevance of Plaintiffs' document requests. As explained in Plaintiffs' opposition brief (at 16-18), that objection turns on Proponents' merits contention that the purpose and motivation behind Prop. 8 are irrelevant to Prop. 8's constitutionality. That argument was considered and properly rejected on summary judgment, and the district court did not commit clear error when it observed that "evidence relat[ing] to messages or themes conveyed to California voters" was relevant to a determination of the electorate's intent. RR 3 (citing *Washington v. Seattle School Dist No. 1*, 458 US 457, 463 (1982).[5]

3. The ACLU contends that permitting Plaintiffs' discovery to move forward is "almost certain" to impose a chill on election campaigns, and, indeed, will "flatten" the "electoral process . . . like a house of straw." ACLU Ltr. at 2, 6. As a threshold matter, in the predecessor case to *Dole*, this Court held this manner of hyperbolic lawyer argument to be insufficient to sustain the prima facie burden to assert the First Amendment privilege. *See Dole*, 950 F.2d at 1458-59 (citing *McLaughlin v. Service Employees Union, AFL-CIO, Local 280*, 880 F.2d 170, 175 (9th Cir. 1989)). "[O]bjective and articulable facts" are necessary. *Dole*, 950 F.2d at 1460.

But separate and apart from their inadequacy under *Dole*, the ACLU's fears are unsubstantiated. Plaintiffs' constitutional challenge is reasonably unique; fortunately, states have only very rarely moved to strip persons of their fundamental rights through the ballot initiative process. Discovery of the type Plaintiffs seek here—evidence relating to the themes and messages initiative sponsors conveyed to the electorate—will be requested only in those rare circumstances where the purpose and motivation behind a ballot initiative are pertinent and disputed facts in a litigation. There is thus no basis for the ACLU's fear that similar discovery will be propounded each time an "[e]lection . . . give[s] rise to litigation." ACLU Ltr. at 3.

Very truly yours,

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

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[5] And for this reason, Plaintiffs' discovery concerning the "messages and themes conveyed to California voters" (RR 3) would be permissible even under the "significantly more demanding" relevance standard suggested by the ACLU. ACLU Ltr. at 4. In equal protection analysis of laws that strip minorities of fundamental rights, the motivations behind the law are, indeed, "truly central" to the constitutional analysis. *Id.*

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